

February 2, 2022

The Honorable Richard J. Durbin
Chair, Senate Judiciary Committee
United States Senate
711 Hart Senate Building
Washington, DC 20510

The Honorable Richard Blumenthal
Senate Judiciary Committee
United States Senate
706 Hart Senate Building
Washington, DC 20510

Re: Committee Markup of S.2710, the Open App Markets Act (February 3, 2022)

A specific provision in S.2710 will, in its current form, be misused to pressure mainstream platforms to carry extremist content, hate speech and misinformation. As Rep. Zoe Lofgren (D-CA) noted ahead of the Judiciary Committee’s markup of a package of related tech antitrust bills last June: “[e]xtremist outlets and disinformation sites could sue platforms for blocking them.”¹ For example, she warned, “Infowars may sue Apple for being kicked out of the app store, while other conservative political outlets are left up”—and the “[s]ame is possible for Parler, Gab, and 4Chan.”² When such apps are removed from app stores, downranked, or merely subject to warnings or filters, app developers will frame such content moderation as “unreasonable preferencing.” They, Republican state attorney generals, and the next Republican administration will sue, treating this bill as what they have long sought: a “Parler Bill of Rights.”³

Sen. Ted Cruz did not conceal this agenda at the recent markup of S.2992. The bill would, he noted, “make some positive improvement on the problem of censorship” (*i.e.*, content moderation) because “it would provide protections to content providers, to businesses that are discriminated against because of the content of what they produce.” In some respects, S.2710 could be even more prone to abuse than S.2992 because the former’s catch-all anti-discrimination provision, while limited to app stores, is even more elastic.

¹ Press Release, Zoe Lofgren, Lofgren Statement Ahead of Judiciary Committee Markup of Tech Antitrust Bills (Jun. 23, 2021), <https://bit.ly/3GfZOon>.

² *Id.*

³ These concerns are not hypothetical. Texas and Florida have already enacted statutes to compel mainstream platforms to carry noxious content and enable lawsuits over moderation decisions. Both are subjects of pending litigation, and more than two dozen other state legislatures are considering similar bills. Texas Attorney General Ken Paxton, retaliating against Twitter for its decision to ban Donald Trump, has launched an investigation into Twitter’s content moderation practices, using the power of his office to demand burdensome production of documents relating to essentially any moderation decision Twitter has ever made. As written, S.2710 will provide additional weapons for such actors to wield in ever-multiplying partisan harassment campaigns against platforms on the basis of their moderation decisions.

Under Section 3(e), a “Covered Company shall not provide unequal treatment of Apps in an App Store through unreasonably preferencing or ranking the Apps of the Covered Company or any of its business partners over those of other Apps.” For example, after January 6, Google removed the Parler app from its store for failing to adhere to the app store’s content moderation policies. Under S.2710, Parler could have argued that Google was favoring YouTube (its own app) or Facebook (Google’s business partner) over the Parler app. Similarly, InfoWars might allege that its exclusion from the Google, Apple and Amazon app stores is “unreasonable” because other apps from Covered Companies’ “business partners” (however defined) found on those stores also contain objectionable content, *e.g.*, organizing for the January 6 insurrection. In both cases, the covered platforms would insist that they had removed these apps for editorial reasons, not self-preferencing. But plaintiffs would claim that, while the bill defines “unreasonably preferencing” to “include” “applying ranking schemes or algorithms that prioritize Apps based on a criterion of ownership interest by the Covered Company or its business partners,”⁴ the term must mean *more* than that. By using the word “include,” they will argue, Congress must have intended “unreasonably preferencing” to cover a broader panoply of harms than self-preferencing alone.

Developers of apps removed from app stores for violating policies will always be able to argue that any justification provided was pretextual—pointing to examples of other apps not subject to the same content moderation decisions despite carrying supposedly equivalent content. By allowing such plaintiffs to frame such allegedly disparate treatment as “unreasonable preferencing,” Section 3(e) invites endless litigation over content moderation. Whether claims based on content moderation would ultimately fail under either the First Amendment or Section 230 is immaterial; the goal of such lawsuits is not necessarily to win in court. Rather, plaintiffs will likely be able to impose the high cost of litigating these fact-specific disputes at least as far as summary judgment. This will allow them to obtain confidential information during discovery that they can portray as “evidence” of “anti-conservative bias” as part of a broader culture war (and fundraising appeals). It is also likely to discourage platforms from engaging in content moderation to address issues such as disinformation or hate speech, in order to avoid the risk of such litigation.

The most effective way to prevent abuse of this provision would be the following amendment to Section 3(e)(2)(A):

(e) Self-Preferencing In Search.—

(1) IN GENERAL.—A Covered Company shall not provide unequal treatment of Apps in an App Store **through ranking schemes or algorithms that** unreasonably preferencing **preference** or ranking the Apps of the Covered Company or any of its business partners over those of other Apps **based on a criterion of ownership interest by the Covered Company or its business partners.**

⁴ S.2710 § 3(e)(2)(A).

(2) CONSIDERATIONS.—Unreasonably preferencing—

~~(A) includes applying ranking schemes or algorithms that prioritize Apps based on a criterion of ownership interest by the Covered Company or its business partners; and~~

~~(B) does not include clearly disclosed advertising.~~

Moving the key provisions of § 3(e)(2)(A) into § 3(e)(1) would protect the stated purpose of this provision—prohibiting “self-preferencing in search” as an *economic* weapon through a broad, flexible standard—while doing much to foreclose creative pleading intended to retaliate against *editorial* content moderation.⁵

Thank you for your attention to our concerns. We would be happy to assist your Committee in working to revise Section 3(e) so that this provision does not assist those attacking our democracy.

Sincerely,

Organizations

TechFreedom

Center for Democracy & Technology

Free Press Action

Copia Institute

LGBT Technology Partnership

National Coalition Against Censorship

The Press Freedom Defense Fund of First Look Institute, Inc.

Woodhull Freedom Foundation

Individuals (affiliations listed for identification purposes only)

Prof. Anupam Chander, Scott K. Ginsburg Professor of Law and Technology, Georgetown University

Daphne Keller, Director, Stanford Cyber Policy Center

⁵ Two potential amendments drawing on text found in S.2992 would not, alone, address our concerns. Clarifying that apps must be “similarly situated” may be helpful but courts will likely infer such a requirement anyway. Providing that the ranking must cause “harm to competition” will still leave the definition of “unreasonably preference” open-ended and invite endless litigation over the meaning of “competition.” A plaintiff aggrieved by content moderation will undoubtedly claim that Congress must have intended “competition” to have a broader meaning than under the Sherman Act, or that, under existing antitrust law, it need only “allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself.” *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998). Alleging such harm will not present a meaningful hurdle: Parler, for example, has already claimed that removing its app from an app store causes harm to third parties such as advertisers and developers.