June 22, 2021

TECH FREEDOM

Honorable Jerrold Nadler
Chair, House Judiciary Committee
United States House of Representatives
2132 Rayburn Building
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member, Chair, House Judiciary Committee
United States House of Representatives
2142 Rayburn House Office building
Washington, DC 20515

**Re: H.R. 3816, the American Choice and Innovation Online Act; and H.R. 3825, the Ending Platform Monopolies Act (June 23, 2021)**

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Dear Members of Congress,

We write to express our concerns about the American Choice and Innovation Online Act and the Ending Platform Monopolies Act. These bills purport to implement the recommendations contained at the end of the "Investigation of Competition in Digital Markets" Report recently issued by your committee.[1] The report repeatedly invokes railroads and telecommunications regulation as models for common carrier regulation.[2] The bills, however, go far beyond any existing model of common carriage regulation and raise serious constitutional concerns.

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[1] Report U.S. House of Representatives, 116th Cong., Report on Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations 378-81 (structural separation), 382-83 (non-discrimination) & 384-87 (open access) (2020).

[2] "Historically, Congress has implemented nondiscrimination requirements in a variety of markets. With railroads, the Interstate Commerce Commission oversaw obligations and prohibitions applied to railroads designated as common carriers. More recently, the Cable Act of 1992 included a provision requiring the Federal Communications Commission to oversee a nondiscrimination requirement for cable operators." Report at 383. *See also* id. at. 6, 7, 302, 380, 382-83 (discussing railroads and telecommunications as models).

These bills would represent the most significant change in American regulation in over a century. In the near-term, they would apply to the five largest tech companies, but it is only a matter of time before other companies cross the $600 billion threshold of market capitalization, particularly the largest financial institutions and Walmart.

We urge your committee to offer the public the same opportunity to comment on the specifics of these proposals that legislation usually receives — through a hearing on the specifics of each bill. Your committee's report simply does not substitute for this core part of the legislative process. The report is remarkably scant on specifics: only after 376 pages does it offer "recommendations," with just eight pages on three crucial topics.[3] There is no way to build a record on the real-world implementation of these bills through a legislative markup, and, without such a record, it would be premature to markup these bills, as your committee plans to do imminently.

Here, we set aside our normative disagreements with the policy approach taken in these bills and focus instead on the legal problems they raise, principally that these bills:

1. Impose common carriage burdens on companies based essentially on their size and success rather than on whether the services at issue would actually qualify as common carrier services under the traditional *functional* analysis of the nature of specific service offerings;
2. Authorize civil penalties for violations of amorphous standards borrowed from common carriage law, where those standards have never been subject to enforcement through penalties — likely violating the Fifth Amendment's due process principles and the Fair Notice doctrine; and
3. Could regulate not only discriminatory business practices, but also editorial judgments inherent in the algorithmic ranking at the core of both search engines and social media, as well as the refusal to associate with content that platforms find objectionable—thus violating the First Amendment.

## The Bills Abandon Core Principles of Common Carriage Regulation

We focus here on two of the five bills under consideration by your committee. First, the American Choice and Innovation Online Act recreates a core duty of common carriers by barring a platform from "discriminat[ing] among similarly situated business users."[4] This is equivalent to Section 202(a) of the Communications Act and provisions of the Interstate

[3] *Id*. at 378-386.

[4] American Choice and Innovation Online Act, H.R. 3816, 117 Cong. § 2 (a)(3) (2021).

Commerce Act of 1887 banning "unjust discrimination" by railroads.[5] In addition to this catch-all provision, the bill imposes eleven more specific non-discrimination duties — all classic forms of common carriage regulation.

Second, the Ending Platform Monopolies Act bars "covered platforms" from owning any "line of business other than the covered platform" that:

> (1) utilizes the covered platform for the sale or provision of products or services;
>
> (2) offers a product or service that the covered platform requires a business user to purchase or utilize as a condition for access to the covered platform, or as a condition for preferred status or placement of a business user's product or services on the covered platform; or
>
> (3) gives rise to a conflict of interest.[6]

This is, in effect, common carriage regulation on steroids. When the FCC developed the distinction between basic services like telephony (now called telecommunications services) and enhanced services (now called information services) in its Second Computer Inquiry Rules (1980),[7] the agency also structurally separated "the common carrier provision of enhanced telecommunications services and customer premises equipment (CPE), and allow[ed] dominant carrier participation in those markets only through the mechanism of separate corporate subsidiaries."[8] The Ending Platform Monopolies Act parallels this approach by defining the core business as common carrier service — but then goes much further.

Rather than merely requiring structural separation into distinct corporate entities, this bill fully prohibits ownership of anything outside the covered business. The purpose of *Computer II*'s structural separation was "segregating the costs traditionally associated with the joint production of tariffed [common carrier] and detariffed [non-common carrier] services," and thus protecting the monopoly ratepayer from abuse.[9] By contrast, the Ending Platform

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[5] 47 U.S.C. § 202(a); *see also* Ad Hoc Telecommunications Users Com. v. F.C.C, 680 F.2d 790, 805 (D.C. Cir. 1982) ("[L]anguage of section 202(a) was drawn from provisions of the Interstate Commerce Act which prohibited discrimination by common carriers against any customers who were purchasing the same service under substantially similar circumstances and conditions.").

[6] Ending Platform Monopolies Act, H.R. 3815, 117 Cong. § 2(a)(1-3).

[7] Section 64.702 of the Commission's Rules and Regulations (*Computer II*), 77 F.C.C.2d 384 (1980).

[8] D.A. Degazon, An Analysis of Structural Regulation as Applied in The FCC's Second Computer Inquiry, iii (1983) (Ph.D. dissertation, New York University) (ProQuest); *see also Computer II*, 77 F.C.C.C2d at 496, ¶ 288.

[9] *Id*.

Monopolies Act aims to limit the same thing common carriage regulation has always regulated — discriminatory practices that favor affiliated offerings — by prohibiting the ownership of those offerings altogether.

These provisions would govern not only how, say, Amazon treats independent vendors who sell their products on Amazon, but also how search engines rank content from "covered businesses," how social media prioritize content provided by "covered businesses" (including media outlets) and how platforms of all kinds decide which content to allow on their platforms. As such, the bill governs not only business practices but also the exercise of editorial judgment. This gives rise to serious First Amendment problems.

## Imposing Common Carriage Status Without Its Prerequisites

These bills depart from existing models of common carriage regulation at the most basic level: what qualifies as a common carrier service. Traditionally, common carrier status is not inherent in the size or popularity of a company, or even a single offering, but in the nature of that offering. As the D.C. Circuit explained in its seminal 1976 *NARUC I* decision:

> Originally, the doctrine was used to impose a greater standard of care upon carriers who held themselves out as offering to serve the public in general. The rationale was that by holding themselves out to the public at large, otherwise private carriers took on a quasi-public character. This character, coupled with the lack of control exercised by shippers or travellers over the safety of their carriage, was seen to justify imposing upon the carrier the status of an insurer…. What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently."[10]

This functional analysis must be conducted at the level of specific services, not corporate entities. The Telecommunications Act of 1996 says so explicitly: A "telecommunications carrier" is "treated as a common carrier ... only to the extent that it is engaged in providing telecommunications services."[11] The Ninth Circuit recently explained the historical roots of this focus on specific services, rather than corporate entities. The court rejected AT&T's argument that the FTC Act, by excluding jurisdiction over common carriers,[12] denied the FTC

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[10] Nat'l Ass'n. of Regulatory Util. Comm'rs v. Fed. Commc'ns Com., 525 F.2d 630, 640-41 (D.C. Cir. 1976) (*NARUC I*).

[11] 47 U.S.C. § 153(51); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 60.

[12] Under Section 5, the FTC may "prevent persons, partnerships, or corporations, except ... common carriers subject to the Acts to regulate commerce ... from using ... unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2).

jurisdiction over *any* of AT&T's services merely because the company provided *some* common carrier services:

> Forty years before the FTC Act , the Supreme Court observed that an entity could be considered a common carrier for some purposes but not others: "A common carrier may, undoubtedly, become a private carrier , or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry." *N. Y. Cent. R.R. Co. v. Lockwood*, 84 U.S. 17 Wall. 357, 377, 21 L.Ed. 627 (1873). In other words, being a common carrier entity was not a unitary status for regulatory purposes. A business with common-carrier status acted in its capacity as a common carrier only when it performed activities that were "embraced within the scope of its chartered powers." *Id*.[13]

Monopoly power alone does not suffice to make something a traditional common carrier. The *NARUC I* court recognized that railroads had been subjected to common carriage regulation "on the basis of the near monopoly power" they exercised — but "coupled with the fact that they 'exercise a sort of public office' in the duties which they perform."[14] Again, "a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve."[15] Conversely, monopoly power was not always essential: "Subsequently, legislation has been upheld imposing stringent regulations of various types on entities found to be affected with a public character, even where nothing approaching monopoly power exists."[16]

The Committee's bills ignore this focus on the nature of each activity in three key ways. First, they define an "online platform" at the level of a "website, online or mobile application, operating system, digital assistant, or online service."[17] This approach ignores the significant differences among the multiple offerings within each potential platform. For example, some scholars have argued that merely hosting third-party content could be a common carrier offering even while simultaneously recognizing that the website's decisions about whether to feature or recommend a business's content would *not* be common carriage offerings.[18]

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[13] Fed. Trade Comm'n v. AT&T Mobility LLC, 883 F.3d 848, 858 (9th Cir. 2018).

[14] *Id*. at 641.

[15] National Ass'n of Reg. Util. Com'rs v. F.C.C, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (*NARUC II*)).

[16] *Id*. at 640-41.

[17] H.R. 3816 § 2(g)(10), H.R. 3825 § 5(10).

[18] Eugene Volokh, *Social Media Platforms as Common Carriers?* 21-24 (unpublished manuscript dated June 18, 2021) (on file with the author).

The bills make no such distinction, treating all aspects of "covered platform" as equally subject to common carriage regulation, regardless of their functionality.

Second, these bills focus on market capitalization and size — having a certain number of users (either consumers or businesses). These concepts are immaterial to traditional conceptions of common carriage status: very small companies may be common carriers and very large ones may not; the key is the nature of their offering.

The bills' third criterion comes closer to traditional common carriage, yet still departs significantly from how it has been defined. The bills defines a "covered platform" as a "critical trading partner" that:

> has the ability to restrict or impede—
>
> (A) the access of a business user to its users or customers; or
>
> (B) the access of a business user to a tool or service that it needs to effectively serve its users or customers.[19]

The bills provide no further basis for courts, or regulated parties, to interpret these terms. The Report speaks broadly of "impeding" or "restricting" competition or entry into the market,[20] or impeding competitors from "reaching users at scale,"[21] but it never explains the concepts behind either term. In some sense, *every* market intermediary that facilitates transactions between buyers and sellers "has the ability to restrict or impede… the access of a business user to its users or customers." The relevant question is: how much? The notion of "effectively" serving customers is equally vague and subjective, varying wildly across different industries.

These questions can only be answered meaningfully by assessing market power — as in antitrust law. By not explicitly requiring such an analysis, these bills leave the agencies and courts free to dispense with any real assessment of market power.

The definition of "critical trading partner" may sound like the "essential facilities" doctrine, but it is not. The Report summarizes the doctrine as requiring that "dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory basis."[22] Under the classic formulation of the doctrine, conduct is illegal under the Sherman Act Section 2

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[19] H.R. 3816 §§ 2(g)(4) & (6).

[20] Report at 14, 35 n. 87, 37, 108, 394.

[21] *Id*.

[22] Report at 397-98.

when (1) the monopolist controls access to an essential facility, (2) a competitor cannot practicably duplicate the facility, (3) the monopolist has denied access to the competitor, and (4) it was feasible for the monopolist to grant such access.[23] The Report fails to acknowledge that this is not settled law: as the Supreme Court declared in *Trinko* (2004): "We have never recognized such a doctrine."[24] But if there were such a doctrine, a core element in a highly fact-dependent test would be proof of market power. These bills replace that concept with a blanket rule that, in effect, large firms must provide open access to their facilities to all comers — and limit themselves to operating those facilities.

## Common Carriage Regulation Cannot Supersede the First Amendment

A carrier of communications that chooses to provide a curated or edited product has, by that very choice, elected to offer a product that is inherently *not* common carriage. When it comes to carriage of *communicative* information, in other words, common carriage must be *voluntary*: it depends on how the company configures the nature of its offerings to consumers. When, for example, then-Judge Kavanaugh objected that the FCC's (since repealed) net neutrality rules violated the First Amendment, Judge Srinivasan responded by pointing out that the rules applied only "to those ISPs that hold themselves out as neutral, indiscriminate conduits to internet content."[25] A provider that "hold[s] itself out as providing something other than a neutral, indiscriminate pathway," by contrast, was *not* a common carrier subject to the rules.[26] To escape common carrier status, a provider needed merely to be up front in "represent[ing] itself as engaging in editorial intervention[.]"[27]

The point is not simply that common carriage has *traditionally* been about transporting physical stuff, rather than about broadcasting speech (though this is true).[28] The key point,

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[23] *See* MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983).

[24] Verizon Comm. v. Law Offices of Trinko, 540 U.S. 398, 411 (2004). *See also*, *e.g.*, Four Corners Nephrology v. Mercy Med, 582 F.3d 1216, 1222 (10th Cir. 2009) (Gorsuch, J.) ("[W]e can hardly blame [the plaintiff] for his disinterest in the ['essential facilities'] label, given the Supreme Court's skepticism about the 'essential facilities doctrine.'"); trueEX, LLC v. MarkitSERV Ltd., 266 F. Supp. 3d 705, 723 (S.D.N.Y. 2017) ("[T]he continued viability of the essential facilities doctrine has been called into question in recent years.").

[25] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 389 (D.C. Cir. 2017) (Srinivasan, J., joined by Tatel, J., concurring in the denial of rehearing en banc).

[26] *Id*.

[27] *Id*.

[28] *See*, *e.g.*, McCoy v. Pac. Spruce Corp., 1 F.2d 853, 855 (9th Cir. 1924) ("A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport *persons or commodities* from place to place, offering his services to such as may choose to employ him and pay his charges.") (emphasis added); German Alliance Ins. Co. v. Kansas, 233 U.S. 389, 406 (1914) (referring to the "transmission of intelligence" as being "of *cognate character*" to common carriage, rather than as being itself common carriage) (emphasis added).

rather, is that, thanks to the First Amendment, a private entity cannot be *forced* to act as a common carrier of speech. If what's being regulated is the expressiveness, rather than simply the *transportation*, of information, forced common carriage of that information is subject to heightened scrutiny.

When platforms "discriminate" among business users for essentially editorial reasons, to curate the nature of content on their platforms, rather than for purely economic reasons, they are engaged in protected editorial discretion.[29] The bills ignore this distinction, defining "business user" to include "a person that utilizes or plans to utilize the covered platform" not only for the sale of products but also for the "provision of products or services."[30] This would apply to essentially *any* organization using platforms to distribute their offerings, from the developers of white supremacy apps to pseudo-journalistic outlets peddling conspiracy theories and dangerously false quack science claims.

The governing precedents are *Miami Herald Publishing Co. v. Tornillo*[31] and *Hurley v. Irish-American Gay, Lesbian Bisexual Group*.[32] *Miami Herald* involved a state law that gave political candidates a right to reply to critics, free of charge, in the newspaper that published the criticism. But "the choice of material to go into a newspaper," says *Miami Herald*, "constitute[s] the exercise of editorial control and judgment."[33] And a publication, *Miami Herald* holds—even one in a highly concentrated local market—has a First Amendment right to exercise such control and judgment as it sees fit.

*Hurley* addressed whether a state could dictate, by law, which signs and messages a private organization must allow in a St. Patrick's Day parade. The parade, a group seeking to march in it argued, was "merely a 'conduit' for the speech of participants," and not "'itself a speaker'"[34]; but the Supreme Court disagreed. The parade's viewers, Hurley concludes, were likely to believe that the message of each parade participant had been deemed "worthy of presentation," and "quite possibly support as well," by the parade's organizers.[35] That being the case, the organizers had a "fundamental" First Amendment right to "the autonomy to choose the content of [their] own message."[36]

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[29] *See* Berin Szóka, *Antitrust, Section 230 & the First Amendment* (May 30, 2021), https://bit.ly/3j1ZwJM.

[30] H.R. 3816 § 2(g)(2), H.R. 3825 § 5(8).

[31] 418 U.S. 241 (1974).

[32] 515 U.S. 557 (1995).

[33] 418 U.S. at 258.

[34] 515 U.S. at 575.

[35] *Id*.

[36] *Id*. at 573.

Internet platforms that curate or edit content have consistently been held to enjoy the First Amendment right to editorial control, and autonomy over message, set forth in *Miami Herald* and *Hurley*.[37] It could hardly be otherwise. Internet platforms are not interchangeable carriers of information widgets. The core aspect of their product, in fact, is not *transportation* at all. The platforms offer a wide array of differentiated—and rapidly evolving—forms of public-facing communication. Facebook is, among other things, a blog, a photo- and video-sharing service, and a news aggregator. "Facebook's First Amendment right to decide what to publish and what not to publish on its platform" therefore is, or certainly should be, beyond question.[38] Google, Microsoft, and Amazon, meanwhile, offer search engines whose *whole point* is to curate information in useful ways. Indeed, prominent legal scholar Eugene Volokh has written, with appropriate bluntness, that "search engines are speakers."[39] "[E]ach search engine's editorial judgment," he observes, "is much like … newspapers' … judgments about which op-ed columnists … are worth carrying regularly, and where their columns are to be placed."[40]

In short, the websites these bills target curate, edit, and moderate—and have always curated, edited, and moderated—extensively.[41] This should come as no surprise, given that curation and editing are a fundamental aspect of the services those platforms exist to provide. Without intermediaries, the Internet would be a bewildering flood of disordered information. By organizing that information, intermediaries help users to "sift through the ever-growing avalanche of desired content that appears on the Internet every day."[42] It is "the editorial discretion that [the] intermediaries exercise" that enables users to avoid "unwanted speech" and "identify and access desired content."[43] These websites' "mass-media speech implicates a broader range of free speech values"—including the values

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[37] *See*, *e.g.*, e-Ventures Worldwide, LLC v. Google, Inc., 2017 U.S. Dist. LEXIS 88650, at *11 (M.D. Fla. Feb. 8, 2017); Davison v. Facebook, Inc., 370 F. Supp. 3d 621, 629 (E.D. Va. 2019), *aff'd*, 774 F. App'x 162 (4th Cir. 2019); Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 437, 440 (S.D.N.Y. 2014).

[38] La'Tiejira v. Facebook, 272 F. Supp. 3d 981, 991-92 (S.D. Tex. 2017).

[39] *See*, *e.g.*, Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. Econ & Pol'y 883, 884 (2012).

[40] Id.

[41] *See*, *e.g.*, Facebook, *Community Standards*, https://bit.ly/3g2IUzX (last accessed June 7, 2021); YouTube, *Rules and Policies: Community Guidelines*, https://bit.ly/34UyxaS (last accessed June 7, 2021); Wayback Machine, *Facebook Terms of Use*, https://bit.ly/3w1gYC5 (Nov. 26, 2005).

[42] Christopher S. Yoo, Free Speech and the Myth of the Internet as an Unintermediated Experience, 78 Geo. Wash. L. Rev. 697, 701 (2010).

[43] Id.

embodied in *Miami Herald* and *Hurley*—than does "person-to-person" speech.[44] "[W]hen [public] *dissemination* of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's [First Amendment] right to autonomy over the message is compromised."[45]

By barring covered entities from "discriminat[ing] among similarly situated business users," the American Choice and Innovation Online Act tramples on that fundamental right. This blatant disregard for the Free Speech Clause is all the more baffling for working diametrically against one of many of your members' highest goals—combatting online dis- and misinformation. For instance, one of the bill's co-sponsors, Chairman Cicilline, has worried that "Facebook and Google host or enable countless pages, targeted advertisements, and suggested content that are dedicated to conspiracy theories and calls to violence."[46] Yet the bill would likely *force* Facebook and Google to host material from Infowars, the business front of well-known conspiracist Alex Jones. At the very least, each website would have to convince judges, on a case-by-case basis (and at the risk of hefty fines in the event of failure), that a given banned entity is not "similarly situated" to other entities the website continues to host. Limiting the bill's application to "businesses" does not avoid these problems, as that includes any app developer, operator of a website, developer of videos, *etc*. — the very people who complain most loudly about supposed "bias" in content moderation.

The problem is particularly acute for search engines. Even more than social media, a search engine must, with each user's query, decide: "Out of the thousands of possible items that could be included, which to include, and how to arrange those that are included?"[47] Such judgments are, "at their core, editorial judgments about what users are likely to find interesting and valuable."[48] Not only does this mean that those judgments are all "fully protected by the First Amendment";[49] it also means that a search engine is *inherently* "discriminatory." Screen space being what it is, a search engine must discriminate even among "similarly situated" entities. Every search result must rank *a* above *b* and *b* above *c* and so on, even if *a*, *b*, and *c* are all, say, local Thai restaurants with similar customer ratings.

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[44] Id. Note, however, that the non-public nature of the communication is a necessary, but not sufficient, element of common carriage. Text messaging, while private, is not a common carriage service today. *See In re Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, 33 FCC Rcd. 12075 (2018). Nor would Internet-based messaging services such as WhatsApp be.

[45] Hurley v. Irish-American Gay, Lesbian Bisexual Group, 515 U.S. 557, 576 (1995) (emphasis added).

[46] Congressman David Cicilline, *Cicilline Remarks on COVID-19 Social Media Disinformation*, https://bit.ly/35HbiS6 (June 16, 2020).

[47] Volokh & Falk, 8 J.L. Econ & Pol'y at 885.

[48] Id.

[49] Id.

In the context of search results, the demand for "non-discrimination" passes beyond a First Amendment violation and into the realm of incoherence.[50]

The unintended consequences of the non-discrimination clause are likely to be swift, immense, and arresting. In the *best*-case scenario, the clause will be promptly struck down, in court, as the sweeping violation of the First Amendment that it clearly is.[51] In the worst-case scenario, the clause will be *enforced*, and the bill's supporters' marked forever as some of the greatest benefactors of online hate and paranoia the nation has known.

## Common Carriage Principles Have Never Been Directly Subject to Civil Penalties

Section 2(f) of the American Choice and Innovation Online Act authorizes enormous civil penalties for any violation of the non-discrimination provisions of 2(a) and 2(b).[52] Any company that failed to anticipate what the FTC or DOJ might later consider a discriminatory practice could be subject to suit for penalties up to "15 percent of [their] total United States revenue … for the previous calendar year; or… 30 percent of the United States revenue of the person in any line of business affected or targeted by the unlawful conduct during the period of the unlawful conduct." In many cases, penalties calculated under this formula could significantly exceed maximum penalties in Europe, which are capped at 10% of global *annual* turnover, calculated at the level of the overall group only "if the parent of that group exercised decisive influence over the operations of the subsidiary during the infringement period."[53]

This is not remotely how common carriage has ever worked: penalties may be imposed only for willful and knowing violations, which means that legal requirements must be clear. What the Supreme Court recognized in applying the Communications Act of 1934 two years after

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[50] *See generally* Mike Masnick, *Ohio Files Bizarre and Nonsensical Lawsuit Against Google, Claiming It's a Common Carrier; But What Does That Even Mean?,* Techdirt, https://bit.ly/3zHzdyx (June 8, 2021).

[51] Were it passed, and then challenged in court (say, by Apple, seeking to avoid, on free-speech grounds, having to carry the Parler or Gab app on its smartphones), the non-discrimination clause might well be struck down altogether. "To succeed in a typical facial attack" on a law, it is true, a party must show "that no set of circumstances exists under which [that law] would be valid." *United States v. Stevens*, 559 U.S. 460, 472 (2010). "In the First Amendment context, however, … a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id*. at 473.

[52] Penalties could be up to "15 percent of the total United States revenue of the person for the previous calendar year; or… 30 percent of the United States revenue of the person in any line of business affected or targeted by the unlawful conduct during the period of the unlawful conduct."

[53] https://bit.ly/3vQcxJp

its enactment — that "[p]enalties do not follow upon innocent mistakes"[54] — remains true today.

Historically, the "common law imposed liability upon a common carrier for loss or damage to goods unless the loss or damage was caused by an act of God or the enemies of the King."[55] This was strict liability — absent any showing of negligence or intent.[56] American judges awarded damages based on actual injury suffered by consumers.[57] Punitive damages for "wounded feelings and humiliation" experienced by passengers wrongfully evicted from trains would be awarded only in extreme cases of violence and abuse by conductors, where malice could be presumed.[58] Even when courts characterized emotional harms as "compensatory damages," they have emphasized the egregiousness of "humiliation and degradation" as intentional acts.[59] Thus, however they might have been characterized, damages that go beyond monetary compensation required proof of intent or willfulness. Honest mistakes were not subject to penalties.

A 1977 law review article claims that "the fundamental justification for the award of punitive damages in public service corporation cases has been the desire to both punish and protect against the abuse of economic power."[60] In fact, even in the case cited, the plaintiff received punitive damages in its action against a public services company only because the

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[54] Am. Tel. & Tel. Co. v. United States, 299 U.S. 232, 245 (1936) ("To subject the company or its officers to prosecution for a crime the violation of the Act must have been knowing and willful.")

[55] 1 Saul Sorkin, *Goods in Transit* § 5.02 (2021).

[56] Forward v. Pittard, 1 T.R. 27, 99 Eng. Rep. 953 (K.B. 1785); Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 Ohio St. L.J. 1127, 1134 (1990).

[57] Sorkin, *supra* at note 55 ("In 1906, Congress codified common law principles relating to the liability of interstate carriers in the Carmack Amendment…The liability imposed upon the common carrier by [the Carmack Amendment] is for the actual loss or injury to the property…."); *Forward*, 1 T.R. 27; Coggs v. Bernard, 2 Ld. Raym. 909, 918; Allied Tube & Conduit Corp. v. Southern Pac. Transp. Co., 211 F.3d 367, 369 (7th Cir. 2000).

[58] "Where a passenger who is wrong-fully ejected from a train by the conductor sustains no physical injury in consequence thereof, and the ejection is unaccompanied by unnecessary force or violence, willfulness or malice, but is made in good faith under the mistaken belief of the conductor that the passenger is not entitled to ride on the train, the passenger may recover compensation for all the inconvenience, loss of time, labor and expense incurred by him in consequence of the wrongful act, but he may not recover damages for mental suffering or humiliation, nor damages by way of smart money… But where the conductor employs unnecessary force or violence to remove the passenger, or where he assaults him with abusive or insulting language, malice will be presumed and in such case the passenger is entitled to damages on account of his outraged feelings and humiliation and also may recover punitive damages." Glover v. Atchison, T. & S. F. R. Co., 108 S.W. 105, 107 (Mo. Ct. App. 1908).

[59] *See, e.g.,* Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381, 387-88 (1882).

[60] Timothy J. Sullivan, Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change, 61 Minn. L. Rev. 207, 226 (1977).

corporation had committed a willful and intentional wrong.[61] Even where courts note the importance of a common carrier's duty to the public, they did not allow punitive damages unless a "wilful [*sic*] and intentional violation of the plaintiff's rights" had occurred.[62]

In 1906, Congress passed the Carmack Amendment, which imposed uniform common law liability over interstate common carriers and preempted state remedies.[63] The Carmack Amendment limited liability in state law actions to those damages caused by the common carrier through dereliction of its common law duty.[64] The Interstate Commerce Act of 1887, the first federal common carriage statute, had already taken a narrow approach to remedies: a carrier could avoid all further liability if, after receiving a complaint from the Interstate Commerce Commission, it made "reparation for the injury alleged to have been done."[65] The Commission was empowered only to make a "recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured."[66] Civil penalties were available only after a carrier flouted "any lawful order or requirement of the Commission"[67] — $500 per day ($14,168 in 2021).[68]

Congress has taken a consistent approach since. While the Clayton and Sherman Acts authorize treble damages to provide additional deterrence, neither authorizes civil penalties.[69] The Robinson-Patman Act provides perhaps the closest analogy to the American Choice and Innovation Online Act, as it generally prohibits price discrimination.[70] To illustrate just how limited the role of civil penalties has been in enforcement, consider that, prior to the passage of the Finality Act in 1959, the Commission was unable to secure civil penalties even for violations of its orders.[71] To sanction violations of the Clayton Act, the

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[61] Ft. Smith & W. Ry. v. Ford, 34 Okla. 575, 578 (1912); Peterson v. Thomas, 24 S.W. 1124, 1124-25 (Tex. Civ. App. 1893); Head v. Ga. P. R. Co., 7 S.E. 217, 218 (Ga. 1887) ("And suppose we call the damages punitive, they are recoverable in such a tort as this if the circumstances were aggravated either in the act or intention.").

[62] Thomas v. S. R. Co., 30 S.E. 343 (N.C. 1898). *See* Milwaukee & S. P. R. Co. v. Arms, 91 U.S. 489 (1875); Phila., W. & B. R. Co. v. Larkin, 47 Md. 155 (1877).

[63] Sorkin, *supra* at note 55; Adams Express Co. v. Croninger, 226 U.S. 491, 499-505 (1913); Underwriters at Lloyds of London v. N. Am. Van Lines, 890 F.2d 1112, 1113 (10th Cir. 1989).

[64] *Adams Express*, 226 U.S. at 507.

[65] Interstate Commerce Act, ch. 104, § 13, 24 Stat. 379 (1887); *see also id*. § 15 (If a carrier satisfies the Commission by compliance with its recommendations, it "shall thereupon be relieved from further liability or penalty for such particular violation of law.").

[66] *Id*. § 14.

[67] *Id*. § 16.

[68] CPI Inflation Calculator, https://bit.ly/3zMLNMY (last visited Jun. 6, 2021).

[69] Clayton Act, 15 U.S.C. § 15(a) (1914); Sherman Act, § 7, 26 Stat. 209 (1980).

[70] 15 U.S.C. § 13.

[71] H.R. Rep. No. 580, 86th Cong., 1st Sess. 4, *quoted in* FTC v. Henry Broch & Co., 368 U.S. 360, 365-66, n. 6 (1962).

Commission had first to apply to the court of appeals for a decree affirming and enforcing its initial order[72] and could impose civil penalties only if the company violated the court's decree.[73] Thus before issuing penalties, the Commission had to prove, at three different proceedings, that respondent had violated the Clayton Act, the Commission's order, and the court's decree.[74]

The Finality Act amended the Clayton Act to allow civil penalties—up to $5000—for violations of final cease and desist orders issued by the FTC.[75] Consequently, enforcement under traditional antitrust legislation required that a respondent violate a Federal Trade Commission order that was affirmed by an appellate court before it would face civil penalties.[76] Today, while the FTC can impose civil penalties for violations of its orders,[77] it cannot do so for violations of Section 5's broad prohibitions against unfair and deceptive acts and practices, and unfair methods of competition.

Likewise, the Communications Act of 1934 requires that a defendant have "willfully and knowingly" (a) done "any act, matter, or thing, in this chapter prohibited or declared to be unlawful," (b) failed to do something required by the Act,[78] or violated "any rule, regulation, restriction, or condition made or imposed by the Commission."[79] Provisions like Section 202(a)'s ban on "unjust or unreasonable discrimination" do not actually "prohibit" or "declare to be unlawful" anything; instead, they serve as the basis for issuing rules that proscribe behavior more specifically. Indeed, "no provision of the Act creates, either by expression or necessary implication, any private right of action which is cognizable, in the first instance, by the district Courts."[80] Thus, for example, the Commission could not have issued civil penalties for violations of the catch-all "general conduct standard" it issued in its

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[72] Martin B. Louis, *The Scope and Enforcement of Robinson-Patman Act Cease and Desist Orders*, 10 Vill. L. Rev. 457, 458 (1965); FTC v. Washington Fish & Oyster Co., 271 F.2d 39 (9th Cir. 1949).

[73] Louis at 458; *E.g*., In re Whitney, 273 F.2d 211 (9th Cir. 1959).

[74] *Id*. at 458.

[75] 73 Stat. 245 (1959), 15 U.S.C. § 21; Louis at 457.

[76] *Id*.

[77] 15 U.S.C. §§ 21(I)(b) ($5,000 per violation of orders generally); 45(m)(1)(b) ($10,000 per violation of cease-and-desist orders).

[78] 47 U.S.C. § 501.

[79] 47 U.S.C. § 502.

[80] Daly v. W. Cent. Broad. Co., 201 F. Supp. 238, 240-41 (S.D. Ill. 1962).

FCC's 2015 Open Internet Order — because even the Chairman of the FCC could not predict what would constitute a violation.[81]

Other federal common carriage schemes take the same approach, authorizing civil liability only for willful and knowing violations.[82]

## Imposing Civil Penalties for Violations of Vague Standards Violates the Fifth Amendment by Denying Due Process

A civil penalty is not a mere "compensati[on]" to "a victim for his loss."[83] It is, rather, a "punishment" that aims "to deter others from offending in like manner."[84] Although "elementary notions of fairness" always "dictate a person receive fair notice" of what conduct to avoid, the "strict[er] constitutional safeguards" around "judgments without notice" are "implicated by civil penalties."[85] When "penalties threaten to inhibit the exercise of constitutionally protected rights," in particular, "a more stringent vagueness and fair-notice test should apply."[86]

Although, in civil enforcement cases, these principles arise most frequently in the context of an agency's shifting how it reads its regulations,[87] "clarity in regulation" is, *in general*, "essential to the protections provided by the Due Process Clause"; and due process, *in general*, "requires the invalidation of laws"—and, in particular, penal laws—"that are

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[81] Rebecca Ruiz, F.C.C. Sets Net Neutrality Rules (March 12, 2015), https://nyti.ms/3gTksl3. ("We don't really know. We don't know where things will go next. We have created a playing field where there are known rules, and the FCC will sit there as a referee and will throw the flag").

[82] *See, e.g.*, Motor Vehicle Act of 1980, 96 P.L. 296, §30(d)(1) ("Any person . . . after notice and opportunity for a hearing, to have knowingly violated this section . . . shall be liable").

[83] Kokesh v. SEC, 137 S. Ct. 1635, 1642 (2017).

[84] *Id*.

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

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

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

impermissibly vague."[88] The FTC Chairwoman, Lina Khan, and outgoing Commissioner Rohit Chopra showed a clear understanding of the danger of vague laws, and of the importance of due process, in a 2020 article.[89] Ambiguous laws, they wrote, deprive regulated parties "of notice about what the law is, thereby undermining due process—a fundamental principle in our legal system."[90]

Under the heightened standard that governs when civil penalties are at stake, a law or regulation must (1) "provide a person of ordinary intelligence fair notice of what is prohibited" and (2) not be "so standardless that it authorizes or encourages seriously discriminatory enforcement."[91] There is ample ground for each concern here.

The key provisions of both bills fall woefully short of enabling "a regulated party acting in good faith" to "identify, with ascertainable certainty" what conduct it must undertake or avoid.[92] This uncertainty begins at the threshold question of whether these laws apply at all. The five largest tech services would know they may be subject to these bills because the bills are carefully designed to target them specifically based on their market capitalization (though other companies will, no doubt, eventually cross these thresholds). Predicting how the DOJ or FTC might assess user counts, however, is less straightforward than it may seem: the bill provides that a platform must have "at least 50,000,000 United States-based monthly active users on the online platform; or (II) has at least 100,000 United States-based monthly active business users…" The term "platform" can include a "website, online or mobile application, operating system, digital assistant, or online service," but, in practice, the agencies would receive broad deference under *Chevron* in applying these terms in either direction.[93] If the agencies wanted to maximize the application of the American Choice and Innovation Online Act, they could include new offerings (with too few customers to qualify as "covered platforms" on their own) as within the scope of an existing platform, especially a broadly defined "online service" — thus subjecting them to the bill's non-discrimination requirements. For example, with only three million subscribers, YouTube TV would not count as a covered platform unless it is considered part of another platform. Despite the

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[88] *Fox*, 567 U.S. at 253.

[89] Rohit Chopra & Lina M. Khan, Symposium: Reassessing the Chicago School of Antitrust Law, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020), https://bit.ly/3gMtXCk.

[90] *Id*. at 360.

[91] *Fox*, 567 U.S. at 253; *see also*, Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995). The Robinson-Patman Act was upheld under a vagueness doctrine challenge. Elizabeth Arden, Inc. v. Federal Trade Commission, 156 F. 2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947). This heightened standard did not apply because the Act does not authorize civil penalties.

[92] *Gen. Elec.*, 53 F.3d at 1329 (D.C. Cir. 1995) (internal quotation omitted).

[93] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

similarity between the names, it is functionally distinct from YouTube: it offers only traditional multichannel video programming content ("cable" and broadcast channels) while YouTube offers videos uploaded by users. Yet the agency might claim they are both part of the same "service" or "website" (since both use youtube.com).

Aggressive enforcement of the Ending Platform Monopolies Act would pull in the other direction: excluding specific offerings or features from the scope of a "covered platform," declaring the platform to be a distinct "line of business," and thus forcing the operator to divest those offerings. Here, examples are easier to contemplate: Is Google Maps part of the same platform as Google Search? If not, the bill could require divestiture or one or the other given the potential "conflict of interests" involved not merely in integrating Google maps results at the top of Google search results, but in including Google maps results among the standard "ten blue links" at all. Likewise, are Google Search and the Google Search Network (which displays ads next to search results) part of the same platform? Should Google be required to divest the ad network and rent space to multiple competing ad networks?

Even more unpredictable is whether each platform will be deemed "a critical trading partner."[94] Again, one could easily argue that every market intermediary that facilitates transactions between buyers and sellers "has the ability to restrict or impede… the access of a business user to its users or customers." Even a grocery store with no market power can, in a literal sense, "impede" — however marginally — the ease with which, say, a cereal manufacturer may "access" the customers who stroll through the store. The alternative grounds for being a "critical trading partner" are hardly more clear: having the "ability to restrict or impede… the access of a business user to a tool or service needed to effectively serve its users or customers." Again, without analysis of market power, what does "effectively" mean?[95]

The key operative terms of both bills are similarly vague. What does it mean, under the American Choice and Innovation Online Act, for one business user to be "similarly situated" to another? Say Facebook hosts more toxic content, in total, than Parler, but Parler puts much less effort into content moderation?[96] May Apple ban Parler's app from iPhones, while allowing Facebook's? Or are those two firms' apps "similarly situated"? If one "news" website spreads misinformation about elections, and another misinformation about COVID-19, may Facebook adjudge the comparative danger of the two forms of misinformation, then decide

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[94] H.R. 3825 § 5(10); H.R. 3816 § 2(c)(1).

[95] *See supra* at 6.

[96] This, of course, is not a particularly speculative hypothetical. Simon Wiesenthal Center, *Parler: An Unbiased Social Platform?* (Nov. 2020), https://bit.ly/3j4HF4U.

to expel one of the sites but not the other? Or, again, are those two websites "similarly situated"? Such imponderables can be spun out forever. The law is too vague even to approach resolving them. Common carriage law avoided all these problems by recognizing that "a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve."[97]

Nor is the bill's ban on "discrimination" much better. As we've discussed, it's not clear how a search engine could ever *not* discriminate when it serves results. This example illustrates the problem with attempting to apply common carriage concepts of non-discrimination to services whose core function is plainly discrimination. Once the threshold analysis of whether a service constitutes common carriage is dispensed with, the tried and true principles of common carriage law can offer little guidance to any company trying to understand what the regulator will consider to be "discrimination." The law may use a familiar term, but that seeming familiarity conceals a vast uncertainty about the law's application.

Likewise, the Ending Platform Monopolies Act's definition of what constitutes a "conflict of interests" is an astoundingly vague basis for requiring that operators of covered platforms divest themselves of entire lines of business. What does it mean to "create[] the incentive and ability… for the covered platform… to advantage" its own offerings over those of competitors? Or to "disadvantage" their rivals' offerings? How might a company make its ownership of another "line of business" consistent with the requirements of the bill by building safeguards against such self-dealing into how that line of business operates? These questions are greatly magnified by the inclusion of "potential or nascent rivals" in these provisions. The antitrust agencies have struggled for years to identify potential competition in any market. Here, the stakes are far higher: should a company fail to identify what might later be deemed to have been a nascent or potential competitor, the company faces not merely treble damages but massive civil penalties unmoored from damages — plus having to spin off that business.

Again, it is worth considering the FCC's most notable experiment with structural separation as a counter-example of the kind of notice that has been provided to companies as to how they may structure their business. While the regulatory burdens were much lighter — mere structural separation into distinct subsidiaries — the FCC's 1980 *Computer II* order developed an elaborate distinction between "basic" common carrier services like telephony and emerging "enhanced" services involving data processing.[98] The Commission drew on

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[97] *NARUC II*, 533 F.2d at 608-09.

[98] *Computer II*, 77 F.C.C.2d at 418-21, ¶¶ 92-97.

longstanding principles of common carriage law, and its own experience in drawing such lines since 1966.[99] While these concepts were not always easy to apply, and have been heavily litigated since, they provided the kind of clear conceptual framework that is sorely lacking in the two bills discussed herein.

The problems with these provisions is both that they deny companies "fair notice of what is prohibited" and also that they enable "seriously discriminatory enforcement."[100] While the antitrust laws also have broad language, which has been given meaning only through decades of judicial interpretation, the danger of arbitrary enforcement here is exceptional. These bills are not, like antitrust, generally applicable to the entire economy. Instead, they have been carefully targeted to apply only to five large, and increasingly unpopular, companies — and each company is so different from the other four that the agencies, in assessing whether each "website, online or mobile application, operating system, digital assistant, or online service"[101] offered by that company qualifies as "a critical trading partner," could take wildly inconsistent positions supported by pretextual justifications about distinctions without real differences. This could allow the DOJ or FTC to engage in political favoritism, both in designating "covered platforms" and in removing that designation — in order to punish or reward companies depending on whether their editorial decisions please or displease political officials, or for other reasons of favoritism.

With one hand, the American Choice and Innovation Online Act makes much of how the five largest tech companies currently operate presumptively illegal. For example, under a plain reading of the bill, if a consumer searched the name of a restaurant chain on Google search, Google could no longer place Google Maps business profiles, which include consumer-friendly information like the nearest locations, directions, photos, menus, and location-specific website URLs, at the top of the search results. Indeed, the Google Maps profiles belonging to the restaurant for which the user searched might not make the first or second page of results and may go undiscovered by the hungry consumer.

With the other hand, the bill offers special dispensation: under the affirmative defense, Google could justify "discriminatory" practices if it can "establish[] by clear and convincing evidence" that its conduct "(A) would not result in harm to the competitive process by restricting or impeding legitimate activity by business users; or (B) was narrowly tailored, could not be achieved through a less discriminatory means, was nonpretextual, and was necessary to—(i) prevent a violation of, or comply with, Federal or State law; or (ii) protect

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[99] Id. 77 F.C.C.2d at 431, ¶¶ 122-23.

[100] *Fox*, 567 U.S. at 253.

[101] H.R. 3825 § 5(10); H.R. 3816 § 2(c)(1).

user privacy or other nonpublic data."[102] Google would bear a heavy burden of showing that surfacing Google Maps profiles does not "harm" the "competitive process." Alternatively, Google could show that displaying Google Maps profiles atop a search is "narrowly tailored," as indiscriminate as possible, "nonprextual," ***and*** "necessary to" "prevent a violation" of the law or necessary to "protect user privacy or other nonpublic data."[103] The "clear and convincing" standard demands that evidence provided be highly and substantially more likely to be true than untrue, or highly probable.[104]

But, ultimately, it would be up to the regulator to decide whether to grant such favors — and, crucially, it would be difficult for other companies to object to favoritism. This is yet another reason why it matters that digital media are not conveyors of commodity services. Arbitrary enforcement among railroads or telecommunications companies is generally easy to identify because all the companies are roughly, if not exactly, the same business. The biggest tech companies are not like dominant railroads operating similar networks. They have little direct overlap in their offerings, so any difference in regulatory treatment among them could always be explained by differences in their offerings. Arbitrariness in enforcement would be difficult, if not impossible, to establish.

## Civil Penalties Are Available Under Civil Rights Laws but for Profoundly Different Reasons

Unlike common carriage law, multiple civil rights laws *do* authorize civil penalties for violations of statutory prohibitions on "discrimination."[105] Civil rights cases fall into one of two buckets. The imposition of civil penalties in cases of intentional discrimination works essentially the same way as in common carriage law, where willfulness is a prerequisite for imposing penalties. But most civil rights cases are established not on a showing of intent but of disparate impact. After making a prima facie case that the adverse effect of the policy or practice falls disproportionately on a protected class, the burden shifts to the defendant to establish both a substantial legitimate justification for the policy or practice, and that there is no alternative that would achieve the same legitimate objective but with less of a

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[102] *Id*.

[103] H.R. 3816 § 2(c)(1).

[104] Colorado v. New Mexico, 467 U.S. 310 (1984).

[105] *See* 42 U.S.C. § 1981(a) (providing complaining parties to recover compensatory and punitive damages in addition to any relief authorized by the Civil Rights Act of 1964 from a respondent who engaged in unlawful intentional discrimination).

discriminatory effect.[106] Yet even in such cases, civil rights law differs from the kind of economic discrimination at issue in the HJC's bills in every way that matters.

Civil rights law involves inherently invidious conduct: discrimination on the basis of protected classes. Most of those classes are grounded in the Fourteenth Amendment, and thus entail inherently *constitutional* harms.[107] When courts ask whether there is a substantial legitimate justification for the practice, they are not weighing discrimination with its benefits, as happens under antitrust law's rule of reason. Discrimination on the basis of any protected class is *per se* illegal.[108] Courts typically must assess whether a purportedly legitimate, nondiscriminatory ground for the defendant's conduct is simply a pretext for discrimination. Thus, the question is whether unlawful discrimination actually occurred, not whether the alleged discrimination was lawful. Once discrimination on the basis of a protected class has been established, the law rightfully imposes penalties for that conduct.

The American Choice and Innovation Online Act aims to address, not "discrimination" of the inherently invidious sort (harm inflicted on someone because of her *immutable identity*, because of *who she is*), but simply the workaday "discrimination" that can arise amid the ruthless[109] churn of the market (harm, that is, inflicted as business *a* competes, for market

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[106] *See* N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (noting that the plaintiff may still prove his case by demonstrating a less discriminatory alternative if the defendant has offered the existence of a substantial legitimate justification for the policy or practice). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); U.S. Department of Justice Title VI Manual, https://bit.ly/35R80LX, (citing 42 U.S.C. § 200e-2(k)).

[107] Title VII 42 U.S.C. § 2000a and the Fair Housing Act (42 U.S.C. § 3604 et al.) of the Civil Rights Act of 1964 address "discrimination or segregation on the ground of race, color, religion, or national origin" in the workplace and the housing industry. *See* Legal Highlight, The Civil Rights Act of 1964, U.S. Department of Labor, https://bit.ly/2Uk0A1m (noting that the Act is "the nation's benchmark civil rights legislation" and has also been amended to additionally include remedies for discrimination of the basis of an individual's disability). *See also* Linda Klein, 14th Amendment should be used to ensure equal protection for those with disabilities, ABA Journal, June 27, 2017, https://bit.ly/3zI0q4h (emphasizing that rights of people with disabilities are not fully protected under the 14th Amendment).

[108] In antitrust law, "[r]estraints analyzed under the per se rule are those that are always (or almost always) so inherently anticompetitive and damaging to the market that they warrant condemnation without further inquiry into their effects on the market or the existence of an objective competitive justification." *Antitrust Standards of Review: The Per Se Rule, Rule of Reason, and Quick Look Tests* (Aug. 10, 2018), https://bit.ly/3xF1LqH (citing U.S. v Socony-Vacuum Oil Co., 310 U.S 150 (1940)); United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Topco Associates, Inc., 405 U.S. 596 (1972); Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761 (8th Cir. 2004); U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (2000), https://bit.ly/3vT23ZE, (Section 3.2).

[109] Writing in an age-discrimination case, Judge Posner vividly captures the wide (and sometimes harsh) distinction between the realm of civil rights, on the one hand, and the realm of the market, on the other:

share and profit, against business *b*). Put another way, the bill is not about the morals of combating prejudice, but about the economics of combating self-dealing. As such, the bill can invoke none of the grounds that justify the harsher penalties that attach to civil rights violations.

Nor, finally, are those harsher penalties awarded blithely. Civil rights plaintiffs face a high burden of proof in establishing disparate impact. This helps to ensure that the conduct for which a company might face civil penalties is not an honest mistake of judgment but in fact conduct that a "a regulated party acting in good faith" should be able to predict is illegal.[110]

## Conclusion

We have explained just some of the legal questions raised by these bills. A more exhaustive treatment was not possible given the time available. We hope that our analysis highlights the difficulties associated with moving from the fairly abstract principles propounded in the report to actual legislative language. Such difficulties can only be explored through the process of holding hearings and hearing expert testimony from a variety of witnesses on the real-world implementation of the concepts in the bills discussed herein.

We stand ready to assist your committee in any way we can.

Sincerely,

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|---|---|
| Berin Szóka | Corbin K. Barthold |
| President | Internet Policy Counsel |
| TechFreedom | TechFreedom |

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> [The defendant] does not claim that [the plaintiff] was dismissed because of poor performance, but rather as the result of a Darwinian struggle among three salesmen for two positions. The weakest lost. The market, like the jungle to which it is sometimes compared, is pitiless. Nothing in the age discrimination law provides tenure to competent older workers. They can be let go for any reason or no reason, provided only that the reason is not their age.

Partington v. Broyhill Furniture Industries, 999 F.2d 269, 271 (7th Cir. 1993).

[110] *Gen. Elec. Co.*, 53 F.3d at 1329 (internal quotation omitted).