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NetChoice
Defending Free Speech and Free Enterprise Online

Hearing - *Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets*

**COMMENT FOR THE RECORD
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Comment of NetChoice on *Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets* before the Senate Judiciary Committee

March 2023

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice internet business models provide to American consumers. NetChoice has worked for over two decades to make the internet safe for free enterprise and free expression. We also work to promote the integrity and availability of the internet on a global stage and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

NetChoice opposes any antitrust proposal that punishes success, threatens innovation, or harms American consumers. For that reason, NetChoice has vocally opposed the bills this Committee is again considering. Indeed, we have written and talked extensively about the deeply flawed bills—a sampling of still-relevant commentary includes:

- NetChoice Testimony for the hearing Before the United States Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights - *Stacking the Tech: Has Google Harmed Competition in Online Advertising?*, and oral testimony.

- NetChoice Comment for the hearing Before the United States Senate - Judiciary Committee *Antitrust Applied: Examining Competition in App Stores.*

- NetChoice Comment for the Record on the Senate Judiciary Hearing - *Protecting Competition and Innovation in Home Technologies.*

Introduction

Congress passed the country's first antitrust law, the Sherman Act, in 1890. That law enshrined "national values of free enterprise and economic competition," and has long been "a central safeguard for the Nation's free market structures."[1] In short, it protects competition not for competitors' sake, but for free-market competition's sake.

Competition spurs innovation. Competition and innovation spur economic growth. And all three benefit American consumers. It is no coincidence, then, that the lodestar of antitrust enforcement—the consumer welfare standard—treats competition, innovation, and consumer welfare as intertwined. It is also no coincidence that, since the United States's adoption of the consumer welfare standard, markets have grown more competitive—even toppling the once-all-powerful Sears—and more innovative, and consumers have benefitted from lower prices and higher-quality goods.[2]

To be sure, the consumer welfare standard has its critics. To some, including members of this Committee and FTC Chair Khan, the consumer welfare standard is outdated and too focused on prices. But that's simply not true. The consumer welfare standard examines a business's effects on prices and intangible factors like quality and *innovation*. In other words, it is entirely plausible under the consumer welfare standard that a business practice be found unlawful because of its effects on innovation.

That courts haven't given innovation its full due speaks not to the consumer welfare standard, but to the antitrust community. Until recently, there wasn't much scholarship examining innovation. But as this Committee's hearings have revealed, economists, scholars, lawyers, practitioners, and enforcers have all begun weighing in. The courts will have the benefit of this new learning moving forward.

Even so, there remains a push to change the country's antitrust laws to target (paradoxically enough) the country's most innovative industry: technology. Instead of studying the onward pace of tech innovation—which helped the country and economy

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[1] *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1110 (2015).
[2] Note that despite some opinions, the breakup of AT&T is not analogous: AT&T was a government-granted monopoly. And its breakup is viewed by some as unsuccessful, having divided the company into regional monopolies, each with fewer resources to innovate to their full extent until the company's reunification decades later.

weather the coronavirus-related lockdowns—tech's critics have instead focused on its size. That some of America's most innovative businesses happen to be among the country's largest is to be expected. After all, with more and more regulations on the books, innovation is rarely cheap. But rather than foster further innovation by removing those regulatory roadblocks, bills like those passed by the House Judiciary Committee and reintroduced in this Committee would punish America's most innovative businesses.

Antitrust laws in the United States work well. In fact, tech's successes show that our antitrust regime works remarkably well. Far from being monopolies, Amazon, Apple, Meta, and Google all face stiff competition. This is so even as they deliver more and more benefits to consumers. And despite rhetoric to the contrary, none engages in unlawful conduct. Instead, each competes aggressively—precisely what our antitrust laws are designed to promote.

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"Tweaking" or overhauling our antitrust laws will harm American consumers and will hinder our nation's competitiveness. Consider Europe. Its antitrust regime is far more aggressive than ours. And yet, Europe can claim only one company on a list of top 30 tech companies in the world (Spotify). Europe's antitrust approach doesn't promote innovation and thus shouldn't be adopted here. Doing so would benefit only foreign competitors.

American tech companies benefit consumers, and competition in digital markets is strong and growing stronger. As the country's economy continues integrating traditional markets with digital ones, tying the hands of America's most innovative companies is the wrong move.

AICOA's Risk to American Consumers

The American Innovation and Choice Online Act will undermine the significant consumer benefits that America's leading technology businesses have created over the past several decades. In fact, these new regulatory proposals would apply only to American businesses, undermining the United States' leading role in the global economy and allowing other countries to strengthen their relative positions at a time when the United States can least afford to fall behind in innovation.

If enacted, the bill would handicap domestic businesses while providing a leg up to competitors from the European Union and China. This is magnified by the fact that these provisions require American businesses to interoperate with foreign competitors and provide them with detailed, personal information on U.S. consumers.

Indeed, the bill is anti-innovation and anti-consumer in its effects. The bill would prohibit Google from providing consumers with the information they need quickly and conveniently by offering the most relevant information, such as maps and reviews, at the top of their search results. It would also prohibit Apple from providing the iPhone with important default apps pre-installed, creating a far worse experience for consumers. And it would force platforms to share consumers' personal information with third parties without allowing them to identify and remove malicious actors.

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Moreover, nothing in this bill does anything to address conservatives' concerns about political bias in content moderation decisions. In fact, it does not apply to most forms of online speech.

Below is a summary of AICOA's biggest flaws:

AICOA will worsen inflation and further erode Americans' purchasing power.
Several studies show that AICOA will increase inflation for Americans. It would do so by dramatically raising the costs of doing business in the United States. This abysmal finding comes on the heels of prices—especially on food—rising consistently across the U.S. for over a year.

AICOA punishes success by arbitrarily targeting politically disfavored businesses.
By defining a "covered platform" as a company with a market capitalization of over $550 billion and 50 million monthly users, AICOA sets an arbitrary size standard, rather than measuring a company's true dominance within the marketplace or whether Americans are actually being harmed.

AICOA puts Americans, their data, and their privacy at risk.
By making it unlawful for covered companies to restrict "interoperability," AICOA would unintentionally open up tech users to increased cybersecurity and privacy threats.

AICOA gives foreign competitors a leg up on the United States.
AICOA will disadvantage American industry on the global stage by bogging it down in regulation, making products less affordable and undermining security services.

AICOA will grow the dark web while chilling free speech on mainstream websites.
If passed, AICOA would exacerbate content moderation issues by giving regulators more power over content moderation online. This would likely chill freedom of speech, as

bureaucrats and politicians would have more influence on what speech is deemed acceptable.

Americans do not support AICOA.
Polling from multiple firms show that Americans don't want antitrust reform. In our recent survey with Echelon Insights, only 2% of Americans said regulating the tech industry is a top 3 priority, and of those who want regulation, they want Congress to focus on data privacy, not antitrust. This has also been reflected in other polling.

A year later, AICOA is still not ready for prime time.
In the last Congress, many members—even Democrats—wanted significant amendments to the bill. This includes Rep. Eric Swalwell (D-Calif.), Sen. Diane Feinstein (D-Calif.), Sen. Alex Padilla (D-Calif.), and Democrat Reps. Zoe Lofgren, Suzan DelBene and Lou Correa.

Promoting Competition and Fostering Opportunity for American Consumers

Antitrust reform has become an increasingly important part of our national policy conversation. Some lawmakers call for a massive overhaul of the United States' current approach to antitrust law and enforcement. In fact, the very purpose of this hearing is to identify potential areas where antitrust law can be changed in light of the unique issues raised by the dynamic economy of the twenty-first century.

But any proposals for reform should take careful consideration of the potential unintended consequences they might create. Unfortunately, many of the proposals currently being discussed have not been approached with this consideration in mind. Instead, these reforms would serve to undermine the rule of law, greatly hinder innovation, harm small businesses and consumers, and threaten economic growth for decades to come.

Too often, "reformers" focus their policies on punishment, not consumer-driven outcomes. Critics are upset with the status quo, angry at the large players, and feel as though something must be done, regardless of the ultimate impact their proposed reforms would have on the broader economy or the average American. But while some of this frustration may be understandable, anger rarely serves as a driver of good policy and the actual consequences of specific reforms should be at the forefront of the discussion, not a secondary afterthought. Even more concerning, many of the more populist-oriented advocates are attempting to use the current wave of antagonism toward the tech sector to enact sweeping and radical reforms that would have devastating consequences throughout the entire United States' economy.

That said, there are several proposals worth serious consideration. Changes to antitrust law that can enhance competition without jeopardizing the consumer benefits and economic prosperity that has emerged over the past several decades as a result of our evidence-focused approach to enforcement.

These include:

1. Formally codifying the consumer welfare standard through statute and clarifying that courts and enforcement agencies should incorporate considerations of quality and innovation in addition to price;
2. Directing antitrust enforcers to sue nonprofits, educational institutions, and state licensing boards; and
3. Reducing redundancy between the federal antitrust agencies and providing greater clarity as to their relative roles and responsibilities.

NetChoice asks that Congress consider focusing on these targeted yet meaningful reforms and refrain from enacting radical, sweeping proposals that would ultimately harm American consumers, businesses, and the broader economy.

Enshrining the Consumer Welfare Standard into Law.

Congress should codify the consumer welfare standard into law through direct legislation and clarify that courts should consider the impact a decision might have on quality and innovation in addition to price. Many critics have pointed out that the CWS was adopted largely through judicial decision making and agency action over time rather than an overt act by Congress. While these critics are incorrect in arguing that this somehow undermines the CWS as the proper loadstar for antitrust analysis, Congress can and should address this concern by formally adopting the CWS through explicit legislation.

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In addition, one reason critics argue that the CWS is ill-equipped to deal with the problems of the twenty-first century economy is because they think it is too narrowly focused on "price and output." But price and output are just two factors that contribute toward a consumer's overall welfare. Quality and innovation are also incredibly important determinants when it comes to consumer outcomes and should play a core role in antitrust analysis under a holistic CWS. While courts and enforcement agencies do already take these considerations into account, Congress can and should provide greater clarity by

explicitly instructing them to incorporate these factors when engaging in analysis under the CWS.

Empowering Antitrust Enforcers to Effectively Scrutinize Educational Institutions and State Licensing Boards.

Congress could also strengthen the ability of antitrust plaintiffs to bring suits against a broader category of defendants, including educational institutions and state licensing boards. While each of these has the power and incentive to engage in anticompetitive conduct that harms consumers, under current law, they are largely exempt from certain types of antitrust scrutiny.

First, Congress should clarify that all federal antitrust laws apply to all institutions of higher education. Although most antitrust laws apply to nonprofits and colleges, they tend to escape antitrust scrutiny and enforcement. In the nonprofit sector, for example, the government and courts are less likely to challenge a nonprofit hospital merger because, presumably, the hospital isn't driven by a desire to raise prices and thus profits. Likewise, in the college context, many practices–from admissions to financial aid to college sports–escape scrutiny because the defendant is a public institution. As discussed below, public institutions chartered by the state are immune from antitrust scrutiny.

To be sure, the enforcement agencies have tried to block nonprofit hospital mergers and the DOJ has investigated colleges and universities for antitrust violations. But these efforts are rare and rarely successful. Making matters worse, since the 1990s, states have passed laws to further protect public institutions from antitrust scrutiny, meaning that their state AGs are stripped from enforcement power and the federal government is the only enforcer in business.

To remedy this, Congress should enshrine the consumer welfare standard in law, making clear that it considers nonprice factors like quality and innovation, and should enshrine in law that nonprofits are treated the same as private businesses.

And second, empowering enforcers to go after state licensing boards would be one of the most effective ways for antitrust law and enforcement to adopt an "antiracist" agenda focused on promoting the welfare of marginalized groups and historically disadvantaged communities. The profound negative impact that state licensing boards have on the poor and disenfranchised is pervasive and well documented. For nearly 80 years, antitrust enforcers have been severely limited in their ability to address this problem because of something known as the "state action" or "*Parker*" doctrine.

Owing its name to the 1943 Supreme Court case *Parker v. Brown*, this doctrine holds that state-sanctioned licensing boards are immune from antitrust scrutiny, subject to a few narrow exceptions. These boards are composed mainly of well-established industry

incumbents that often use the board's power to engage in blatant and egregious anticompetitive behavior while cloaking themselves behind a facade of state action.

But because of the state action doctrine, antitrust plaintiffs are greatly curbed in their ability to challenge these boards under America's antitrust laws. Congress should overturn this doctrine and empower antitrust enforcement agencies to bring suits against state licensing boards when they are engaging in blatantly anticompetitive conduct.

If Congress wants to better address this issue without fully overturning the *Parker* decision, it could also limit the state action doctrine to cases where the state fulfills certain requirements. For example, it could qualify the ability of a state to invoke the doctrine on a requirement that the state engage in a "least restrictive means" approach to professional regulations or adopt a judicial appeals process for aggrieved parties hoping to challenge a board decision. This would allow states to retain their immunity when acting in good faith while requiring them to take precautionary steps that would prevent their boards from being captured by incumbents and used to promote anticompetitive ends. This was the approach taken by Sen. Lee in the Restoring Board Immunity Act of 2017.

Reducing Redundancy Between the Federal Antitrust Enforcement Agencies.

A final proposal that Congress could adopt to help modernize antitrust enforcement would be to help reduce redundancy and discrepancies between the federal antitrust enforcement agencies by clarifying their relative roles and responsibilities. Senator Mike Lee's "One Agency" bill, for example, would consolidate the federal government's antitrust enforcement in the DOJ Antitrust Division. If enacted, this proposal would streamline government review, increase efficiency, and reduce friction between government enforcers.

Even if agency consolidation is not in the cards, Congress should pursue changes that clarify roles and harmonize guidelines. With few exceptions, the DOJ and FTC largely decide for themselves which agency oversees which industry and even players within the same industry. For example, the DOJ currently oversees Google and is responsible for the government's antitrust lawsuit against it; the FTC, meanwhile, oversees Facebook and is the lead on the government's case against it. This division of labor makes little sense.

Indeed, even though the agencies use similar guidelines in making their enforcement, differences in substance and procedure exist. So by arbitrarily dividing up the same industry and subjecting competitors to slightly different guidelines, the agencies undermine their own authority. At the very least, then, the agencies should have to use the same guidelines from start to finish so that the federal government's evaluative tools are uniform.

Second, Congress should abolish the FTC's in-house adjudication system. From a constitutional perspective, the FTC's adjudicatory body is suspect. Whereas the DOJ must

pursue its cases in an Article III court, the FTC may instead choose to bring a case in house. That raises serious concerns about objectivity, fairness, and due process. Indeed, as the FTC recently acknowledged, it has not lost an in-house adjudication in decades.

Eliminating the FTC's in-house adjudication system will also promote stability in legal doctrine.

Although that may be a testament to the FTC's case selection–and it undoubtedly is to an extent–it calls into question the adjudicatory body's independence and objectiveness. Whether that's true as a factual matter is important but not dispositive. As the Supreme Court has noted, due process can be undermined by the appearance of partiality. Given the ramifications of antitrust enforcement, all parties should have confidence in the tribunal's ultimate decision. To aid in that, Congress should require the FTC to sue only in federal court, like it does for the DOJ.

Eliminating the FTC's in-house adjudication system will also promote stability in legal doctrine. By requiring all antitrust lawsuits to go before the judiciary, Congress can help create better clarity by establishing binding precedent that will put businesses on notice going forward. Currently, many cases are resolved through consent decrees that apply to the parties in the current action but do not establish binding precedent. This creates a lack of certainty for businesses trying to comply with the law and risks empowering enforcers to extract short-term concessions without actually litigating the issue in a court of law to create binding precedent.

Conclusion

The United States was the first country to pass antitrust legislation. It was also the first country to reorient its antitrust doctrines away from political considerations toward objective enforcement based on empirical evidence. This reorientation, which occurred primarily because of the country's adoption of the consumer welfare standard, largely insulated antitrust enforcement from politics. But under current FTC and DOJ leadership, that is no longer the case.

We have the opportunity to engage in this kind of innovative, forward-thinking, and evidence-based modernization again and should seize upon this opportunity without jeopardizing the incredible consumer benefits and economic prosperity that has emerged over the past several decades. We can do this by rejecting radical proposals that would completely overhaul the American approach to antitrust while embracing thoughtful, targeted reforms that keep what's working and meaningfully addressing what's not.

As always, we stand ready to work with Congress to achieve good policy outcomes for the country. We appreciate your consideration of our views and are happy to provide further information.

Sincerely,

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