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S. 673

To provide a temporary safe harbor for publishers of online content to collectively negotiate with dominant online platforms regarding the terms on which content may be distributed.

IN THE SENATE OF THE UNITED STATES

MARCH 10, 2021

Ms. KLOBUCHAR (for herself, Mr. KENNEDY, Mr. BOOKER, Mr. WHITEHOUSE, Ms. LUMMIS, Mrs. FEINSTEIN, Ms. COLLINS, Mr. GRAHAM, Ms. HIRONO, Mr. CASSIDY, Mr. BLUMENTHAL, Mr. THUNE, Mr. DURBIN, and Mr. MANCHIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

NOVEMBER 28, 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 a temporary safe harbor for publishers of online content to collectively negotiate with dominant online platforms regarding the terms on which content may be distributed.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~**SECTION 1. SHORT TITLE.**~~

~~This Act may be cited as the "Journalism Competition and Preservation Act of 2021".~~

~~**SEC. 2. SAFE HARBOR FOR CERTAIN COLLECTIVE NEGOTIATIONS.**~~

~~(a) DEFINITIONS.—In this section:~~

~~(1) ANTITRUST LAWS.—The term "antitrust laws"—~~

~~(A) has the meaning given the term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12); and~~

~~(B) includes—~~

~~(i) section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that section applies to unfair methods of competition; and~~

~~(ii) any State law (including regulations) that prohibits or penalizes the conduct described in, or is otherwise inconsistent with, subsection (b).~~

~~(2) NEWS CONTENT CREATOR.—The term "news content creator" means—~~

~~(A) any print, broadcast, or digital news organization that—~~

~~(i) has a dedicated professional editorial staff that creates and distributes~~

~~original news and related content concerning local, national, or international matters of public interest on at least a weekly basis; and~~

~~(ii) is marketed through subscriptions, advertising, or sponsorship; and~~

~~(B)(i) provides original news and related content with the editorial content consisting of not less than 25 percent current news and related content; or~~

~~(ii) broadcasts original news and related content pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 et seq.).~~

~~(3) ONLINE CONTENT DISTRIBUTOR.—The term "online content distributor" means any entity that—~~

~~(A) operates a website or other online service that displays, distributes, or directs users to news articles, works of journalism, or other content on the internet that is generated by third-party news content creators; and~~

~~(B) has not fewer than 1,000,000,000 monthly active users, in the aggregate, of all of its websites or online services worldwide.~~

~~(b) LIMITATION OF LIABILITY.—A news content creator may not be held liable under the antitrust laws for engaging in negotiations with any other news content creator during the 4-year period beginning on the date of enactment of this Act to collectively withhold content from, or negotiate with, an online content distributor regarding the terms on which the news content of the news content creator may be distributed by the online content distributor, if—~~

~~(1) the negotiations with the online content distributor—~~

~~(A) are not limited to price;~~

~~(B) are nondiscriminatory as to similarly situated news content creators;~~

~~(C) directly relate to the quality, accuracy, attribution or branding, and interoperability of news; and~~

~~(D) pertain to terms that would be available to all news content creators;~~

~~(2) the coordination between the news content creators is directly related to and reasonably necessary for negotiations with an online content dis-~~

~~tributor that are otherwise consistent with this Act; and~~

~~(3) the negotiations do not involve any person that is not a news content creator or an online content distributor.~~

~~(c) RULE OF CONSTRUCTION.—Except as provided in this Act, this Act shall not be construed to modify, impair, or supersede the operation of the antitrust laws.~~

SECTION 1. SHORT TITLE.

This Act may be cited as the "Journalism Competition and Preservation Act of 2022".

SEC. 2. DEFINITIONS.

In this Act:

(1) ACCESS.—The term "access" means acquiring, crawling, or indexing content.

(2) ANTITRUST LAWS.—The term "antitrust laws"—

(A) has the meaning given the term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12); and

(B) includes—

(i) section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that section applies to unfair methods of competition; and

(ii) any State law (including regulations) that prohibits or penalizes the conduct described in, or is otherwise inconsistent with, sections 3 or 4.

(3) COVERED PLATFORM.—The term "covered platform" means an online platform that at any point during the 12 months preceding the formation of a joint negotiation entity under section 3(a)(1)—

(A) has at least 50,000,000 United States-based monthly active users or subscribers on the online platform;

(B) is owned or controlled by a person with—

(i) United States net annual sales or a market capitalization greater than $550,000,000,000, adjusted for inflation on the basis of the Consumer Price Index; or

(ii) not fewer than 1,000,000,000 worldwide monthly active users on the online platform; and

(C) is not an organization described in section 501(c)(3) of the Internal Revenue Code of 1986.

(4) ELIGIBLE BROADCASTER.—The term "eligible broadcaster" means a person that—

(A) holds or operates under a license issued by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 et seq.);

(B) engages professionals to create, edit, produce, and distribute original content concerning local, regional, national, or international matters of public interest through activities including conducting interviews, observing current events, analyzing documents and other information, and fact checking through multiple firsthand or secondhand news sources;

(C) updates its content on at least a weekly basis;

(D) uses an editorial process for error correction and clarification, including a transparent process for reporting errors or complaints to the station; and

(E) is not a television network.

(5) ELIGIBLE DIGITAL JOURNALISM PROVIDER.—The term "eligible digital journalism provider" means any eligible publisher or eligible broadcaster that discloses its ownership to the public.

(6) ELIGIBLE PUBLISHER.—The term "eligible publisher" means any person that publishes 1 or more qualifying publications.

(7) NETWORK STATION.—The term "network station" means a television broadcast station, including any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, 1 or more television networks.

(8) ONLINE PLATFORM.—The term "online platform" means a website, online or mobile application, operating system, digital assistant, or online service that accesses news articles, works of journalism, or other content, or portions thereof, generated, created, produced, or owned by eligible digital journalism providers, and aggregates, displays, provides, distributes, or directs users to such content.

(9) PERSON.—The term "person" includes an individual or entity existing under or authorized by the laws of the United States, the laws of any of territory of the United States, the laws of any State, the laws of the District of Columbia, or the laws of any foreign country.

(10) PRICING, TERMS, AND CONDITIONS.—The term "pricing, terms, and conditions" does not include any term or condition which relates to the use, display, promotion, ranking, distribution, curation, suppression, throttling, filtering, or labeling of the content or viewpoint of any person.

(11) QUALIFYING PUBLICATION.—The term "qualifying publication" means any website, mobile application, or other digital service that—

(A) does not primarily display, provide, distribute, or offer content generated, created, produced, or owned by an eligible broadcaster or television network; and

(B)(i) provides information to an audience primarily in the United States;

(ii) performs a public-information function comparable to that traditionally served by newspapers and other periodical news publications;

(iii) engages professionals to create, edit, produce, and distribute original content concerning local, regional, national, or international matters of public interest through activities, including conducting interviews, observing current events, or analyzing documents and

other information, and fact checking through multiple firsthand or secondhand news sources;

(iv) updates its content on at least a weekly basis;

(v) has an editorial process for error correction and clarification, including a transparent process for reporting errors or complaints to the publication;

(vi)(I) generated at least $100,000 in annual revenue from its editorial content in the previous calendar year;

(II) has an International Standard Serial Number assigned to an affiliated periodical before the date of enactment of this Act; or

(III) is owned or controlled by an exempt organization described in section 501(c)(3) of the Internal Revenue Code of 1986;

(vii) has not less than 25 percent of its editorial content consisting of information about topics of current local, national, or international public interest;

(viii) employed not more than 1,500 exclusive full-time employees during the 12-month period prior to the date of enactment of this Act; and

(ix) is not controlled or wholly or partially owned by an entity that is—

(I) a foreign power or an agent of a foreign power, as those terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(II)(aa) designated as a foreign terrorist organization pursuant to section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

(bb) a terrorist organization, as defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)(II));

(cc) designated as a specially designated global terrorist organization under Executive Order 13224 (50 U.S.C. 1701 note; relating to blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism); or

(dd) an affiliate of an entity described in item (aa), (bb), or (cc); or

(III) an entity that has been convicted of violating, or attempting to violate, sec-

tion 2331, 2332b, or 2339A of title 18, United States Code.

(12) TELEVISION NETWORK.—The term "television network"—

(A) means any person that, on February 8, 1996, offered an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States; and

(B) does not include any network station that is owned or operated by, or affiliated with a person described in subparagraph (A).

SEC. 3. FRAMEWORK FOR CERTAIN JOINT NEGOTIATIONS.

(a) NOTICE.—

(1) PROCESS TO FORM A JOINT NEGOTIATION ENTITY.—

(A) IN GENERAL.—An eligible digital journalism provider shall provide public notice to announce the opportunity for other eligible digital journalism providers to join a joint negotiation entity for the purpose of engaging in joint negotiations with a covered platform under this section, regarding the pricing, terms, and conditions by which the covered platform may access the content of the eligible digital journalism pro-

viders that are members of the joint negotiation entity.

(B) APPLICATION.—During the 60-day period beginning on the date public notice is made under subparagraph (A), any eligible digital journalism provider may apply to join the joint negotiation entity.

(C) FORMATION.—A joint negotiation entity is established upon the agreement of 2 or more eligible digital journalism providers, and may create admission criteria for membership unrelated to the size of an eligible digital journalism provider or the views expressed by its content, including criteria to limit membership to only eligible publishers or only eligible broadcasters.

(D) GOVERNANCE.—By a majority vote of its members, a joint negotiation entity formed under this section shall establish rules and procedures to govern decision making by the entity and each eligible digital journalism provider shall be entitled to 1 vote on any matter submitted to a vote of the members.

(E) ADDITIONAL MEMBERS.—After the expiration of the 60-day period described in subparagraph (B), an eligible digital journalism pro-

vider may apply to join the joint negotiation entity, and may be admitted to the joint negotiation entity upon a majority vote of its members, if the applicant otherwise satisfies any criteria for admission established by the joint negotiation entity.

(F) DESIGNATION.—A joint negotiation entity may designate agents on a nonexclusive basis—

(i) to engage in negotiations with a covered platform conducted under this section; and

(ii) to agree to pay or receive payments under or related to an agreement negotiated under this section or an arbitration decision issued under section 4.

(G) OPT-OUT.—

(i) IN GENERAL.—After becoming a member of the joint negotiation entity, an eligible digital journalism provider may opt out of the joint negotiation entity at any time before notice is sent to the covered platform under paragraph (2).

(ii) PROHIBITION ON REJOINING.—If an eligible digital journalism provider opts

out of a joint negotiation entity under clause (i), the eligible digital journalism provider may not—

(I) rejoin the joint negotiation entity; or

(II) receive any payment under or related to an agreement negotiated by the joint negotiation entity under this section or an arbitration decision issued under section 4.

(H) TERMINATION.—A joint negotiation entity will terminate and cease to exist—

(i) when the entity no longer has at least 2 members;

(ii) upon a majority vote of its members; or

(iii) upon the expiration or termination of an agreement negotiated under this section or an arbitration decision issued under section 4.

(2) NOTICE TO A COVERED PLATFORM TO INITIATE A JOINT NEGOTIATION.—

(A) IN GENERAL.—A joint negotiation under this section shall commence after a covered

platform receives a notice, sent by or on behalf of a joint negotiation entity.

(B) CONTENTS OF NOTICE.—The notice described in subparagraph (A) shall—

(i) state that the joint negotiation entity is initiating a negotiation under this section to reach an agreement regarding the pricing, terms, and conditions by which the covered platform may access the content of the eligible digital journalism providers that are members of the joint negotiation entity;

(ii) identify the eligible digital journalism providers that are members of the joint negotiation entity; and

(iii) provide the physical mail address (street address or post office box), telephone number, and email address of a representative authorized to receive a response to the notice on behalf of the joint negotiation entity.

(C) REPLY.—Not later than 30 days after receiving a notice described in subparagraph (A), the covered platform shall send a reply notice to the authorized representative identified by

or on behalf of the joint negotiation entity to acknowledge receipt of the notice.

(D) NOTICE TO FEDERAL ENFORCERS.—Copies of any notice described in subparagraph (A) shall be filed by or on behalf of the eligible digital journalism providers that are members of the joint negotiation entity with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice not later than 30 days after the notice is sent to the covered platform.

(b) CONDUCT OF THE JOINT NEGOTIATIONS.—After the date a reply notice is sent under subsection (a)(2)(C), the following shall apply:

(1) Any negotiation conducted under this section shall be conducted in good faith and solely to reach an agreement regarding the pricing, terms, and conditions under which the covered platform may access the content of the eligible digital journalism providers.

(2) No pre-agreement discussions or agreement reached regarding pricing, terms, and conditions under this section may address whether or how the covered platform or any such eligible digital journalism provider—

(A) displays, ranks, distributes, suppresses, promotes, throttles, labels, filters, or curates the content of the eligible digital journalism providers; or

(B) displays, ranks, distributes, suppresses, promotes, throttles, labels, filters, or curates the content of any other person.

(3) A party is not conducting negotiations in good faith in accordance with paragraph (1) if the party—

(A) refuses to negotiate, except where eligible digital journalism providers decide to jointly deny a covered platform access to content licensed or produced by such eligible digital journalism providers under subsection (c);

(B) refuses to designate a representative with authority to make binding representations;

(C) refuses to meet and negotiate at reasonable times and locations or otherwise causes unreasonable delay;

(D) refuses to put forth more than a single, unilateral proposal;

(E) fails to respond to a proposal of the other party, including the reasons for rejection;

(F) enters into a separate third-party agreement that unreasonably impedes the party from reaching an agreement with the negotiating party; or

(G) refuses to execute a full and written agreement that has been reached verbally.

(4) A covered platform is not conducting negotiations in good faith in accordance with paragraph (1) if the covered platform enters into a separate agreement with an eligible digital journalism provider that impedes the eligible digital journalism provider from participating in a negotiation under this section.

(5) During any negotiation conducted under this section, the joint negotiation entity and the covered platform shall each make a reasonable offer regarding the pricing, terms, and conditions by which the covered platform may access the content of the eligible digital journalism providers that are members of the joint negotiation entity, substantiated with comprehensive data and methodologies, including expert analysis, that reflects—

(A) the pricing, terms, and conditions comparable to those found in commercial agreements between similarly situated entities, including

price, duration, territory, value of data generated directly or indirectly by the content;

(B) the fair market value to the covered platform of having access to the content of the eligible digital journalism providers that are members of the joint negotiation entity and the resulting incremental contribution to the revenue of the covered platform, including direct and indirect advertising or promotional revenues, which shall not be offset by any value conferred upon the eligible digital journalism providers that are members of the joint negotiation entity by the covered platform for aggregating or distributing their content; and

(C) the investment of the eligible digital journalism providers that are members of the joint negotiation entity in producing original news and related content, including the number of journalists employed by each.

(c) JOINT WITHHOLDING OF CONTENT.—At any point after a notice is sent to the covered platform to initiate joint negotiations under subsection (a)(2), the eligible digital journalism providers that are members of the joint negotiation entity may jointly deny the covered platform access

to content licensed or produced by such eligible digital journalism providers.

SEC. 4. ARBITRATION FOR ELIGIBLE PUBLISHERS.

(a) RIGHT TO FINAL OFFER ARBITRATION.—

(1) IN GENERAL.—If the membership of a joint negotiation entity consists only of eligible publishers, on or after the date that is 180 days after the date negotiations under section 3 begin, the joint negotiation entity may initiate a final offer arbitration against the covered platform for an arbitration panel to determine the pricing, terms, and conditions by which the content displayed, provided, distributed, or offered by a qualifying publication of any eligible publisher that is a member of the joint negotiation entity will be accessed by the covered platform if the parties are unable to reach an agreement and regardless of whether the joint negotiation entity, its members, or the covered platform complied with the requirements of section 3(b).

(2) EFFECT OF ADDITIONAL MEMBERS.—If an additional member joins the joint negotiation entity under section 3(a)(1)(E) more than 90 days after the date negotiations under section 3 begin, the joint negotiation entity may not initiate a final offer arbitration under paragraph (1) until 180 days after the

date the last member joins the joint negotiation entity. No additional members may join the joint negotiation entity after the arbitration has commenced.

(b) NOTICE.—The joint negotiation entity shall provide notice of its intention to initiate final offer arbitration under this section to all of the members of the joint negotiation entity no less than 10 days prior to initiating such final offer arbitration.

(c) MEMBERSHIP.—If a joint negotiation entity initiates final offer arbitration under this section, any individual eligible publisher that is a member of the joint negotiation entity shall remain a member of the joint negotiation entity until the completion of the arbitration, unless the eligible publisher provides written notice to the joint negotiation entity of its intention to withdraw from the joint negotiation entity within 7 days of receiving notice under subsection (b).

(d) PROCEEDINGS.—

(1) RULES OF ARBITRATION.—The arbitration shall be decided by a panel of 3 arbitrators under the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures and the American Arbitration Association-International Centre for Dispute Resolution Final Offer Arbitration

Supplementary Rules, except to the extent they conflict with this subsection.

(2) INITIATION OF ARBITRATION.—A final offer arbitration under subsection (a) shall be initiated as provided in Rule R-4 of the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures, except that the joint negotiation entity initiating the arbitration shall refer to this Act in its demand for arbitration, rather than submitting contractual arbitration provisions.

(3) COMMENCEMENT AND FUNDING.—

(A) COMMENCEMENT.—A final offer arbitration proceeding shall commence 10 days after the date a final offer arbitration is initiated under subsection (a).

(B) FUNDING.—The cost of administering the arbitration proceeding, including arbitrator compensation, expenses, and administrative fees, shall be shared equally between the covered platform and the joint negotiation entity.

(4) APPOINTMENT OF THE ARBITRATION PANEL.—The arbitrators shall be appointed in accordance with the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures.

(5) OTHER REQUIREMENTS.—During a final offer arbitration proceeding under this section—

(A) the joint negotiation entity and the covered platform may demand the production of documents and information that are nonprivileged, reasonably necessary, and reasonably accessible without undue expense;

(B) documents and information described in subparagraph (A) shall be exchanged not later than 30 days after the date the demand is filed;

(C) rules regarding the admissibility of evidence applicable in Federal court shall apply;

(D) the joint negotiation entity and covered platform shall each submit a final offer proposal for the pricing, terms, and conditions under which the content displayed, provided, distributed, or offered by a qualifying publication of any eligible publisher that is a member of the joint negotiation entity will be accessed by the covered platform, and which shall include the remuneration that the eligible publishers should receive from the covered platform for programmatic access to the content of the eligible publishers that are members of the joint negotiation entity during the period under negotiation

based on the fair market value of such access, which shall include backup materials sufficient to permit the other party to replicate the proffered valuation;

(E) no discussion or final offer under this section may address whether or how the covered platform or any such eligible digital journalism provider—

(i) displays, ranks, distributes, suppresses, promotes, throttles, labels, filters, or curates the content of the eligible digital journalism providers; or

(ii) displays, ranks distributes, suppresses, promotes, throttles, labels, filters or curates the content of any other person; and

(F) if applicable, each eligible publisher that is a member of the joint negotiation entity shall provide information and data to guide the distribution of remuneration among the members of the joint negotiation entity, including—

(i) any compensation received by the eligible publisher through commercial agreement prior to commencement of negotiations under section 3 for access to content by the covered platform during any part of

the period under negotiation, which shall be deducted from its allocation accordingly; and

(ii) spending by the eligible publisher on news journalists, which are employed for an average of not fewer than 20 hours per week during the calendar quarter by the eligible digital journalism provider and are responsible for gathering, preparing, directing the recording of, producing, collecting, photographing, recording, writing, editing, reporting, presenting, or publishing original news or information that concerns local, regional, national, or international matters of public interest in the previous fiscal year, as a proportion of its overall budget of the eligible digital journalism provider for that period, which shall be used to guide 65 percent of the distribution of remuneration among the members of the joint negotiation entity.

(e) AWARD.—

(1) IN GENERAL.—Not later than 60 days after the date proceedings commence under subsection (d)(3)(A), the arbitration panel shall issue an award

that selects a final offer from 1 of the parties without modification.

(2) REQUIREMENTS.—In issuing an award under paragraph (1), the arbitration panel—

(A) may not consider any value conferred upon any eligible publisher by the covered platform for distributing or aggregating its content as an offset to the value created by such eligible publisher;

(B) shall consider past incremental revenue contributions as a guide to the future incremental revenue contribution by any eligible publisher;

(C) shall consider the pricing, terms, and conditions of any available, comparable commercial agreements between parties granting access to digital content, including pricing, terms, and conditions relating to price, duration, territory, the value of data generated directly or indirectly by the content accounting for any material disparities in negotiating power between the parties to such commercial agreements; and

(D) shall issue a binding, reasoned award, including the factual and economic bases of its award, that applies for the number of years set

forth in the winning proposal, but not fewer than 5 years.

(f) PAYMENTS PURSUANT TO AWARD.—

(1) IN GENERAL.—Not later than 90 days after the date an award is issued under subsection (e), the covered platform shall begin paying any eligible publisher that was a member of the joint negotiation entity participating in the arbitration according to the terms in the final offer selected by the arbitration panel.

(2) DISBURSEMENT.—Payments made under paragraph (1) shall be dispersed by a claims administrator to the individual claimants that comprise the joint negotiation entity not later than 60 days after the date the funds were received from the covered platform.

(g) ENFORCEMENT AND JUDICIAL REVIEW.—

(1) IN GENERAL.—An award made under subsection (e) shall be enforceable by the eligible publishers or the covered platform subject to the award through a civil action brought before a district court of the United States.

(2) EXPEDITED JUDICIAL PROCESS.—In any civil action to enforce or seek judicial review of an award made under subsection (e), the court shall

adopt a rebuttable presumption that good cause exists to prioritize the action under section 1657 of title 28, United States Code.

SEC. 5. LIMITATION OF LIABILITY.

(a) IN GENERAL.—In accordance with sections 3 and 4, it shall not be in violation of the antitrust laws for any eligible digital journalism providers that are members of a joint negotiation entity to—

(1) jointly deny a covered platform access to content for which the eligible digital journalism providers, individually or jointly, have the right to negotiate or arbitrate access with respect to the covered platform; or

(2) participate in joint negotiations and arbitration, as members of the joint negotiation entity, with such covered platform solely regarding the pricing, terms, and conditions under which the covered platform may access the content for which the eligible digital journalism providers, individually or jointly, have the right to negotiate or arbitrate access with respect to the covered platform.

(b) SAFE HARBOR.—

(1) ELIGIBLE DIGITAL JOURNALISM PROVIDERS.—An eligible digital journalism provider shall not be in violation of the antitrust laws if the

eligible digital journalism provider participates, as a member of a joint negotiation entity, in negotiations under section 3 or arbitration under section 4—

(A) with a person that is not an eligible digital journalism provider, if the eligible digital journalism provider reasonably believes that the person is another eligible digital journalism provider; or

(B) with a person that is not a covered platform, if the eligible digital journalism provider reasonably believes that the person is a covered platform.

(2) JOINT NEGOTIATION ENTITIES.—A joint negotiation entity shall not be in violation of the antitrust laws if the joint negotiation entity engages in negotiations under section 3 or arbitration under section 4—

(A) with or on behalf of a person that is not an eligible digital journalism provider, if the joint negotiation entity reasonably believes that the person is an eligible digital journalism provider; or

(B) with a person that is not a covered platform, if the joint negotiation entity reason-

ably believes that the person is a covered platform.

(c) NOTIFICATION OF AGREEMENTS AND ARBITRATION DECISIONS.—

(1) AGREEMENTS.—The parties to any written agreement, resulting from a negotiation under section 3 or implementing an arbitration decision issued under section 4, shall file a copy of such agreement with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice not later than 60 days after such agreement is executed.

(2) ARBITRATION DECISIONS.—The parties to any arbitration decision issued under section 4, shall file a copy of such decision with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice not later than 60 days after such decision is issued.

(3) PUBLIC DISCLOSURE.—The Federal Trade Commission shall make the documents submitted under this subsection available to the public on the Federal Trade Commission's website.

(d) LIMITATION REGARDING THE SCOPE OF LIMITATION OF LIABILITY.—No antitrust immunity shall apply

to any negotiations, discussions, agreements, or arbitrations relating to the use, display, promotion, ranking, distribution, curation, suppression, throttling, filtering, or labeling of the content of the eligible digital journalism provider or of any other person. The limitation of liability under this section shall apply only to negotiations, discussions, agreements, or arbitrations regarding the pricing, terms, and conditions under which the covered platform may access the content of the eligible digital journalism provider, not to any discussions or agreements that differentiate content based on the viewpoint expressed by such content.

SEC. 6. NONDISCRIMINATION, RETALIATION, AND TRANSPARENCY.

(a) NONDISCRIMINATION.—

(1) JOINT NEGOTIATION ENTITIES.—A joint negotiation entity may not discriminate against any eligible digital journalism provider based on the size of the eligible digital journalism provider or the views expressed by the eligible digital journalism provider's content.

(2) COVERED PLATFORMS.—No covered platform may discriminate against any eligible digital journalism provider that is a member of a joint negotiation entity in connection with a negotiation conducted under section 3, or an arbitration conducted

under section 4, based on the size of the eligible digital journalism provider or the views expressed by the eligible digital journalism provider's content.

(b) PROHIBITION ON RETALIATION BY COVERED PLATFORMS.—

(1) IN GENERAL.—No covered platform may retaliate against an eligible digital journalism provider for participating in a negotiation conducted under section 3, or an arbitration conducted under section 4, including by refusing to index content or changing the ranking, identification, modification, branding, or placement of the content of the eligible digital journalism provider on the covered platform.

(2) EFFECT OF CONTRACT PROVISIONS.—Any provision in an agreement that restricts an eligible digital journalism provider from receiving compensation through a negotiation conducted under section 3 or an arbitration conducted under section 4 shall be void.

(c) INVESTING IN JOURNALISM.—

(1) IN GENERAL.—Without disclosing confidential information regarding the pricing, terms, and conditions of an agreement reached under section 3, an agreement implementing an arbitration decision issued under section 4, or an arbitration decision

issued under section 4, or confidential financial information, any eligible digital journalism provider that receives funds under or related to such agreement or arbitration decision shall provide to the Federal Trade Commission, on an annual basis, information regarding the use of any such funds during the prior year to support ongoing and future operations to maintain or enhance the production and distribution of news or information that concerns local, regional, national, or international matters of public interest, including—

(A) the amount of funds received under or related to each such agreement or decision; and

(B) a good-faith estimate of the amount of funds that went to news journalists employed for an average of not fewer than 20 hours per week during the calendar year by the eligible digital journalism provider.

(2) PUBLIC DISCLOSURE.—The Federal Trade Commission shall make the disclosures submitted under paragraph (1) available to the public on the Federal Trade Commission's website.

SEC. 7. PRIVATE RIGHTS OF ACTION.

(a) NEGOTIATIONS.—

(1) IN GENERAL.—Any eligible digital journalism provider, either jointly with other eligible digital journalism providers or through an authorized representative, or covered platform that participated in negotiations under section 3 may bring a civil action in an appropriate district court of the United States alleging a violation of section 3(b).

(2) DAMAGES.—A court shall award damages to a prevailing plaintiff under this subsection—

(A) approximating the value of the last reasonable offer of the plaintiff if the defendant did not conduct negotiations in good faith in violation of section 3(b)(1);

(B) approximating the value of the last reasonable offer of the plaintiff if the defendant—

(i) did not conduct negotiations in good faith in violation of section 3(b)(1); and

(ii) had not yet extended a reasonable offer; or

(C) approximating the value of the plaintiff's last reasonable offer if the defendant did not make a reasonable offer in violation of section 3(b)(5).

(3) ATTORNEYS FEES.—A court shall award attorney's fees to the prevailing party under this subsection.

(b) DISCRIMINATION.—

(1) JOINT NEGOTIATION ENTITIES.—

(A) IN GENERAL.—An eligible digital journalism provider that is denied membership in a joint negotiation entity in violation of section 6(a)(1) may bring a civil action in an appropriate district court of the United States against the joint negotiation entity and its members not later than 30 days after the date membership is denied.

(B) REMEDIES.—

(i) BEFORE AGREEMENT OR ARBITRATION DECISION.—

(I) IN GENERAL.—An eligible digital journalism provider that prevails in an action under subparagraph (A) before the date an agreement is executed under section 3 or an arbitration decision is issued under section 4, as applicable, regarding the pricing, terms, and conditions by which the covered platform may access the con-

tent of the eligible digital journalism providers that are members of the joint negotiation entity, may join the joint negotiation entity and participate in the negotiation under section 3 or the arbitration under section 4, as applicable.

(II) NOTICE.—A notice, by or on behalf of the joint negotiation entity, shall be sent to the covered platform to identify the eligible digital journalism provider that joins the negotiation or arbitration under subclause (I).

(ii) AFTER AGREEMENT OR ARBITRATION DECISION.—

(I) IN GENERAL.—An eligible digital journalism provider that prevails in an action under subparagraph (A) after the date an agreement is executed under section 3 or an arbitration decision is issued under section 4, as applicable, regarding the pricing, terms, and conditions by which the covered platform may access the content of the eligible digital journalism providers

that are members of the joint negotiation entity, may join the joint negotiation entity and be eligible for the same pricing, terms, and conditions by which the covered platform may access the content of the other eligible digital journalism providers that are members of the joint negotiation entity.

(II) NOTICE.—A notice, by or on behalf of the joint negotiation entity, shall be sent to the covered platform to identify the eligible digital journalism provider that joins the joint negotiation entity under subclause (I) and that is eligible to receive the same pricing, terms, and conditions under the agreement negotiated under section 3 or the arbitration decision issued under section 4, as applicable, by which the covered platform may access the content of the other eligible digital journalism providers that are members of the joint negotiation entity.

(2) COVERED PLATFORMS.—

(A) IN GENERAL.—An eligible digital journalism provider that is discriminated against in violation of section 6(a)(2) may bring a civil action in an appropriate district court of the United States against the covered platform.

(B) REMEDIES.—An eligible digital journalism provider that prevails under subparagraph (A) shall be entitled to—

(i) recover the actual damages sustained by the eligible digital journalism provider as a result of the discrimination;

(ii) injunctive relief on such terms as the court may deem reasonable to prevent or restrain the covered platform from discriminating against the eligible digital journalism provider; and

(iii) the costs of the suit, including reasonable attorneys' fees.

(c) RETALIATION.—

(1) IN GENERAL.—An eligible digital journalism provider that is retaliated against in violation of section 6(b)(1) may bring a civil action in an appropriate district court of the United States against the covered platform.

(2) REMEDIES.—An eligible digital journalism provider that prevails in an action under paragraph (1) shall be entitled to—

(A) recover the actual damages sustained by the eligible digital journalism provider as a result of the retaliation;

(B) injunctive relief on such terms as the court may deem reasonable to prevent or restrain the covered platform from retaliating against the eligible digital journalism provider; and

(C) the costs of the suit, including reasonable attorneys' fees.

SEC. 8. REPORT.

(a) STUDY.—The Comptroller General shall study the impact of the joint negotiations authorized under this Act, including a summary of the deals negotiated, the impact of such deals on local and regional news, the effect on the free, open, and interoperable Internet including the ability of the public to share and access information, and the effect this Act has had on employment for journalists.

(b) REPORT.—Not later than 5 years after the date of enactment of this Act, the Comptroller General shall submit to Congress a report on the study required under subsection (a).

SEC. 9. SUNSET.

(a) IN GENERAL.—Except as provided in subsections (b) and (c), this Act shall cease to have effect on the date that is 6 years after the date of its enactment.

(b) EXCEPTION IN CASE OF INITIATED BUT INCOMPLETE JOINT NEGOTIATION OR ARBITRATION.—With respect to eligible digital journalism providers that have initiated but not concluded a negotiation under section 3 or an arbitration under section 4 on or before the sunset date described in subsection (a), this Act shall cease to be effective on the date such negotiation or arbitration concludes or 180 days after the date described in subsection (a), whichever occurs first.

(c) LIMITATION OF LIABILITY EXCEPTION.—Section 5 shall remain effective without cessation for any—

(1) negotiation conducted or agreement executed under section 3;

(2) arbitration conducted or arbitration decision issued under section 4; or

(3) agreement implementing an arbitration decision issued under section 4;

during the period of effectiveness of this Act.

SEC. 10. RULE OF CONSTRUCTION.

(a) ANTITRUST LAWS.—Nothing in this Act may be construed to modify, impair, or supersede the operation of

the antitrust laws except as otherwise expressly provided in this Act.

(b) COPYRIGHT AND TRADEMARK LAW.—Nothing in this Act may be construed to modify, impair, expand, or in any way alter rights pertaining to title 17, United States Code, or the Lanham Act (15 U.S.C. 1051 et seq.)

SEC. 11. SEVERABILITY.

If any provision of this Act, or the application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, and the application of the remaining provisions of this Act to any person or circumstance shall not be affected.

Calendar No. 569

117TH CONGRESS
2D SESSION

S. 673

A BILL

To provide a temporary safe harbor for publishers of online content to collectively negotiate with dominant online platforms regarding the terms on which content may be distributed.

NOVEMBER 28, 2022

Reported with an amendment