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S. 2992

To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 18, 2021

Ms. KLOBUCHAR (for herself, Mr. GRASSLEY, Mr. DURBIN, Mr. GRAHAM, Mr. BLUMENTHAL, Mr. KENNEDY, Mr. BOOKER, Ms. LUMMIS, Ms. HIRONO, Mr. WARNER, Mr. HAWLEY, and Mr. DAINES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

MARCH 2, 2022

Reported by Mr. DURBIN, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “American Innovation
5 and Choice Online Act”.

1 **SEC. 2. UNLAWFUL CONDUCT.**

2 (a) VIOLATION.—It shall be unlawful for a person op-
 3 erating a covered platform, in or affecting commerce, if
 4 it is shown, by a preponderance of the evidence, that the
 5 person has engaged in conduct that would—

6 (1) unfairly preference the covered platform op-
 7 erator's own products, services, or lines of business
 8 over those of another business user on the covered
 9 platform in a manner that would materially harm
 10 competition on the covered platform;

11 (2) unfairly limit the ability of another business
 12 user's products, services, or lines of business to com-
 13 pete on the covered platform relative to the covered
 14 platform operator's own products, services, or lines
 15 of business in a manner that would materially harm
 16 competition on the covered platform; or

17 (3) discriminate in the application or enforce-
 18 ment of the covered platform's terms of service
 19 among similarly situated business users in a manner
 20 that may materially harm competition on the cov-
 21 ered platform.

22 (b) UNLAWFUL CONDUCT.—It shall be unlawful for
 23 a person operating a covered platform, in or affecting com-
 24 merce, if it is shown, by a preponderance of the evidence,
 25 that the person has engaged in conduct that would—

1 (1) materially restrict or impede the capacity of
2 a business user to access or interoperate with the
3 same platform, operating system, hardware or soft-
4 ware features that are available to the covered plat-
5 form operator's own products, services, or lines of
6 business that compete or would compete with prod-
7 ucts or services offered by business users on the cov-
8 ered platform;

9 (2) condition access to the covered platform or
10 preferred status or placement on the covered plat-
11 form on the purchase or use of other products or
12 services offered by the covered platform operator
13 that are not part of or intrinsic to the covered plat-
14 form itself;

15 (3) use non-public data that are obtained from
16 or generated on the covered platform by the activi-
17 ties of a business user or by the interaction of a cov-
18 ered platform user with the products or services of
19 a business user to offer, or support the offering of,
20 the covered platform operator's own products or
21 services that compete or would compete with prod-
22 ucts or services offered by business users on the cov-
23 ered platform;

24 (4) materially restrict or impede a business user
25 from accessing data generated on the covered plat-

1 form by the activities of the business user, or
2 through an interaction of a covered platform user
3 with the business user's products or services, such as
4 by establishing contractual or technical restrictions
5 that prevent the portability of the business user's
6 data by the business user to other systems or appli-
7 cations;

8 (5) unless necessary for the security or func-
9 tioning of the covered platform, materially restrict or
10 impede covered platform users from un-installing
11 software applications that have been preinstalled on
12 the covered platform or changing default settings
13 that direct or steer covered platform users to prod-
14 ucts or services offered by the covered platform op-
15 erator;

16 (6) in connection with any covered platform
17 user interface, including search or ranking
18 functionality offered by the covered platform, treat
19 the covered platform operator's own products, serv-
20 ices, or lines of business more favorably relative to
21 those of another business user than they would be
22 treated under standards mandating the neutral, fair,
23 and non-discriminatory treatment of all business
24 users; or

1 (7) retaliate against any business user or cov-
 2 ered platform user that raises concerns with any law
 3 enforcement authority about actual or potential vio-
 4 lations of State or Federal law.

5 (c) RULE OF CONSTRUCTION.—Subsections (a) and
 6 (b) shall not be construed to require a covered platform
 7 operator to divulge, license, or otherwise grant the use of
 8 the covered platform operator's intellectual property, trade
 9 or business secrets, or other confidential proprietary busi-
 10 ness processes to a business user.

11 (d) AFFIRMATIVE DEFENSES.—

12 (1) IN GENERAL.—Subsection (a) shall not
 13 apply if the defendant establishes by a preponder-
 14 ance of the evidence that the conduct described in
 15 subsections (a) was narrowly tailored, was
 16 nonpretextual, and was necessary to—

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

19 (B) protect safety, user privacy, the secu-
 20 rity of non-public data, or the security of the
 21 covered platform; or

22 (C) maintain or enhance the core
 23 functionality of the covered platform.

24 (2) UNLAWFUL CONDUCT.—Subsection (b) shall
 25 not apply if the defendant establishes by a prepon-

1 derance of the evidence that the conduct described
 2 in subsection (b)—

3 ~~(A)~~ has not resulted in and would not re-
 4 sult in material harm to the competitive process
 5 by restricting or impeding legitimate activity by
 6 business users; or

7 ~~(B)~~ was narrowly tailored, could not be
 8 achieved through less discriminatory means,
 9 was nonpretextual, and was necessary to—

10 (i) prevent a violation of, or comply
 11 with, Federal or State law;

12 (ii) protect safety, user privacy, the
 13 security of non-public data, or the security
 14 of the covered platform; or

15 (iii) maintain or enhance the core
 16 functionality of the covered platform.

17 ~~(e) COVERED PLATFORM DESIGNATION.—~~The Fed-
 18 eral Trade Commission and Department of Justice may
 19 jointly, with concurrence of the other, designate a covered
 20 platform for the purpose of implementing and enforcing
 21 this Act. Such designation shall—

22 ~~(1)~~ be based on a finding that the criteria set
 23 forth in clauses (i) through (iii) of subsection ~~(h)~~(4)
 24 are met;

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

3 (3) apply for 7 years from its issuance regard-
4 less of whether there is a change in control or own-
5 ership over the covered platform unless the Commis-
6 sion or the Department of Justice removes the des-
7 ignation under subsection (f).

8 (f) REMOVAL OF COVERED PLATFORM DESIGNA-
9 TION.—The Commission or the Department of Justice
10 shall—

11 (1) consider whether its designation of a cov-
12 ered platform under subsection (e) should be re-
13 moved prior to the expiration of the 7-year period if
14 the covered platform operator files a request with
15 the Commission or the Department of Justice, which
16 shows that the online platform no longer meets the
17 criteria set forth in clauses (i) through (iii) of sub-
18 section (h)(4);

19 (2) determine whether to grant a request sub-
20 mitted under paragraph 1 not later than 120 days
21 after the date of the filing of such request; and

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

1 (g) REMEDIES.—The remedies provided in this sub-
 2 section are in addition to, and not in lieu of, any other
 3 remedy available under Federal or State law.

4 (1) CIVIL PENALTY.—Any person who is found
 5 to have violated subsections (a) or (b) shall be liable
 6 to the United States or the Commission for a civil
 7 penalty, which shall accrue to the United States
 8 Treasury, in an amount not more than 15 percent
 9 of the total United States revenue of the person for
 10 the period of time the violation occurred.

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

16 (3) REPEAT OFFENDERS.—If the fact finder
 17 determines that a person has engaged in a pattern
 18 or practice of violating this Act, the court shall con-
 19 sider requiring, and may order, that the Chief Exec-
 20 utive Officer, and any other corporate officer as ap-
 21 propriate to deter violations of this Act, forfeit to
 22 the United States Treasury any compensation re-
 23 ceived by that person during the 12 months pre-
 24 ceeding or following the filing of a complaint for an
 25 alleged violation of this Act.

1 (h) DEFINITIONS.—In this section:

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

5 (2) BUSINESS USER.—The term “Business
6 User” means a person that utilizes or is likely to
7 utilize the covered platform for the sale or provision
8 of products or services, including such persons that
9 are operating a covered platform or are controlled by
10 a covered platform operator.

11 (3) COMMISSION.—The term “Commission”
12 means the Federal Trade Commission.

13 (4) COVERED PLATFORM.—The term “covered
14 platform” means an online platform—

15 (A) that has been designated as a covered
16 platform under section 2(e); or

17 (B) that—

18 (i) at any point during the 12 months
19 preceding a designation under section 2(e)
20 or at any point during the 12 months pre-
21 ceeding the filing of a complaint for an al-
22 leged violation of this Act—

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

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

4 (ii) at any point during the 2 years
 5 preceeding a designation under section 2(e)
 6 or at any point during the 2 years pre-
 7 ceding the filing of a complaint for an al-
 8 leged violation of this Act, is owned or con-
 9 trolled by a person with United States net
 10 annual sales or a market capitalization
 11 greater than \$550,000,000,000, adjusted
 12 for inflation on the basis of the Consumer
 13 Price Index; and

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

18 (5) ~~CRITICAL TRADING PARTNER.~~—The term
 19 “critical trading partner” means a person that has
 20 the ability to restrict or materially impede the access
 21 of—

22 (A) a business user to its users or cus-
 23 tomers; or

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

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

7 ~~(7)~~ DATA.—

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

14 ~~(B)~~ DATA.—The term “data” shall include
 15 information that is collected by or provided to
 16 a covered platform or business user that is
 17 linked, or reasonably linkable, to a specific—

18 ~~(i)~~ user or customer of the covered
 19 platform; or

20 ~~(ii)~~ user or customer of a business
 21 user.

22 ~~(8)~~ ONLINE PLATFORM.—The term “online
 23 platform” means a website, online or mobile applica-
 24 tion, operating system, digital assistant, or online
 25 service that—

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

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

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

11 (9) CONTROL.—The term “control” with re-
12 spect to a person means—

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

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

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

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

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

1 ~~(F)~~ otherwise exercises substantial control
 2 over the person.

3 ~~(10)~~ STATE.—The term “State” means a State,
 4 the District of Columbia, the Commonwealth of
 5 Puerto Rico, and any other territory or possession of
 6 the United States.

7 ~~(i)~~ ENFORCEMENT.—

8 ~~(1)~~ IN GENERAL.—Except as otherwise pro-
 9 vided in this Act—

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

17 ~~(B)~~ the Attorney General shall enforce this
 18 Act in the same manner, by the same means,
 19 and with the same jurisdiction, powers and du-
 20 ties as though all applicable terms of the Sher-
 21 man Act (~~15~~ U.S.C. 1 et seq.), Clayton Act (~~15~~
 22 U.S.C. 12 et seq.), and Antitrust Civil Process
 23 Act (~~15~~ U.S.C. 1311 et seq.) were incorporated
 24 into and made a part of this Act; and

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

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

13 (3) COMMISSION INDEPENDENT LITIGATION AU-
 14 THORITY.—If the Commission has reason to believe
 15 that a person violated this Act, the Commission may
 16 commence a civil action, in its own name by any of
 17 its attorneys designated by it for such purpose, to
 18 recover a civil penalty and seek other appropriate re-
 19 lief in a district court of the United States.

20 (4) PARENS PATRIAE.—Any attorney general of
 21 a State may bring a civil action in the name of such
 22 State for a violation of this Act as parens patriae on
 23 behalf of natural persons residing in such State, in
 24 any district court of the United States having juris-

1 dictation of the defendant, and may secure any form
 2 of relief provided for in this section.

3 ~~(j) EMERGENCY RELIEF.—~~

4 ~~(1) IN GENERAL.—~~The Commission, Assistant
 5 Attorney General of the Antitrust Division, or any
 6 attorney general of a State may seek a temporary
 7 injunction requiring the covered platform operator to
 8 take or stop taking any action for not more than
 9 120 days and the court may grant such relief if the
 10 Commission, the United States, or the attorney gen-
 11 eral of a State proves—

12 ~~(A)~~ there is a claim that a covered plat-
 13 form operator took an action that would violate
 14 this Act; and

15 ~~(B)~~ that action impairs the ability of busi-
 16 ness users to compete with the covered platform
 17 operator.

18 ~~(2) EMERGENCY RELIEF.—~~The emergency re-
 19 lief shall not last more than 120 days from the filing
 20 of the complaint.

21 ~~(3) TERMINATION.—~~The court shall terminate
 22 the emergency relief at any time that the covered
 23 platform operator proves that the Commission, the
 24 United States, or the attorney general of the State
 25 seeking relief under this section has not taken rea-

1 sonable steps to investigate whether a violation has
2 occurred.

3 (4) OTHER EQUITABLE RELIEF.—Nothing in
4 this subsection prevents or limits the Commission,
5 the United States, or any attorney general of any
6 State from seeking other equitable relief as provided
7 in subsection (g) of this section.

8 (k) STATUTE OF LIMITATIONS.—A proceeding for a
9 violation of this section may be commenced not later than
10 6 years after such violation occurs.

11 **SEC. 3. JUDICIAL REVIEW.**

12 (a) IN GENERAL.—Any party that is subject to a cov-
13 ered platform designation under section 2(e) of this Act,
14 a decision in response to a request to remove a covered
15 platform designation under section 2(f) of this Act, a final
16 order issued in any district court of the United States
17 under this Act, or a final order of the Commission issued
18 in an administrative adjudicative proceeding under this
19 Act may within 30 days of the issuance of such designa-
20 tion, decision, or order, petition for review of such designa-
21 tion, decision, or order in the United States Court of Ap-
22 peals for the District of Columbia Circuit.

23 (b) TREATMENT OF FINDINGS.—In a proceeding for
24 judicial review of a covered platform designation under
25 section 2(e) of this Act, a decision in response to a request

1 to remove a covered platform designation under section
 2 2(f) of this Act, or a final order of the Commission issued
 3 in an administrative adjudicative proceeding under this
 4 Act, the findings of the Commission or the Assistant At-
 5 torney General as to the facts, if supported by evidence,
 6 shall be conclusive.

7 **SEC. 4. ENFORCEMENT GUIDELINES.**

8 (a) IN GENERAL.—Not later than 1 year after the
 9 date of enactment of this Act, the Commission and the
 10 Assistant Attorney General of the Antitrust Division shall
 11 jointly issue guidelines outlining policies and practices, re-
 12 lating to agency enforcement of this Act, including policies
 13 for determining the appropriate amount of a civil penalty
 14 to be sought under section 2(g)(1) of this Act, with the
 15 goal of promoting transparency, deterring violations, and
 16 imposing sanctions proportionate to the gravity of indi-
 17 vidual violations.

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

24 (c) OPERATION.—The Joint Guidelines issued under
 25 this section do not confer any rights upon any person,

1 State, or locality, nor shall they operate to bind the Com-
 2 mission, Department of Justice, or any person, State, or
 3 locality to the approach recommended in such Guidelines.

4 **SEC. 5. RULE OF CONSTRUCTION.**

5 (a) Notwithstanding any other provision of law,
 6 whether user conduct would constitute a violation of sec-
 7 tion 1030 of title 18 of the United States Code is not dis-
 8 positive of whether the defendant has established an af-
 9 firmative defense under this Act.

10 (b) An action taken by a covered platform operator
 11 that is reasonably tailored to protect the rights of third
 12 parties under sections 106, 1101, 1201, or 1401 of title
 13 17 of the United States Code or rights actionable under
 14 sections 32 or 43 of the Lanham Act (15 U.S.C. 1114,
 15 1125), or corollary state law, shall not be considered un-
 16 lawful conduct under subsection 2(a) or (b) of this Act.

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

22 **SEC. 6. SEVERABILITY.**

23 If any provision of this Act, an amendment made by
 24 this Act, or the application of such provision or amend-
 25 ment to any person or circumstance is held to be unconsti-

1 tutional; the remainder of this Act and of the amendments
 2 made by this Act, and the application of the remaining
 3 provisions of this Act and amendments to any person or
 4 circumstance shall not be affected.

5 **SECTION 1. SHORT TITLE.**

6 *This Act may be cited as the “American Innovation*
 7 *and Choice Online Act”.*

8 **SEC. 2. DEFINITIONS.**

9 (a) *IN GENERAL.—In this Act:*

10 (1) *ANTITRUST LAWS; PERSON.—The terms*
 11 *“antitrust laws” and “person” have the meanings*
 12 *given the terms in subsection (a) of the first section*
 13 *of the Clayton Act (15 U.S.C. 12).*

14 (2) *BUSINESS USER.—The term “business*
 15 *user”—*

16 (A) *means a person that uses or is likely to*
 17 *use a covered platform for the advertising, sale,*
 18 *or provision of products or services, including*
 19 *such persons that are operating a covered plat-*
 20 *form or are controlled by a covered platform op-*
 21 *erator; and*

22 (B) *does not include a person that—*

23 (i) *is a clear national security risk; or*

1 (ii) is controlled by the Government of
2 the People’s Republic of China or the gov-
3 ernment of another foreign adversary.

4 (3) COMMISSION.—The term “Commission”
5 means the Federal Trade Commission.

6 (4) CONTROL.—The term “control” means, with
7 respect to a person—

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

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

12 (C) in the event of the dissolution of the
13 person, having the right to 25 percent or more
14 of the assets of the person;

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

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

21 (F) otherwise exercising substantial control
22 over the person.

23 (5) COVERED PLATFORM.—The term “covered
24 platform” means an online platform that—

1 (A) has been designated as a covered plat-
2 form under section 3(d);

3 (B) is owned or controlled by a person
4 that—

5 (i) is a publicly traded company; and

6 (ii)(I) at any point during the 12
7 months preceding a designation under sec-
8 tion 3(d) or the 12 months preceding the fil-
9 ing of a complaint for an alleged violation
10 of this Act has at least—

11 (aa) 50,000,000 United States-
12 based monthly active users on the on-
13 line platform; or

14 (bb) 100,000 United States-based
15 monthly active business users on the
16 online platform;

17 (II) during—

18 (aa) the 2 years preceding a des-
19 ignation under section 3(d), or the 2
20 years preceding the filing of a com-
21 plaint for an alleged violation of this
22 Act—

23 (AA) at any point, is owned
24 or controlled by a person with
25 United States net annual sales of

1 greater than \$550,000,000,000,
2 adjusted for inflation on the basis
3 of the Consumer Price Index; or

4 (BB) during any 180-day
5 period during the 2-year period,
6 an average market capitalization
7 greater than \$550,000,000,000,
8 adjusted for inflation on the basis
9 of the Consumer Price Index or

10 (bb) the 12 months preceding a
11 designation under section 3(d), or at
12 any point during the 12 months pre-
13 ceding the filing of a complaint for an
14 alleged violation of this Act, has at
15 least 1,000,000,000 worldwide monthly
16 active users on the online platform;
17 and

18 (III) is a critical trading partner for
19 the sale or provision of any product or serv-
20 ice offered on or directly related to the on-
21 line platform; or

22 (C) is owned or controlled by a person
23 that—

24 (i) is not a publicly traded company;
25 and

1 (ii)(I) at any point during the 12
2 months preceding a designation under sec-
3 tion 3(d), or the 12 months preceding the
4 filing of a complaint for an alleged viola-
5 tion of this Act has at least—

6 (aa) 50,000,000 United States-
7 based monthly active users on the on-
8 line platform; or

9 (bb) 100,000 United States-based
10 monthly active business users on the
11 online platform;

12 (II) at any point—

13 (aa) during the 2 years preceding
14 a designation under section 3(d), or
15 the 2 years preceding the filing of a
16 complaint for an alleged violation of
17 this Act, is owned or controlled by a
18 person with earnings, before interest,
19 taxes, depreciation, and amortization,
20 in the previous fiscal year of greater
21 than \$30,000,000,000, adjusted for in-
22 flation on the basis of the Consumer
23 Price Index; or

24 (bb) during the 12 months pre-
25 ceding a designation under section

1 3(d), or the 12 months preceding the
 2 filing of a complaint for an alleged
 3 violation of this Act, has at least
 4 1,000,000,000 worldwide monthly ac-
 5 tive users on the online platform; and
 6 (III) is a critical trading partner for
 7 the sale or provision of any product or serv-
 8 ice offered on or directly related to the on-
 9 line platform.

10 (6) *CRITICAL TRADING PARTNER.*—The term
 11 “critical trading partner” means a person that has
 12 the ability to restrict or materially impede the access
 13 of—

14 (A) a business user to the users or customers
 15 of the business user; or

16 (B) a business user to a tool or service that
 17 the business user needs to effectively serve the
 18 users or customers of the business user.

19 (7) *DATA.*—The term “data” includes informa-
 20 tion that is collected by or provided to a covered plat-
 21 form or business user that is linked, or reasonably
 22 linkable, to a specific—

23 (A) user or customer of the covered plat-
 24 form; or

25 (B) user or customer of a business user.

1 (8) *FOREIGN ADVERSARY*.—The term “foreign
2 adversary” has the meaning given the term in section
3 8(c) of the Secure and Trusted Communications Net-
4 works Act of 2019 (47 U.S.C. 1607(c)).

5 (9) *ONLINE PLATFORM*.—The term “online plat-
6 form” means a website, online or mobile application,
7 operating system, digital assistant, or online service
8 that—

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

12 (B) facilitates the offering, advertising, sale,
13 purchase, payment, or shipping of products or
14 services, including software applications, between
15 and among consumers or businesses not con-
16 trolled by the platform operator; or

17 (C) enables user searches or queries that ac-
18 cess or display a large volume of information.

19 (10) *PUBLICLY TRADED COMPANY*.—The term
20 “publicly traded company”—

21 (A) means any company whose principal
22 class of shares—

23 (i) is listed on a stock exchange; and

24 (ii) can be readily purchased or sold
25 by the public; and

1 (B) includes all subsidiaries of a company
2 described in subparagraph (A).

3 (11) STATE.—The term “State” means a State,
4 the District of Columbia, the Commonwealth of Puer-
5 to Rico, and any other territory or possession of the
6 United States.

7 (b) REGULATIONS.—Not later than 180 days after the
8 date of enactment of this Act, the Commission shall promul-
9 gate regulations in accordance with section 553 of title 5,
10 United States Code, to define the term data for the purpose
11 of implementing and enforcing this Act.

12 **SEC. 3. UNLAWFUL CONDUCT.**

13 (a) IN GENERAL.—It shall be unlawful for a person
14 operating a covered platform in or affecting commerce to
15 engage in conduct, as demonstrated by a preponderance of
16 the evidence, that would—

17 (1) preference the products, services, or lines of
18 business of the covered platform operator over those of
19 another business user on the covered platform in a
20 manner that would materially harm competition;

21 (2) limit the ability of the products, services, or
22 lines of business of another business user to compete
23 on the covered platform relative to the products, serv-
24 ices, or lines of business of the covered platform oper-

1 *ator in a manner that would materially harm com-*
2 *petition;*

3 *(3) discriminate in the application or enforce-*
4 *ment of the terms of service of the covered platform*
5 *among similarly situated business users in a manner*
6 *that would materially harm competition;*

7 *(4) materially restrict, impede, or unreasonably*
8 *delay the capacity of a business user to access or*
9 *interoperate with the same platform, operating sys-*
10 *tem, or hardware or software features that are avail-*
11 *able to the products, services, or lines of business of*
12 *the covered platform operator that compete or would*
13 *compete with products or services offered by business*
14 *users on the covered platform;*

15 *(5) condition access to the covered platform or*
16 *preferred status or placement on the covered platform*
17 *on the purchase or use of other products or services*
18 *offered by the covered platform operator that are not*
19 *part of or intrinsic to the covered platform;*

20 *(6) use nonpublic data that are obtained from or*
21 *generated on the covered platform by the activities of*
22 *a business user or by the interaction of a covered*
23 *platform user with the products or services of a busi-*
24 *ness user to offer, or support the offering of, the prod-*
25 *ucts or services of the covered platform operator that*

1 *compete or would compete with products or services*
 2 *offered by business users on the covered platform;*

3 (7) *materially restrict or impede a business user*
 4 *from accessing data generated on the covered platform*
 5 *by the activities of the business user, or through an*
 6 *interaction of a covered platform user with the prod-*
 7 *ucts or services of the business user, such as by estab-*
 8 *lishing contractual or technical restrictions that pre-*
 9 *vent the portability by the business user to other sys-*
 10 *tems or applications of the data of the business user;*

11 (8) *materially restrict or impede covered plat-*
 12 *form users from uninstalling software applications*
 13 *that have been preinstalled on the covered platform or*
 14 *changing default settings that direct or steer covered*
 15 *platform users to products or services offered by the*
 16 *covered platform operator, unless necessary—*

17 (A) *for the security or functioning of the*
 18 *covered platform; or*

19 (B) *to prevent data from the covered plat-*
 20 *form operator or another business user from*
 21 *being transferred to the Government of the Peo-*
 22 *ple's Republic of China or the government of an-*
 23 *other foreign adversary;*

24 (9) *in connection with any covered platform user*
 25 *interface, including search or ranking functionality*

1 offered by the covered platform, treat the products,
 2 services, or lines of business of the covered platform
 3 operator more favorably relative to those of another
 4 business user than under standards mandating the
 5 neutral, fair, and nondiscriminatory treatment of all
 6 business users; or

7 (10) retaliate against any business user or cov-
 8 ered platform user that raises concerns with any law
 9 enforcement authority about actual or potential viola-
 10 tions of State or Federal law.

11 (b) *AFFIRMATIVE DEFENSES.*—

12 (1) *IN GENERAL.*—It shall be an affirmative de-
 13 fense to an action under paragraph (1), (2), or (3) of
 14 subsection (a) if the defendant establishes by a pre-
 15 ponderance of the evidence that the conduct was nar-
 16 rowly tailored, nonpretextual, and reasonably nec-
 17 essary to—

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

20 (B) protect safety, user privacy, the security
 21 of nonpublic data, or the security of the covered
 22 platform; or

23 (C) maintain or substantially enhance the
 24 core functionality of the covered platform.

1 (2) *OTHER UNLAWFUL CONDUCT.*—*It shall be an*
 2 *affirmative defense to an action under paragraph (4),*
 3 *(5), (6), (7), (8), (9), or (10) of subsection (a) if the*
 4 *defendant establishes by a preponderance of the evi-*
 5 *dence that the conduct—*

6 *(A) has not resulted in and would not result*
 7 *in material harm to competition; or*

8 *(B) was narrowly tailored, could not be*
 9 *achieved through less discriminatory means, was*
 10 *nonpretextual, and was reasonably necessary*
 11 *to—*

12 *(i) prevent a violation of, or comply*
 13 *with, Federal or State law;*

14 *(ii) protect safety, user privacy, the se-*
 15 *curity of non-public data, or the security of*
 16 *the covered platform; or*

17 *(iii) maintain or substantially enhance*
 18 *the core functionality of the covered plat-*
 19 *form.*

20 (3) *EFFECT OF OTHER LAWS.*—*Notwithstanding*
 21 *any other provision of law, whether user conduct*
 22 *would constitute a violation of section 1030 of title*
 23 *18, United States Code, shall have no effect on wheth-*
 24 *er the defendant has established an affirmative defense*
 25 *under this Act.*

1 (c) *ENFORCEMENT.*—

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

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

10 (B) *the Attorney General shall enforce this*
11 *Act in the same manner, by the same means,*
12 *and with the same jurisdiction, powers, and du-*
13 *ties as though all applicable terms of the Sher-*
14 *man Act (15 U.S.C. 1 et seq.), Clayton Act (15*
15 *U.S.C. 12 et seq.), and Antitrust Civil Process*
16 *Act (15 U.S.C. 1311 et seq.) were incorporated*
17 *into and made a part of this Act; and*

18 (C) *any attorney general of a State shall*
19 *enforce this Act in the same manner, by the same*
20 *means, and with the same jurisdiction, powers,*
21 *and duties as though all applicable terms of the*
22 *Sherman Act (15 U.S.C. 1 et seq.) and the Clay-*
23 *ton Act (15 U.S.C. 12 et seq.) were incorporated*
24 *into and made a part of this Act.*

1 (2) *COMMISSION INDEPENDENT LITIGATION AU-*
 2 *THORITY.*—*If the Commission has reason to believe*
 3 *that a person violated this Act, the Commission may*
 4 *commence a civil action, in its own name by any of*
 5 *its attorneys designated by it for such purpose, to re-*
 6 *cover a civil penalty and seek other appropriate relief*
 7 *in a district court of the United States.*

8 (3) *PARENS PATRIAE.*—*Any attorney general of*
 9 *a State may bring a civil action in the name of such*
 10 *State for a violation of this Act as parens patriae on*
 11 *behalf of natural persons residing in such State, in*
 12 *any district court of the United States having juris-*
 13 *diction of the defendant for any form of relief pro-*
 14 *vided for in this section.*

15 (4) *ENFORCEMENT IN FEDERAL DISTRICT*
 16 *COURT.*—*The Commission, Attorney General, or any*
 17 *attorney general of a State shall only be able to en-*
 18 *force this Act through a civil action brought before a*
 19 *district court of the United States.*

20 (5) *REMEDIES.*—

21 (A) *IN GENERAL.*—*The remedies provided*
 22 *in this paragraph are in addition to, and not in*
 23 *lieu of, any other remedy available under Fed-*
 24 *eral or State law.*

1 (B) *CIVIL PENALTY.*—Any person who vio-
 2 lates this Act shall be liable to the United States
 3 or the Commission for a civil penalty, which
 4 shall accrue to the United States Treasury, in an
 5 amount not greater than 15 percent of the total
 6 United States revenue of the person for the pe-
 7 riod of time the violation occurred.

8 (C) *INJUNCTIONS.*—

9 (i) *IN GENERAL.*—The Assistant Attor-
 10 ney General in charge of the Antitrust Divi-
 11 sion, the Commission, or the attorney gen-
 12 eral of any State may seek, and the court
 13 may order, relief in equity as necessary to
 14 prevent, restrain, or prohibit violations of
 15 this Act.

16 (ii) *TEMPORARY INJUNCTIONS.*—

17 (I) *IN GENERAL.*—The Commis-
 18 sion, Assistant Attorney General in
 19 charge of the Antitrust Division, or
 20 any attorney general of a State may
 21 seek a temporary injunction requiring
 22 the covered platform operator to take
 23 or stop taking any action for not more
 24 than 120 days.

1 (II) *GRANT.*—*The court may*
2 *grant a temporary injunction under*
3 *this clause if the Commission, the*
4 *United States, or the attorney general*
5 *of a State, as applicable, proves—*

6 (aa) *there is a plausible*
7 *claim, supported by evidence, that*
8 *a covered platform operator took*
9 *an action that would violate this*
10 *Act;*

11 (bb) *that action materially*
12 *impairs the ability of business*
13 *users to compete with the covered*
14 *platform operator; and*

15 (cc) *a temporary injunction*
16 *would be in the public interest.*

17 (III) *DURATION.*—*A temporary*
18 *injunction under this clause shall ex-*
19 *pire not later than the date that is 120*
20 *days after the date on which a com-*
21 *plaint under this subsection is filed.*

22 (IV) *TERMINATION.*—*The court*
23 *shall terminate a temporary injunction*
24 *under this clause if the covered plat-*
25 *form operator proves that—*

1 (aa) the Commission, the
 2 United States, or the attorney
 3 general of the State seeking relief
 4 under this subsection has not
 5 taken reasonable steps to inves-
 6 tigate whether a violation has oc-
 7 curred; or

8 (bb) allowing the temporary
 9 injunction to continue would
 10 harm the public interest.

11 (V) *OTHER EQUITABLE RELIEF.*—
 12 Nothing in this clause shall prevent or
 13 limit the Commission, the United
 14 States, or any attorney general of any
 15 State from seeking other equitable re-
 16 lief, including the relief provided in
 17 this paragraph.

18 (D) *FORFEITURE FOR REPEAT OFFEND-*
 19 *ERS.*—If a person has engaged in a pattern or
 20 practice of violating this Act, the court shall con-
 21 sider requiring, and may order, that the chief ex-
 22 ecutive officer, and any other corporate officer as
 23 appropriate to deter violations of this Act, forfeit
 24 to the United States Treasury any compensation
 25 received by that person during the 12 months

1 *preceding or following the filing of a complaint*
 2 *for an alleged violation of this Act.*

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

6 (7) *RULES OF CONSTRUCTION.*—

7 (A) *IN GENERAL.*—*Nothing in subsection*
 8 *(a) may be construed—*

9 (i) *to require a covered platform oper-*
 10 *ator to divulge or license any intellectual*
 11 *property, including any trade secrets, busi-*
 12 *ness secrets, or other confidential propri-*
 13 *etary business processes, owned by or li-*
 14 *censed to the covered platform operator;*

15 (ii) *to prevent a covered platform oper-*
 16 *ator from asserting its preexisting rights*
 17 *under intellectual property law to prevent*
 18 *the unauthorized use of any intellectual*
 19 *property owned by or duly licensed to the*
 20 *covered platform operator;*

21 (iii) *to require a covered platform op-*
 22 *erator to interoperate or share data with*
 23 *persons or business users that are on any*
 24 *list maintained by the Federal Government*
 25 *by which entities—*

1 (I) are identified as limited or
2 prohibited from engaging in economic
3 transactions as part of United States
4 sanctions or export-control regimes; or

5 (II) have been identified as na-
6 tional security, intelligence, or law en-
7 forcement risks;

8 (iv) to prohibit a covered platform op-
9 erator from promptly requesting and ob-
10 taining the consent of a covered platform
11 user prior to providing access to the non-
12 public, personally identifiable information
13 of the user to a covered platform user under
14 that subsection;

15 (v) in a manner that would likely re-
16 sult in data on the covered platform or data
17 from another business user being transferred
18 to the Government of the People's Republic
19 of China or the government of another for-
20 eign adversary; or

21 (vi) to impose liability on a covered
22 platform operator solely for offering—

23 (I) full end-to-end encrypted mes-
24 saging or communication products or

1 *services that allow communication be-*
 2 *tween covered platform users; or*

3 *(II) a fee-for-service subscription*
 4 *that provides benefits to covered plat-*
 5 *form users on the covered platform.*

6 *(B) COPYRIGHT AND TRADEMARK VIOLA-*
 7 *TIONS.—An action taken by a covered platform*
 8 *operator that is reasonably tailored to protect the*
 9 *rights of third parties under section 106, 1101,*
 10 *1201, or 1401 of title 17, United States Code, or*
 11 *rights actionable under section 32 or 43 of the*
 12 *Act entitled “An Act to provide for the registra-*
 13 *tion and protection of trademarks used in com-*
 14 *merce, to carry out the provisions of certain*
 15 *international conventions, and for other pur-*
 16 *poses”, approved July 5, 1946 (commonly known*
 17 *as the “Lanham Act” or the “Trademark Act of*
 18 *1946”)* (15 U.S.C. 1114, 1125), *or corollary*
 19 *State law, shall not be considered unlawful con-*
 20 *duct under subsection (a).*

21 *(d) COVERED PLATFORM DESIGNATION.—*

22 *(1) IN GENERAL.—The Commission and Depart-*
 23 *ment of Justice may jointly, with concurrence of the*
 24 *other, designate an online platform as a covered plat-*

1 *form for the purpose of implementing and enforcing*
 2 *this Act, which shall—*

3 *(A) be based on a finding that the criteria*
 4 *set forth in subparagraph (B) or (C) of section*
 5 *2(a)(5) are met;*

6 *(B) be issued in writing and published in*
 7 *the Federal Register; and*

8 *(C) except as provided in paragraph (2),*
 9 *apply for a 7-year period beginning on the date*
 10 *on which the designation is issued, regardless of*
 11 *whether there is a change in control or owner-*
 12 *ship over the covered platform.*

13 *(2) REMOVAL OF COVERED PLATFORM DESIGNA-*
 14 *TION.—The Commission or the Department of Justice*
 15 *shall—*

16 *(A) consider whether a designation of a cov-*
 17 *ered platform under paragraph (1) should be re-*
 18 *moved prior to the expiration of the 7-year pe-*
 19 *riod if the covered platform operator files a re-*
 20 *quest with the Commission or the Department of*
 21 *Justice that shows that the online platform no*
 22 *longer meets the criteria set forth in subpara-*
 23 *graphs (B) and (C);*

24 *(B) determine whether to grant a request*
 25 *submitted under subparagraph (A) not later*

1 *than 120 days after the date on which the re-*
2 *quest is filed; and*

3 *(C) obtain the concurrence of the Commis-*
4 *sion or the Department of Justice, as appro-*
5 *priate, before granting a request submitted under*
6 *subparagraph (A).*

7 *(3) JUDICIAL REVIEW.—*

8 *(A) IN GENERAL.—Any person aggrieved by*
9 *a designation under paragraph (1), a decision in*
10 *response to a request under paragraph (2), or a*
11 *final order issued in any district court of the*
12 *United States under this Act may, within 30*
13 *days of the issuance of such designation, deci-*
14 *sion, or order, petition for review of such des-*
15 *ignation, decision, or order in the United States*
16 *Court of Appeals for the District of Columbia*
17 *Circuit.*

18 *(B) TREATMENT OF FINDINGS.—In a pro-*
19 *ceeding for judicial review of a designation*
20 *under paragraph (1) or a decision in response to*
21 *a request under paragraph (2), the findings of*
22 *fact by the Commission or the Department of*
23 *Justice, if supported by evidence, shall be conclu-*
24 *sive.*

1 **SEC. 4. ENFORCEMENT GUIDELINES.**

2 (a) *IN GENERAL.*—Not later than 270 days after the
 3 date of enactment of this Act, the Commission and the As-
 4 sistant Attorney General in charge of the Antitrust Divi-
 5 sion, in consultation with other relevant Federal agencies
 6 and State attorneys general, shall jointly issue agency en-
 7 forcement guidelines outlining policies and practices relat-
 8 ing to conduct that may materially harm competition
 9 under section 3(a), agency interpretations of the affirmative
 10 defenses under section 3(b), and policies for determining the
 11 appropriate amount of a civil penalty to be sought under
 12 section 3(c), with the goal of promoting transparency, deter-
 13 ring violations, fostering innovation and procompetitive
 14 conduct, and imposing sanctions proportionate to the grav-
 15 ity of individual violations.

16 (b) *UPDATES.*—The Commission and the Assistant At-
 17 torney General in charge of the Antitrust Division shall up-
 18 date the joint guidelines issued under subsection (a) as
 19 needed to reflect current agency policies and practices, but
 20 not less frequently than once every 4 years beginning on
 21 the date of enactment of this Act.

22 (c) *PUBLIC NOTICE AND COMMENT.*—Before issuing
 23 guidelines, or updates to those guidelines, under this section,
 24 the Commission and the Assistant Attorney General in
 25 charge of the Antitrust Division shall—

1 (1) *publish proposed guidelines in draft form;*
 2 *and*

3 (2) *provide public notice and opportunity for*
 4 *comment for not less than 60 days after the date on*
 5 *which the draft guidelines are published.*

6 (d) *OPERATION.—The joint guidelines issued under*
 7 *this section do not—*

8 (1) *confer any rights upon any person, State, or*
 9 *locality; and*

10 (2) *operate to bind the Commission, Department*
 11 *of Justice, or any person, State, or locality to the ap-*
 12 *proach recommended in the guidelines.*

13 **SEC. 5. RULE OF CONSTRUCTION.**

14 *Nothing in this Act may be construed to limit—*

15 (1) *any authority of the Attorney General or the*
 16 *Commission under the antitrust laws, section 5 of the*
 17 *Federal Trade Commission Act (15 U.S.C. 45), or*
 18 *any other provision of law; or*

19 (2) *the application of any law.*

20 **SEC. 6. SEVERABILITY.**

21 *If any provision of this Act, or the application of such*
 22 *provision to any person or circumstance, is held to be un-*
 23 *constitutional, the remainder of this Act, and the applica-*
 24 *tion of the remaining provisions of this Act, to any person*
 25 *or circumstance, shall not be affected.*

1 **SEC. 7. EFFECTIVE DATE.**

2 (a) *IN GENERAL.*—*Except as provided in subsection*
3 *(b), this Act shall take effect on the date of enactment of*
4 *this Act.*

5 (b) *EXCEPTION.*—*Section 3(a) shall take effect on the*
6 *date that is 1 year after the date of enactment of this Act.*

7 (c) *AUTHORITY.*—*The exception in subsection (b) shall*
8 *not limit the authority of the Commission or Department*
9 *of Justice to implement other sections of this Act.*

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S. 2992

A BILL

To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

MARCH 2, 2022

Reported with an amendment