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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.

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

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Journalism Competi-
3 tion and Preservation Act of 2021”.

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

6 (a) **DEFINITIONS.**—In this section:

7 (1) **ANTITRUST LAWS.**—The term “antitrust
8 laws”——

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

12 (B) includes——

13 (i) section 5 of the Federal Trade
14 Commission Act (~~15 U.S.C. 45~~) to the ex-
15 tent that section applies to unfair methods
16 of competition; and

17 (ii) any State law (including regula-
18 tions) that prohibits or penalizes the con-
19 duct described in, or is otherwise incon-
20 sistent with, subsection (b).

21 (2) **NEWS CONTENT CREATOR.**—The term
22 “news content creator” means——

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

25 (i) has a dedicated professional edi-
26 torial 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

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

4 ~~(b) LIMITATION OF LIABILITY.—~~A news content cre-
 5 ator may not be held liable under the antitrust laws for
 6 engaging in negotiations with any other news content cre-
 7 ator during the ~~4~~-year period beginning on the date of en-
 8 actment of this Act to collectively withhold content from,
 9 or negotiate with, an online content distributor regarding
 10 the terms on which the news content of the news content
 11 creator may be distributed by the online content dis-
 12 tributor, if—

13 ~~(1)~~ the negotiations with the online content dis-
 14 tributor—

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

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

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

21 ~~(D)~~ pertain to terms that would be avail-
 22 able to all news content creators;

23 ~~(2)~~ the coordination between the news content
 24 creators is directly related to and reasonably nec-
 25 essary for negotiations with an online content dis-

1 tributor that are otherwise consistent with this Act;
 2 and

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

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

9 **SECTION 1. SHORT TITLE.**

10 *This Act may be cited as the “Journalism Competition*
 11 *and Preservation Act of 2022”.*

12 **SEC. 2. DEFINITIONS.**

13 *In this Act:*

14 (1) *ACCESS.—The term “access” means acquir-*
 15 *ing, crawling, or indexing content.*

16 (2) *ANTITRUST LAWS.—The term “antitrust*
 17 *laws”—*

18 *(A) has the meaning given the term in sub-*
 19 *section (a) of the first section of the Clayton Act*
 20 *(15 U.S.C. 12); and*

21 *(B) includes—*

22 *(i) section 5 of the Federal Trade Com-*
 23 *mission Act (15 U.S.C. 45) to the extent*
 24 *that section applies to unfair methods of*
 25 *competition; and*

1 (ii) any State law (including regula-
 2 tions) that prohibits or penalizes the con-
 3 duct described in, or is otherwise incon-
 4 sistent with, sections 3 or 4.

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

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

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

14 (i) United States net annual sales or a
 15 market capitalization greater than
 16 \$550,000,000,000, adjusted for inflation on
 17 the basis of the Consumer Price Index; or

18 (ii) not fewer than 1,000,000,000
 19 worldwide monthly active users on the on-
 20 line platform; and

21 (C) is not an organization described in sec-
 22 tion 501(c)(3) of the Internal Revenue Code of
 23 1986.

24 (4) ELIGIBLE BROADCASTER.—The term “eligible
 25 broadcaster” means a person that—

1 (A) holds or operates under a license issued
 2 by the Federal Communications Commission
 3 under title III of the Communications Act of
 4 1934 (47 U.S.C. 301 et seq.);

5 (B) engages professionals to create, edit,
 6 produce, and distribute original content con-
 7 cerning local, regional, national, or inter-
 8 national matters of public interest through ac-
 9 tivities including conducting interviews, observ-
 10 ing current events, analyzing documents and
 11 other information, and fact checking through
 12 multiple firsthand or secondhand news sources;

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

15 (D) uses an editorial process for error cor-
 16 rection and clarification, including a trans-
 17 parent process for reporting errors or complaints
 18 to the station; and

19 (E) is not a television network.

20 (5) *ELIGIBLE DIGITAL JOURNALISM PROVIDER.*—
 21 The term “eligible digital journalism provider” means
 22 any eligible publisher or eligible broadcaster that dis-
 23 closes its ownership to the public.

1 (6) *ELIGIBLE PUBLISHER.*—The term “eligible
2 publisher” means any person that publishes 1 or more
3 qualifying publications.

4 (7) *NETWORK STATION.*—The term “network sta-
5 tion” means a television broadcast station, including
6 any translator station or terrestrial satellite station
7 that rebroadcasts all or substantially all of the pro-
8 gramming broadcast by a network station, that is
9 owned or operated by, or affiliated with, 1 or more
10 television networks.

11 (8) *ONLINE PLATFORM.*—The term “online plat-
12 form” means a website, online or mobile application,
13 operating system, digital assistant, or online service
14 that accesses news articles, works of journalism, or
15 other content, or portions thereof, generated, created,
16 produced, or owned by eligible digital journalism pro-
17 viders, and aggregates, displays, provides, distributes,
18 or directs users to such content.

19 (9) *PERSON.*—The term “person” includes an in-
20 dividual or entity existing under or authorized by the
21 laws of the United States, the laws of any of territory
22 of the United States, the laws of any State, the laws
23 of the District of Columbia, or the laws of any foreign
24 country.

1 (10) *PRICING, TERMS, AND CONDITIONS.*—The
 2 term “pricing, terms, and conditions” does not in-
 3 clude any term or condition which relates to the use,
 4 display, promotion, ranking, distribution, curation,
 5 suppression, throttling, filtering, or labeling of the
 6 content or viewpoint of any person.

7 (11) *QUALIFYING PUBLICATION.*—The term
 8 “qualifying publication” means any website, mobile
 9 application, or other digital service that—

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

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

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

19 (iii) engages professionals to create, edit,
 20 produce, and distribute original content con-
 21 cerning local, regional, national, or inter-
 22 national matters of public interest through ac-
 23 tivities, including conducting interviews, observ-
 24 ing current events, or analyzing documents and

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

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

5 *(v) has an editorial process for error correc-*
6 *tion and clarification, including a transparent*
7 *process for reporting errors or complaints to the*
8 *publication;*

9 *(vi)(I) generated at least \$100,000 in an-*
10 *ual revenue from its editorial content in the*
11 *previous calendar year;*

12 *(II) has an International Standard Serial*
13 *Number assigned to an affiliated periodical be-*
14 *fore the date of enactment of this Act; or*

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

18 *(vii) has not less than 25 percent of its edi-*
19 *torial content consisting of information about*
20 *topics of current local, national, or international*
21 *public interest;*

22 *(viii) employed not more than 1,500 exclu-*
23 *sive full-time employees during the 12-month pe-*
24 *riod prior to the date of enactment of this Act;*
25 *and*

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

3 *(I) a foreign power or an agent of a*
4 *foreign power, as those terms are defined in*
5 *section 101 of the Foreign Intelligence Sur-*
6 *veillance Act of 1978 (50 U.S.C. 1801);*

7 *(II)(aa) designated as a foreign ter-*
8 *rorist organization pursuant to section*
9 *219(a) of the Immigration and Nationality*
10 *Act (8 U.S.C. 1189(a));*

11 *(bb) a terrorist organization, as de-*
12 *fined in section 212(a)(3)(B)(vi)(II) of the*
13 *Immigration and Nationality Act (8 U.S.C.*
14 *1182(a)(3)(B)(vi)(II));*

15 *(cc) designated as a specially des-*
16 *ignated global terrorist organization under*
17 *Executive Order 13224 (50 U.S.C. 1701*
18 *note; relating to blocking property and pro-*
19 *hibiting transactions with persons who com-*
20 *mit, threaten to commit, or support ter-*
21 *rorism); or*

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

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

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

3 (12) *TELEVISION NETWORK.*—The term “tele-
4 vision network”—

5 (A) means any person that, on February 8,
6 1996, offered an interconnected program service
7 on a regular basis for 15 or more hours per week
8 to at least 25 affiliated television licensees in 10
9 or more States; and

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

13 **SEC. 3. FRAMEWORK FOR CERTAIN JOINT NEGOTIATIONS.**

14 (a) *NOTICE.*—

15 (1) *PROCESS TO FORM A JOINT NEGOTIATION EN-*
16 *TITY.*—

17 (A) *IN GENERAL.*—An eligible digital jour-
18 nalism provider shall provide public notice to
19 announce the opportunity for other eligible dig-
20 ital journalism providers to join a joint negotia-
21 tion entity for the purpose of engaging in joint
22 negotiations with a covered platform under this
23 section, regarding the pricing, terms, and condi-
24 tions by which the covered platform may access
25 the content of the eligible digital journalism pro-

1 *viders that are members of the joint negotiation*
2 *entity.*

3 (B) *APPLICATION.*—*During the 60-day pe-*
4 *riod beginning on the date public notice is made*
5 *under subparagraph (A), any eligible digital*
6 *journalism provider may apply to join the joint*
7 *negotiation entity.*

8 (C) *FORMATION.*—*A joint negotiation entity*
9 *is established upon the agreement of 2 or more*
10 *eligible digital journalism providers, and may*
11 *create admission criteria for membership unre-*
12 *lated to the size of an eligible digital journalism*
13 *provider or the views expressed by its content,*
14 *including criteria to limit membership to only*
15 *eligible publishers or only eligible broadcasters.*

16 (D) *GOVERNANCE.*—*By a majority vote of*
17 *its members, a joint negotiation entity formed*
18 *under this section shall establish rules and proce-*
19 *dures to govern decision making by the entity*
20 *and each eligible digital journalism provider*
21 *shall be entitled to 1 vote on any matter sub-*
22 *mitted to a vote of the members.*

23 (E) *ADDITIONAL MEMBERS.*—*After the expi-*
24 *ration of the 60-day period described in subpara-*
25 *graph (B), an eligible digital journalism pro-*

1 *vider may apply to join the joint negotiation en-*
 2 *tity, and may be admitted to the joint negotia-*
 3 *tion entity upon a majority vote of its members,*
 4 *if the applicant otherwise satisfies any criteria*
 5 *for admission established by the joint negotiation*
 6 *entity.*

7 *(F) DESIGNATION.—A joint negotiation en-*
 8 *tity may designate agents on a nonexclusive*
 9 *basis—*

10 *(i) to engage in negotiations with a*
 11 *covered platform conducted under this sec-*
 12 *tion; and*

13 *(ii) to agree to pay or receive pay-*
 14 *ments under or related to an agreement ne-*
 15 *gotiated under this section or an arbitration*
 16 *decision issued under section 4.*

17 *(G) OPT-OUT.—*

18 *(i) IN GENERAL.—After becoming a*
 19 *member of the joint negotiation entity, an*
 20 *eligible digital journalism provider may opt*
 21 *out of the joint negotiation entity at any*
 22 *time before notice is sent to the covered plat-*
 23 *form under paragraph (2).*

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

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

4 *(I) rejoin the joint negotiation en-*
 5 *tity; or*

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

11 *(H) TERMINATION.—A joint negotiation en-*
 12 *tity will terminate and cease to exist—*

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

15 *(ii) upon a majority vote of its mem-*
 16 *bers; or*

17 *(iii) upon the expiration or termi-*
 18 *nation of an agreement negotiated under*
 19 *this section or an arbitration decision*
 20 *issued under section 4.*

21 *(2) NOTICE TO A COVERED PLATFORM TO INI-*
 22 *TIATE A JOINT NEGOTIATION.—*

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

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

3 (B) *CONTENTS OF NOTICE.—The notice de-*
4 *scribed in subparagraph (A) shall—*

5 (i) *state that the joint negotiation enti-*
6 *ty is initiating a negotiation under this sec-*
7 *tion to reach an agreement regarding the*
8 *pricing, terms, and conditions by which the*
9 *covered platform may access the content of*
10 *the eligible digital journalism providers that*
11 *are members of the joint negotiation entity;*

12 (ii) *identify the eligible digital jour-*
13 *nalism providers that are members of the*
14 *joint negotiation entity; and*

15 (iii) *provide the physical mail address*
16 *(street address or post office box), telephone*
17 *number, and email address of a representa-*
18 *tive authorized to receive a response to the*
19 *notice on behalf of the joint negotiation en-*
20 *tity.*

21 (C) *REPLY.—Not later than 30 days after*
22 *receiving a notice described in subparagraph*
23 *(A), the covered platform shall send a reply no-*
24 *tice to the authorized representative identified by*

1 or on behalf of the joint negotiation entity to ac-
2 knowledge receipt of the notice.

3 (D) NOTICE TO FEDERAL ENFORCERS.—

4 Copies of any notice described in subparagraph
5 (A) shall be filed by or on behalf of the eligible
6 digital journalism providers that are members of
7 the joint negotiation entity with the Federal
8 Trade Commission and the Assistant Attorney
9 General in charge of the Antitrust Division of
10 the Department of Justice not later than 30 days
11 after the notice is sent to the covered platform.

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

15 (1) Any negotiation conducted under this section
16 shall be conducted in good faith and solely to reach
17 an agreement regarding the pricing, terms, and con-
18 ditions under which the covered platform may access
19 the content of the eligible digital journalism pro-
20 viders.

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

1 (A) displays, ranks, distributes, suppresses,
 2 promotes, throttles, labels, filters, or curates the
 3 content of the eligible digital journalism pro-
 4 viders; or

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

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

11 (A) refuses to negotiate, except where eligi-
 12 ble digital journalism providers decide to jointly
 13 deny a covered platform access to content li-
 14 censed or produced by such eligible digital jour-
 15 nalism providers under subsection (c);

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

18 (C) refuses to meet and negotiate at reason-
 19 able times and locations or otherwise causes un-
 20 reasonable delay;

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

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

1 (F) enters into a separate third-party agree-
 2 ment that unreasonably impedes the party from
 3 reaching an agreement with the negotiating
 4 party; or

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

7 (4) A covered platform is not conducting nego-
 8 tiations in good faith in accordance with paragraph
 9 (1) if the covered platform enters into a separate
 10 agreement with an eligible digital journalism pro-
 11 vider that impedes the eligible digital journalism pro-
 12 vider from participating in a negotiation under this
 13 section.

14 (5) During any negotiation conducted under this
 15 section, the joint negotiation entity and the covered
 16 platform shall each make a reasonable offer regarding
 17 the pricing, terms, and conditions by which the cov-
 18 ered platform may access the content of the eligible
 19 digital journalism providers that are members of the
 20 joint negotiation entity, substantiated with com-
 21 prehensive data and methodologies, including expert
 22 analysis, that reflects—

23 (A) the pricing, terms, and conditions com-
 24 parable to those found in commercial agreements
 25 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

1 *to content licensed or produced by such eligible digital jour-*
 2 *nalism providers.*

3 **SEC. 4. ARBITRATION FOR ELIGIBLE PUBLISHERS.**

4 *(a) RIGHT TO FINAL OFFER ARBITRATION.—*

5 *(1) IN GENERAL.—If the membership of a joint*
 6 *negotiation entity consists only of eligible publishers,*
 7 *on or after the date that is 180 days after the date*
 8 *negotiations under section 3 begin, the joint negotia-*
 9 *tion entity may initiate a final offer arbitration*
 10 *against the covered platform for an arbitration panel*
 11 *to determine the pricing, terms, and conditions by*
 12 *which the content displayed, provided, distributed, or*
 13 *offered by a qualifying publication of any eligible*
 14 *publisher that is a member of the joint negotiation en-*
 15 *tity will be accessed by the covered platform if the*
 16 *parties are unable to reach an agreement and regard-*
 17 *less of whether the joint negotiation entity, its mem-*
 18 *bers, or the covered platform complied with the re-*
 19 *quirements of section 3(b).*

20 *(2) EFFECT OF ADDITIONAL MEMBERS.—If an*
 21 *additional member joins the joint negotiation entity*
 22 *under section 3(a)(1)(E) more than 90 days after the*
 23 *date negotiations under section 3 begin, the joint ne-*
 24 *gotiation entity may not initiate a final offer arbitra-*
 25 *tion under paragraph (1) until 180 days after the*

1 *date the last member joins the joint negotiation enti-*
 2 *ty. No additional members may join the joint negotia-*
 3 *tion entity after the arbitration has commenced.*

4 (b) *NOTICE.*—*The joint negotiation entity shall pro-*
 5 *vide notice of its intention to initiate final offer arbitration*
 6 *under this section to all of the members of the joint negotia-*
 7 *tion entity no less than 10 days prior to initiating such*
 8 *final offer arbitration.*

9 (c) *MEMBERSHIP.*—*If a joint negotiation entity initi-*
 10 *ates final offer arbitration under this section, any indi-*
 11 *vidual eligible publisher that is a member of the joint nego-*
 12 *tiation entity shall remain a member of the joint negotia-*
 13 *tion entity until the completion of the arbitration, unless*
 14 *the eligible publisher provides written notice to the joint ne-*
 15 *gotiation entity of its intention to withdraw from the joint*
 16 *negotiation entity within 7 days of receiving notice under*
 17 *subsection (b).*

18 (d) *PROCEEDINGS.*—

19 (1) *RULES OF ARBITRATION.*—*The arbitration*
 20 *shall be decided by a panel of 3 arbitrators under the*
 21 *American Arbitration Association’s Commercial Arbi-*
 22 *tration Rules and Mediation Procedures and the*
 23 *American Arbitration Association-International Cen-*
 24 *tre for Dispute Resolution Final Offer Arbitration*

1 *Supplementary Rules, except to the extent they con-*
 2 *flict with this subsection.*

3 (2) *INITIATION OF ARBITRATION.*—*A final offer*
 4 *arbitration under subsection (a) shall be initiated as*
 5 *provided in Rule R-4 of the American Arbitration As-*
 6 *sociation’s Commercial Arbitration Rules and Medi-*
 7 *ation Procedures, except that the joint negotiation en-*
 8 *tity initiating the arbitration shall refer to this Act*
 9 *in its demand for arbitration, rather than submitting*
 10 *contractual arbitration provisions.*

11 (3) *COMMENCEMENT AND FUNDING.*—

12 (A) *COMMENCEMENT.*—*A final offer arbi-*
 13 *tration proceeding shall commence 10 days after*
 14 *the date a final offer arbitration is initiated*
 15 *under subsection (a).*

16 (B) *FUNDING.*—*The cost of administering*
 17 *the arbitration proceeding, including arbitrator*
 18 *compensation, expenses, and administrative fees,*
 19 *shall be shared equally between the covered plat-*
 20 *form and the joint negotiation entity.*

21 (4) *APPOINTMENT OF THE ARBITRATION*
 22 *PANEL.*—*The arbitrators shall be appointed in ac-*
 23 *cordance with the American Arbitration Association’s*
 24 *Commercial Arbitration Rules and Mediation Proce-*
 25 *dures.*

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

3 (A) *the joint negotiation entity and the cov-*
4 *ered platform may demand the production of*
5 *documents and information that are nonprivi-*
6 *leged, reasonably necessary, and reasonably ac-*
7 *cessible without undue expense;*

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

11 (C) *rules regarding the admissibility of evi-*
12 *dence applicable in Federal court shall apply;*

13 (D) *the joint negotiation entity and covered*
14 *platform shall each submit a final offer proposal*
15 *for the pricing, terms, and conditions under*
16 *which the content displayed, provided, distrib-*
17 *uted, or offered by a qualifying publication of*
18 *any eligible publisher that is a member of the*
19 *joint negotiation entity will be accessed by the*
20 *covered platform, and which shall include the re-*
21 *muneration that the eligible publishers should re-*
22 *ceive from the covered platform for pro-*
23 *grammatic access to the content of the eligible*
24 *publishers that are members of the joint negotia-*
25 *tion entity during the period under negotiation*

1 *based on the fair market value of such access,*
 2 *which shall include backup materials sufficient*
 3 *to permit the other party to replicate the prof-*
 4 *ferred valuation;*

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

9 *(i) displays, ranks, distributes, sup-*
 10 *presses, promotes, throttles, labels, filters, or*
 11 *curates the content of the eligible digital*
 12 *journalism providers; or*

13 *(ii) displays, ranks distributes, sup-*
 14 *presses, promotes, throttles, labels, filters or*
 15 *curates the content of any other person; and*

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

21 *(i) any compensation received by the*
 22 *eligible publisher through commercial agree-*
 23 *ment prior to commencement of negotia-*
 24 *tions under section 3 for access to content*
 25 *by the covered platform during any part of*

1 *the period under negotiation, which shall be*
 2 *deducted from its allocation accordingly;*
 3 *and*

4 *(ii) spending by the eligible publisher*
 5 *on news journalists, which are employed for*
 6 *an average of not fewer than 20 hours per*
 7 *week during the calendar quarter by the eli-*
 8 *gible digital journalism provider and are*
 9 *responsible for gathering, preparing, direct-*
 10 *ing the recording of, producing, collecting,*
 11 *photographing, recording, writing, editing,*
 12 *reporting, presenting, or publishing original*
 13 *news or information that concerns local, re-*
 14 *gional, national, or international matters of*
 15 *public interest in the previous fiscal year,*
 16 *as a proportion of its overall budget of the*
 17 *eligible digital journalism provider for that*
 18 *period, which shall be used to guide 65 per-*
 19 *cent of the distribution of remuneration*
 20 *among the members of the joint negotiation*
 21 *entity.*

22 *(e) AWARD.—*

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

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

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

5 (A) *may not consider any value conferred*
 6 *upon any eligible publisher by the covered plat-*
 7 *form for distributing or aggregating its content*
 8 *as an offset to the value created by such eligible*
 9 *publisher;*

10 (B) *shall consider past incremental revenue*
 11 *contributions as a guide to the future incre-*
 12 *mental revenue contribution by any eligible pub-*
 13 *lisher;*

14 (C) *shall consider the pricing, terms, and*
 15 *conditions of any available, comparable commer-*
 16 *cial agreements between parties granting access*
 17 *to digital content, including pricing, terms, and*
 18 *conditions relating to price, duration, territory,*
 19 *the value of data generated directly or indirectly*
 20 *by the content accounting for any material dis-*
 21 *parities in negotiating power between the parties*
 22 *to such commercial agreements; and*

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

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

3 *(f) PAYMENTS PURSUANT TO AWARD.—*

4 *(1) IN GENERAL.—Not later than 90 days after*
 5 *the date an award is issued under subsection (e), the*
 6 *covered platform shall begin paying any eligible pub-*
 7 *lisher that was a member of the joint negotiation enti-*
 8 *ty participating in the arbitration according to the*
 9 *terms in the final offer selected by the arbitration*
 10 *panel.*

11 *(2) DISBURSEMENT.—Payments made under*
 12 *paragraph (1) shall be dispersed by a claims admin-*
 13 *istrator to the individual claimants that comprise the*
 14 *joint negotiation entity not later than 60 days after*
 15 *the date the funds were received from the covered plat-*
 16 *form.*

17 *(g) ENFORCEMENT AND JUDICIAL REVIEW.—*

18 *(1) IN GENERAL.—An award made under sub-*
 19 *section (e) shall be enforceable by the eligible pub-*
 20 *lishers or the covered platform subject to the award*
 21 *through a civil action brought before a district court*
 22 *of the United States.*

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

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

4 **SEC. 5. LIMITATION OF LIABILITY.**

5 (a) *IN GENERAL.*—*In accordance with sections 3 and*
 6 *4, it shall not be in violation of the antitrust laws for any*
 7 *eligible digital journalism providers that are members of*
 8 *a joint negotiation entity to—*

9 (1) *jointly deny a covered platform access to con-*
 10 *tent for which the eligible digital journalism pro-*
 11 *viders, individually or jointly, have the right to nego-*
 12 *tiate or arbitrate access with respect to the covered*
 13 *platform; or*

14 (2) *participate in joint negotiations and arbitra-*
 15 *tion, as members of the joint negotiation entity, with*
 16 *such covered platform solely regarding the pricing,*
 17 *terms, and conditions under which the covered plat-*
 18 *form may access the content for which the eligible dig-*
 19 *ital journalism providers, individually or jointly,*
 20 *have the right to negotiate or arbitrate access with re-*
 21 *spect to the covered platform.*

22 (b) *SAFE HARBOR.*—

23 (1) *ELIGIBLE DIGITAL JOURNALISM PRO-*
 24 *VIDERS.*—*An eligible digital journalism provider*
 25 *shall not be in violation of the antitrust laws if the*

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

4 *(A) with a person that is not an eligible*
 5 *digital journalism provider, if the eligible digital*
 6 *journalism provider reasonably believes that the*
 7 *person is another eligible digital journalism pro-*
 8 *vider; or*

9 *(B) with a person that is not a covered*
 10 *platform, if the eligible digital journalism pro-*
 11 *vider reasonably believes that the person is a cov-*
 12 *ered platform.*

13 *(2) JOINT NEGOTIATION ENTITIES.—A joint ne-*
 14 *gotiation entity shall not be in violation of the anti-*
 15 *trust laws if the joint negotiation entity engages in*
 16 *negotiations under section 3 or arbitration under sec-*
 17 *tion 4—*

18 *(A) with or on behalf of a person that is not*
 19 *an eligible digital journalism provider, if the*
 20 *joint negotiation entity reasonably believes that*
 21 *the person is an eligible digital journalism pro-*
 22 *vider; or*

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

1 ably believes that the person is a covered plat-
2 form.

3 (c) *NOTIFICATION OF AGREEMENTS AND ARBITRATION*
4 *DECISIONS.*—

5 (1) *AGREEMENTS.*—*The parties to any written*
6 *agreement, resulting from a negotiation under section*
7 *3 or implementing an arbitration decision issued*
8 *under section 4, shall file a copy of such agreement*
9 *with the Federal Trade Commission and the Assistant*
10 *Attorney General in charge of the Antitrust Division*
11 *of the Department of Justice not later than 60 days*
12 *after such agreement is executed.*

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

20 (3) *PUBLIC DISCLOSURE.*—*The Federal Trade*
21 *Commission shall make the documents submitted*
22 *under this subsection available to the public on the*
23 *Federal Trade Commission’s website.*

24 (d) *LIMITATION REGARDING THE SCOPE OF LIMITA-*
25 *TION OF LIABILITY.*—*No antitrust immunity shall apply*

1 *to any negotiations, discussions, agreements, or arbitrations*
 2 *relating to the use, display, promotion, ranking, distribu-*
 3 *tion, curation, suppression, throttling, filtering, or labeling*
 4 *of the content of the eligible digital journalism provider or*
 5 *of any other person. The limitation of liability under this*
 6 *section shall apply only to negotiations, discussions, agree-*
 7 *ments, or arbitrations regarding the pricing, terms, and*
 8 *conditions under which the covered platform may access the*
 9 *content of the eligible digital journalism provider, not to*
 10 *any discussions or agreements that differentiate content*
 11 *based on the viewpoint expressed by such content.*

12 **SEC. 6. NONDISCRIMINATION, RETALIATION, AND TRANS-**
 13 **PARENCY.**

14 *(a) NONDISCRIMINATION.—*

15 *(1) JOINT NEGOTIATION ENTITIES.—A joint ne-*
 16 *gotiation entity may not discriminate against any el-*
 17 *igible digital journalism provider based on the size of*
 18 *the eligible digital journalism provider or the views*
 19 *expressed by the eligible digital journalism provider's*
 20 *content.*

21 *(2) COVERED PLATFORMS.—No covered platform*
 22 *may discriminate against any eligible digital jour-*
 23 *nalism provider that is a member of a joint negotia-*
 24 *tion entity in connection with a negotiation con-*
 25 *ducted under section 3, or an arbitration conducted*

1 *under section 4, based on the size of the eligible dig-*
 2 *ital journalism provider or the views expressed by the*
 3 *eligible digital journalism provider's content.*

4 *(b) PROHIBITION ON RETALIATION BY COVERED PLAT-*
 5 *FORMS.—*

6 *(1) IN GENERAL.—No covered platform may re-*
 7 *taliate against an eligible digital journalism provider*
 8 *for participating in a negotiation conducted under*
 9 *section 3, or an arbitration conducted under section*
 10 *4, including by refusing to index content or changing*
 11 *the ranking, identification, modification, branding, or*
 12 *placement of the content of the eligible digital jour-*
 13 *nalism provider on the covered platform.*

14 *(2) EFFECT OF CONTRACT PROVISIONS.—Any*
 15 *provision in an agreement that restricts an eligible*
 16 *digital journalism provider from receiving compensa-*
 17 *tion through a negotiation conducted under section 3*
 18 *or an arbitration conducted under section 4 shall be*
 19 *void.*

20 *(c) INVESTING IN JOURNALISM.—*

21 *(1) IN GENERAL.—Without disclosing confiden-*
 22 *tial information regarding the pricing, terms, and*
 23 *conditions of an agreement reached under section 3,*
 24 *an agreement implementing an arbitration decision*
 25 *issued under section 4, or an arbitration decision*

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

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

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

19 *(2) PUBLIC DISCLOSURE.—The Federal Trade*
 20 *Commission shall make the disclosures submitted*
 21 *under paragraph (1) available to the public on the*
 22 *Federal Trade Commission’s website.*

23 **SEC. 7. PRIVATE RIGHTS OF ACTION.**

24 *(a) NEGOTIATIONS.—*

1 (1) *IN GENERAL.*—Any eligible digital jour-
 2 nalism provider, either jointly with other eligible dig-
 3 ital journalism providers or through an authorized
 4 representative, or covered platform that participated
 5 in negotiations under section 3 may bring a civil ac-
 6 tion in an appropriate district court of the United
 7 States alleging a violation of section 3(b).

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

10 (A) approximating the value of the last rea-
 11 sonable offer of the plaintiff if the defendant did
 12 not conduct negotiations in good faith in viola-
 13 tion of section 3(b)(1);

14 (B) approximating the value of the last rea-
 15 sonable offer of the plaintiff if the defendant—

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

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

21 (C) approximating the value of the plain-
 22 tiff's last reasonable offer if the defendant did not
 23 make a reasonable offer in violation of section
 24 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-

1 *tent of the eligible digital journalism*
 2 *providers that are members of the joint*
 3 *negotiation entity, may join the joint*
 4 *negotiation entity and participate in*
 5 *the negotiation under section 3 or the*
 6 *arbitration under section 4, as appli-*
 7 *cable.*

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

14 (ii) AFTER AGREEMENT OR ARBITRA-
 15 TION DECISION.—

16 (I) IN GENERAL.—*An eligible digi-*
 17 *tal journalism provider that prevails*
 18 *in an action under subparagraph (A)*
 19 *after the date an agreement is executed*
 20 *under section 3 or an arbitration deci-*
 21 *sion is issued under section 4, as ap-*
 22 *plicable, regarding the pricing, terms,*
 23 *and conditions by which the covered*
 24 *platform may access the content of the*
 25 *eligible digital journalism providers*

1 *that are members of the joint negotia-*
 2 *tion entity, may join the joint negotia-*
 3 *tion entity and be eligible for the same*
 4 *pricing, terms, and conditions by*
 5 *which the covered platform may access*
 6 *the content of the other eligible digital*
 7 *journalism providers that are members*
 8 *of the joint negotiation entity.*

9 (II) NOTICE.—*A notice, by or on*
 10 *behalf of the joint negotiation entity,*
 11 *shall be sent to the covered platform to*
 12 *identify the eligible digital journalism*
 13 *provider that joins the joint negotia-*
 14 *tion entity under subclause (I) and*
 15 *that is eligible to receive the same pric-*
 16 *ing, terms, and conditions under the*
 17 *agreement negotiated under section 3*
 18 *or the arbitration decision issued*
 19 *under section 4, as applicable, by*
 20 *which the covered platform may access*
 21 *the content of the other eligible digital*
 22 *journalism providers that are members*
 23 *of the joint negotiation entity.*

24 (2) COVERED PLATFORMS.—

1 (A) *IN GENERAL.*—An eligible digital jour-
 2 nalism provider that is discriminated against in
 3 violation of section 6(a)(2) may bring a civil ac-
 4 tion in an appropriate district court of the
 5 United States against the covered platform.

6 (B) *REMEDIES.*—An eligible digital jour-
 7 nalism provider that prevails under subpara-
 8 graph (A) shall be entitled to—

9 (i) recover the actual damages sus-
 10 tained by the eligible digital journalism
 11 provider as a result of the discrimination;

12 (ii) injunctive relief on such terms as
 13 the court may deem reasonable to prevent or
 14 restrain the covered platform from discrimi-
 15 nating against the eligible digital jour-
 16 nalism provider; and

17 (iii) the costs of the suit, including rea-
 18 sonable attorneys' fees.

19 (c) *RETALIATION.*—

20 (1) *IN GENERAL.*—An eligible digital journalism
 21 provider that is retaliated against in violation of sec-
 22 tion 6(b)(1) may bring a civil action in an appro-
 23 priate district court of the United States against the
 24 covered platform.

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

4 (A) *recover the actual damages sustained by*
 5 *the eligible digital journalism provider as a re-*
 6 *sult of the retaliation;*

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

11 (C) *the costs of the suit, including reason-*
 12 *able attorneys' fees.*

13 **SEC. 8. REPORT.**

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

21 (b) *REPORT.*—*Not later than 5 years after the date*
 22 *of enactment of this Act, the Comptroller General shall sub-*
 23 *mit to Congress a report on the study required under sub-*
 24 *section (a).*

1 **SEC. 9. SUNSET.**

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

5 (b) *EXCEPTION IN CASE OF INITIATED BUT INCOM-*
 6 *plete JOINT NEGOTIATION OR ARBITRATION.*—*With re-*
 7 *spect to eligible digital journalism providers that have initi-*
 8 *ated but not concluded a negotiation under section 3 or an*
 9 *arbitration under section 4 on or before the sunset date de-*
 10 *scribed in subsection (a), this Act shall cease to be effective*
 11 *on the date such negotiation or arbitration concludes or 180*
 12 *days after the date described in subsection (a), whichever*
 13 *occurs first.*

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

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

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

20 (3) *agreement implementing an arbitration deci-*
 21 *sion issued under section 4;*
 22 *during the period of effectiveness of this Act.*

23 **SEC. 10. RULE OF CONSTRUCTION.**

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

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

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

7 ***SEC. 11. SEVERABILITY.***

8 *If any provision of this Act, or the application of such*
9 *provision to any person or circumstance, is held to be un-*
10 *constitutional, the remainder of this Act, and the applica-*
11 *tion of the remaining provisions of this Act to any person*
12 *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