

June 1, 2022

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Mike Lee
Ranking Member
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Amy Klobuchar
Chairwoman
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Senator Durbin, Senator Grassley, Senator Klobuchar, Senator Lee, Congressman Nadler, and Congressman Jordan:

Over the last twenty years, my work has focused intensely on determining the appropriate competition policy approach for restricting the ability of dominant platforms to harm competition from emerging and start-up businesses. In this letter, I share my views on the American Innovation and Choice Online Act, Senate Bill S. 2992 and the American Innovation and Choice Online Act, House Bill H.R. 3816 (collectively, “Acts”). I strongly support their passage and urge additional steps to build upon them.

I. The Importance of an Online Platform Agency

The rise of dominant online platforms, including Meta’s social networking platform, Google’s search platform, and Amazon’s ecommerce platform, among others, presents important challenges for technology competition policy. Such platforms, not unlike broadband firms in concentrated markets, threaten to act as gatekeepers that can influence or even dictate the availability and quality of content, protect or harm consumer privacy, and facilitate or undermine competition. As I have explained with Pennsylvania Attorney General Josh Shapiro, the optimal approach for overseeing such platforms is to empower an agency with regulatory oversight of the platforms’ conduct.¹

¹ Letter from Attorneys General Weiser and Shapiro to the Subcommittee on Consumer Protection, Product Safety, and Data Security (Oct. 2021), available at <https://coag.gov/app/uploads/2021/10/Internet-Regulation-Letter-to-US-Senate-10.0.21-Final.pdf>. To be sure, this letter did not suggest whether it would be preferable to establish a new online platform agency or empower an existing one with the relevant responsibilities (say, the Federal Trade Commission).

In addition to competition concerns, dominant online platforms—particularly those that enable user-created content to spread rapidly—raise a number of other policy challenges, including their impact on teen mental health, protecting our democratic institutions (including ensuring effective disclosure of campaign spending online), harms from illegal content (child pornography, for example), and consumer data privacy. Optimal and effective oversight of these platforms—and addressing these important policy challenges—will be most effectively advanced by a regulatory agency with the necessary authority to take appropriate action. Ideally, such an agency would be charged with developing a comprehensive understanding of the challenges in this sector, informed by an evaluation of how the algorithms used by social media platforms operate, an awareness of the appropriate means for protecting children, and a focus on the risks to democratic institutions by such platforms.² The agency could, for example, consider regulations that required appropriate transparency, imposed effective age verification and parental consent requirements for social media use, and limited foreign disinformation campaigns.

As Congress proceeds to enact the strong initial steps represented by these bills, I strongly encourage the Committees to keep in mind the broader challenges presented by online platforms. Consider, for example, that an increasing number of commentators and industry leaders have recognized the wisdom of adopting a comprehensive approach.³ I urge the Committees to explore this concept in the years ahead.

II. The State of Antitrust Law

Since the U.S. Supreme Court decided *Verizon v. Trinko*,⁴ antitrust courts have sometimes displayed a level of hostility towards overseeing access arrangements with dominant platforms. In particular, antitrust defendants regularly use *Trinko*—and some unfortunate dicta in the decision—as a tool for opposing effective antitrust oversight and are all too often successful in doing so.⁵

By passing the Acts, Congress can make clear that an expansive view of *Trinko* is misguided. Prior to *Trinko*, the Supreme Court, including in the *Otter Tail* case,⁶ was more hospitable to antitrust plaintiffs' monopolization cases. In *Otter Tail*, for example, the Court concluded that a local electric utility's refusal to transmit power generated by competing generation companies through its transmission system to municipal distribution systems that wanted to buy cheaper power from the defendant's competitors violated Section 2 of the Sherman Act. And, similarly, a number of lower courts—including the D.C. Circuit in *Microsoft*⁷ and the D.C. District Court in

² My vision of such an agency would be that it would be empowered and expected to use what I have called entrepreneurial administration. See Philip J. Weiser, *Entrepreneurial Administration*, 97 B.U. L. REV. 2011 (2017), available at <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2198&context=articles>.

³ For a discussion of such proposals, see Tom Wheeler, *Time for a New Digital Regulatory Authority*, Brookings (April 2022), available at <https://www.brookings.edu/blog/techtank/2022/04/15/time-for-a-new-digital-regulatory-authority/>. Just recently, Senator Michael Bennet, in an important proposal to advance this conversation, introduced a bill that would establish a new online platform agency. See Digital Platform Commission Act of 2022.

⁴ 540 U.S. 398 (2004).

⁵ For a discussion of *Trinko* and its potential for mischief, see Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, Antitrust Bulletin, Vol. 50, September 2005, U. of Colorado Law Legal Studies Research Paper No. 06-19, available at: <https://ssrn.com/abstract=814945>.

⁶ *Otter Tail Power Co. v. United States*, 410 U.S. 366, 382 (1973).

⁷ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

*U.S. v. AT&T*⁸—concluded that Section 2 of the Sherman Act can be violated by undermining non-discriminatory access for purposes of protecting a monopoly. In passing this legislation, I urge that both Acts state plainly (perhaps, in the preamble of the legislation) that they repudiate the expansive reading of *Trinko*—that is, one that would undermine or even overturn *Otter Tail*—rather than condone it.⁹

In too many cases, antitrust courts have found ways to bend over backwards to avoid findings of liability. This dynamic represents, as I have explained,¹⁰ a relic of the Chicago School view that antitrust enforcement is a risk to economic growth and under-enforcement is preferable to over-enforcement.¹¹ The Supreme Court’s *American Express* decision and the Ninth Circuit’s *Qualcomm* decision both exemplify this dynamic.¹² In so doing, both cases represent the triumph of ideology—a pre-existing view about the impact of antitrust enforcement—over empirical reality.¹³

III. A New Model of Internet Platform Oversight

For antitrust law, even without problematic decisions like *Trinko* and *American Express* providing defendants with arguments against appropriate enforcement, the work of defining a market, demonstrating market power, and proving an antitrust violation is time and labor intensive. Antitrust law’s model of examining one case at a time and delving deeply into the past and current practices of a company or companies is a good model for ferreting out harm to competition. This model, however, is less well-suited to meeting the challenges presented by all the ways that dominant online platforms can undermine competition where the industry itself is rapidly changing and the modes of undermining competition are varied. To be sure, I believe that pending (and future) cases can and will limit harm by these platforms. Nonetheless, an industry-wide approach provides important additional safeguards that can protect competition and limit future harm.

To confront dominant online platforms, Congress should institute a model of oversight that is faster, that applies more broadly, and that recognizes the need to protect the future of competition and innovation. The challenge is thus to create a model for oversight that truly focuses on dominant firms that are well-positioned to act in exclusionary ways and does not impede efficient conduct.

The Acts meet the challenge of overseeing the conduct of dominant online platforms by defining a set of entities who possess the equivalent of significant market power. Under the Acts, the critical

⁸ *United States v. AT&T Co.*, 524 F. Supp. 1336 (D.D.C. 1981).

⁹ For a recent discussion of the appropriate interpretation of *Trinko*, see Brief for the Appellants, *New York v. Facebook*, No. 21-7078 (D.C. Cir.), available at

https://ag.ny.gov/sites/default/files/new_york_et_al_v_facebook_inc_appellant_brief_public.pdf;

Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *New York v. Facebook*, No. 21-7078 (D.C. Cir.), available at <https://www.justice.gov/atr/case-document/file/1467321/download>.

¹⁰ Prepared remarks: Attorney General Phil Weiser at George Mason Law Review 24th Annual Antitrust Symposium (Feb. 16, 2021), available at <https://coag.gov/blog-post/prepared-remarks-attorney-general-phil-weiser-at-george-mason-law-review-24th-annual-antitrust-symposium-feb-16-2021/>.

¹¹ For a classic statement of this position, see Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984).

¹² *F.T.C. v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

¹³ For a discussion of this point, see Jonathan Sallet, *Antitrust Reform: A Litigation Perspective*, Antitrust Magazine: American Bar Association, Vol. 36, No. 2, Spring 2022.

concept is whether a provider is a “critical trading partner” with the ability to “impede or restrict access of a business user to its customers or a tool or service that the business user needs to effectively serve the users or customers.”¹⁴ Ideally, an agency could be empowered to make judgments about what firms possess the equivalence of significant market power and warrant oversight. For such cases, however, it should not be necessary to demonstrate that an individual company engaged in conduct illegal under the antitrust laws before basic anti-discrimination protections would apply. In that respect, the form of oversight provided by these bills is closer to the Telecommunications Act of 1996’s non-discriminatory interconnection requirements (imposed on traditional providers) than it is to traditional antitrust law.¹⁵

In one sense, the regulatory regime contemplated by these Acts is comparable to earlier discussions of how best to protect competition in the broadband arena. Twenty years ago, as discussions were developing on how to oversee broadband platforms, I looked to antitrust law for guidance on an appropriate regulatory model. As I explained, such a model would involve after-the-fact oversight based on an evaluation of whether discriminatory conduct was justified by a legitimate business reason.¹⁶ In so doing, I argued that such a model could provide firms with appropriate freedom to operate and, at the same time, address anticompetitive conduct effectively.¹⁷

Like the model of regulation I envisioned for broadband platforms, the Acts provide a mechanism for overseeing a series of possible forms of discrimination that an online platform could use to undermine competition. The Acts’ premise is that discriminatory conduct raises a competition policy concern and should be addressed absent a compelling business explanation.¹⁸ Consequently, the Acts provide platform owners with an opportunity to justify their conduct, including through showing the conduct has not resulted in harm to competition. Presumably, such a showing would allow—as is the case in antitrust law—the platform owner to explain how any efficiencies from the conduct outweigh any competitive harms. But, crucially, in the face of a showing of discriminatory conduct, the burden to justify the practice at issue would rest with the dominant platform.

Given the challenges of antitrust litigation related to dominant platforms, the streamlined model of the Acts provides a promising form of oversight. Moreover, the ability of the antitrust agencies to develop guidelines under the Acts provide a valuable starting place for how this law would operate in practice. And the ability of state attorneys general to enforce this law alongside federal enforcers provides a valuable additional check on these platforms. The Acts could be improved

¹⁴ S. 2992 Sec. 2(a)(6); H. R. 3816 Sec. 2 (g)(6).

¹⁵ See 47 U.S.C. § 251(b).

¹⁶ Philip J. Weiser, *Toward A Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 66 (2003), available at <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2344&context=articles>.

¹⁷ *Id.* at 77. I developed this basic model further in Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529 (2009), available at <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1269&context=articles>.

¹⁸ These actions include that it is unlawful for a platform to: preference products, services, or lines of business that would materially harm competition; limit the ability of the products, services, or lines of business of another business user to compete on the covered platform relative to products offered by platform operator in a manner that would materially harm competition; 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; materially restrict, impede, or unreasonably delay the capacity of a business user to access or interoperate with the same platform available to covered platform operator; or condition access to the covered platform based on purchase of products or services that are not part of or intrinsic to covered platform. See S. 2992 Sec. 3(a).

on this point by explicitly providing state attorneys' generals the ability to seek civil penalties under *federal law*.¹⁹ Moreover, it makes sense to provide explicitly that the full range of remedial tools in enforcing the Acts are available to the Federal Trade Commission (FTC) and Department of Justice (DOJ) as well as state attorneys general in enforcing this law. Finally, Congress should make clear that this legislation supplements, but does not supplant, existing antitrust laws.

IV. Some Remedial Considerations and Opportunities for Improvement

The most plausible underpinning for the *Trinko* decision is the concern that antitrust courts are ill-equipped to manage and enforce the terms of non-discrimination requirements. In *Trinko*, the central allegation was that the dominant incumbent local telephone provider (Verizon) refused to port a telephone subscriber's number to a rival telephone provider within a reasonable period of time. The Supreme Court's view of the matter was that this allegation, at its core, was better addressed by the regulatory system established by Congress than an antitrust court.

For online platforms, no comprehensive regulatory oversight model yet exists. Consequently, at the same time as the Federal Communications Commission (FCC) continues to refine and implement a model of oversight of broadband platforms, any oversight of Google's search platform, for example, remains left to antitrust law alone. As noted above, antitrust cases are long and involved, with relief often coming years after the anticompetitive conduct. Consequently, developing a more expedited and adaptable model of oversight—as provided by these bills—is a salutary step forward. And insofar as we are concerned about the conduct of a dominant online platform provider, it no longer makes sense to focus solely on broadband providers and to ignore other dominant online platforms.

To ensure effective oversight of dominant online platforms, it will be important to not allow claims of intellectual property protection over interfaces or access arrangements to interfere with the imposition of the Act's non-discrimination requirements. Famously, the D.C. Circuit's *Microsoft* decision rejected the claim by Microsoft that copyright protection immunized that company against antitrust liability.²⁰ To clear up any potential uncertainty on this point, I recommend that the following provision be clarified: “nothing [in this Act] 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.”²¹ In particular, the Act should specify that no claim of intellectual

¹⁹ It also merits note that S. 2992 provides states the right to seek injunctions, but H.R. 3816 does not. To give state enforcers an effective model of enforcement, the Senate version's explicit language is worth adopting.

²⁰ In particular, the D.C. Circuit stated:

[Microsoft] claims an absolute and unfettered right to use its intellectual property as it wishes: “[I]f intellectual property rights have been lawfully acquired,” it says then “their subsequent exercise cannot give rise to antitrust liability.” That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated: “Intellectual property rights do not confer a privilege to violate the antitrust laws.”

United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001) (quoting Appellant's Opening Br. at 105; *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000)).

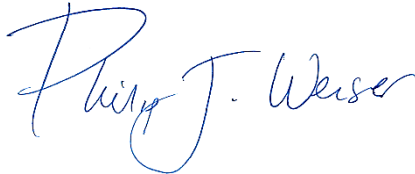
²¹ S. 2992 Sec. 3 (c)(8)(A)(a)(i).

property protection should interfere with the effective enforcement of any non-discriminatory access arrangement imposed under the Act.²²

The FCC oversees broadband platforms under a regime managed by a regulatory agency. By contrast, the Acts envision that cases brought under its provisions would result in consent decrees administered by federal courts. For the FTC, DOJ, and state attorneys general, the management of such cases will present important remedial challenges, including the need to develop and manage the requisite technical expertise to oversee non-discriminatory access arrangements. As Congress advances its consideration of the Acts, it merits attention that the agencies may need additional staff and funding to do just that, including a technical division that could complement their existing economic units.²³ All too often, unfortunately, enforcers overlook remedial issues, leaving them as an afterthought.²⁴ As these bills are refined and finalized, further discussion and support for remedial oversight would pay valuable dividends in their implementation. And, wherever possible, building in flexibility and authorization for the antitrust agencies to define key terms will allow more dynamism and adaptability in the Acts, enabling them to be more effective in practice.

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I welcome Congress's efforts to advance competition policy and protect innovation in the Internet economy. State attorneys general stand willing to be your partners in this important work and would be happy to provide any assistance you may need.



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²² There is a separate, and related, question about when intellectual property protection should be permitted to prevent access to key interfaces for interoperability purposes (say, through reverse engineering). On that point, I have argued that patent or copyright law should not be allowed to stand against access and interoperability to a dominant platform. See Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534 (2003), available at <https://scholar.law.colorado.edu/articles/542>.

²³ The House Bill's establishment of a Bureau of Digital Markets is a good step in this direction. H. R. 3816 Sec. 4.

²⁴ For some reflections on antitrust remedies, see Philip J. Weiser, *Regulating Interoperability: Lessons from AT&T, Microsoft, and Beyond*, 76 ANTITRUST L.J. 271 (2009), available at <https://scholar.law.colorado.edu/articles/454>.