

Weaponizing Antitrust to Achieve Radical Ideological Goals

Conservatives have every reason to be angry with some Big Tech companies. It seems as though every day these companies are finding new ways to show their bias and chill the speech of conservatives. Something needs to be done, but solutions must eschew radical leftist attempts to strengthen the relationship between Big Tech and the federal government. Further, the House bills would do nothing to address conservatives' primary concerns regarding Big Tech: viewpoint suppression and censorship.

Instead, these far-left bills are the antithesis of conservative principles: They punish success, presume that the federal government can centrally plan the economy, would force companies to divest businesses, cede private business decision-making authority to the federal government, and hurt consumers, innovation, and economic growth. These bills embrace European Union (EU) antitrust policy while rejecting modern American antitrust and one of the biggest conservative achievements over the past half-century: the consumer welfare standard that focuses solely on economic factors and consumers. American antitrust law *should be* applied to the technology sector, just as it is applied to other industries. This would address genuine anticompetitive concerns instead of meddling with antitrust law by promoting leftist and EU-centric policies that would hurt the economy and competition itself.

The left appears to think that conservatives will fall for their Trojan Horse, which is a trap to take advantage of justified conservative anger toward Big Tech by obfuscating what they are doing: weaponizing antitrust and turning antitrust into a tool that can be used to

reshape industries and the economy. They are already seeking to radically change the nature of businesses and capitalism; weaponized antitrust would be their most powerful tool yet in their campaign to change the American economy and restrict economic freedom. These proposed bills are an attempt to codify some of these radical proposals.

Solutions to Big Tech's viewpoint suppression and censorship are multifaceted. They include focused reforming of Section 230, promoting the principles of federalism through constitutional state legislative action, and amplifying free-market alternatives by entrepreneurs and technologists, as well as vivifying civil society efforts to promote transparency within these companies. Conservatives should focus on solutions to the actual problems, not embrace dangerous policies that could take this country down a path on which there might not be any turning back.

The following are just a few issues to consider regarding the House bills:

H.R. 3825, THE ENDING PLATFORM MONOPOLIES ACT, WOULD:

- Force companies to get rid of certain businesses they own.
- Make it easier for Big Tech firms to avoid competition by not having to compete against other technology firms that would be able to compete with them.
- Hurt consumers by not allowing services to be packaged together in a "one-stop-shop" manner, thereby driving up costs and

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making it more difficult for consumers to secure the desired services.

H.R. 3816, THE AMERICAN INNOVATION AND CHOICE ONLINE ACT, WOULD:

- Grant the federal government the power to prohibit ordinary and well-established business practices.
- Pick winners and losers by prohibiting the same ordinary business practice by one type of firm but not another type of firm.
- Affect consumers by placing limitations on the use of customer data for a company's own products, thereby hindering companies from offering their own products to consumers even if such products are lower-priced or higher-quality.

H.R. 3826, THE PLATFORM COMPETITION AND OPPORTUNITY ACT, WOULD:

- Allow the federal government to effectively ban, except in narrow circumstances, some businesses from being able to enter into voluntary economic transactions with firms that want to merge or be acquired.
- Force private actors to prove a negative if they want to engage in free and voluntary economic transactions.
- Deprive businesses for a 10-year period of the ability to go to an Article III court to prove that market conditions have changed.
- Hurt entrepreneurs, small businesses, and innovation by making it extremely difficult for smaller firms to be acquired by big firms. In 2019, half of U.S. start-ups across the economy said that their most realistic long-term goal is to be acquired. Making their desired exit strategy far less likely would discourage entrepreneurs from starting businesses in the first place.

- Hurt consumers by restricting mergers and acquisitions that often create efficiencies in the market by lowering prices and improving goods and services, among other benefits.
- Incorrectly assume that size is a proxy for competition and preemptively decide that it is automatically anticompetitive for certain big companies to merge or acquire a firm. This is not unlike the way the EU's competition law works. Such blanket rules are themselves anticompetitive by blocking many transactions that will further competition. American antitrust law recognizes the complex fact-specific nature of cases and is both flexible and adaptable to address anti-competitive transactions.

H.R. 3849, THE AUGMENTING COMPATIBILITY AND COMPETITION BY ENABLING SERVICE SWITCHING (ACCESS) ACT, WOULD:

- Incorrectly assume that data collection is a significant barrier to entry. Success does not come from merely collecting data, but from making effective use of those data. Dominant platforms are not able to stop new entrants from gathering significant amounts of data, including the same data the platforms themselves possess. Data, like a public good, are non-rivalrous (the supply does not decrease as consumption increases) and non-excludable (they are available to all). Big Data collection is not limited to the technology sector and covers offline businesses, such as manufacturing (the largest consumer of data), financial institutions, and insurance companies. Actual experience shows numerous examples of this alleged data advantage being overcome.
- Pick winners and losers when it comes to data collection, inappropriately punishing some firms in the technology sector even as firms in other industries are engaged in similar practices.

- Put the federal government in charge of dictating technical standards affecting the technology sector.
- Require firms literally to petition the government to make changes that *might* affect its interoperability interface.
- Increase risks for data breaches and leaks that would jeopardize security and reduce user experience. This could come in the form of leaked photos or private messages.
- Reduce competition by favoring the methods already used by incumbent tech companies today. If the government sets the standards for how data should be communicated between companies, it will likely be based on how it is done today, which would prevent a new business that is entering the market from operating and moving data in new and better ways.
- Ignore federal spending concerns by increasing the Federal Trade Commission (FTC) budget by 19 percent over current levels and the Department of Justice Antitrust Division budget by 36 percent over current levels. These whopping spending increases are even greater than what has been requested by the Biden Administration.
- Help fund the left's weaponized antitrust efforts, especially if any of the House weaponized antitrust bills pass. Regardless of the other bills, the Biden Administration Justice Department and the FTC will likely push toward weaponizing antitrust to the extent they can regardless of legislative changes.
- Not guarantee how expansion of resources could be used to target areas other than Big Tech through regulation in the long term.

H.R. 3843, THE MERGER FILING FEE MODERNIZATION ACT, WOULD:

- Significantly increase fees for all types of businesses across the economy that simply want to engage in voluntary commercial transactions. (This is not limited to the technology sector.) Such a move to increase costs on firms now is especially troubling when Congress should be doing what it can to *reduce* costs, not increase them, as the United States and its economy try to recover after the pandemic.
- Inappropriately delegate congressional power to agencies once again by significantly increasing fees that exist outside of the appropriations process.
- Reduce agency accountability to Congress and the American people because of the increased fees, enabling agencies to be more independent.

H.R. 3460, THE STATE ANTITRUST ENFORCEMENT VENUE ACT, WOULD:

- Be a remedy in search of a problem. States have not brought an antitrust lawsuit in decades that has advanced antitrust law.

Bottom Line: These bills weaponize antitrust and give the left their most powerful tool with which to control and shape the makeup of the economy while not addressing conservative concerns of bias and censorship. The focus should be how the current antitrust laws can address possible anticompetitive behavior and enforce existing law. These proposed bills would significantly undermine modern American antitrust law, one of the leading conservative achievements over the past half-century.