

April 20, 2021

The Honorable Amy Klobuchar
Chairwoman
Senate Committee on the Judiciary
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Washington, District of Columbia 20510

The Honorable Mike Lee
Ranking Member
Senate Committee on the Judiciary
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Washington, District of Columbia 20510

Antitrust Applied: Examining Competition in the App Stores

Dear Chairwoman Klobuchar, Ranking Member Lee, and Members of the Subcommittee,

We applaud this Subcommittee for its examination of the competitive dynamics of tech-driven markets, including app stores, with tomorrow's hearing, "Antitrust Applied: Examining Competition in App Stores." ACT | The App Association (the App Association) is the leading trade group representing small mobile software and connected device companies in the app economy, a \$1.7 trillion ecosystem led by U.S. companies and employing 108,260 in Minnesota and 65,520 in Utah alone.¹ Our member companies create the software that brings your smart devices to life. They also make the connected devices that are revolutionizing healthcare, education, public safety, and virtually all industry verticals. They propel the data-driven evolution of these industries and compete with each other and larger firms in a variety of ways, including on privacy and security protections.

The witnesses in this hearing underscore highly publicized conflicts between large companies and software platforms (the app store / operating system combinations that facilitate app company-consumer transactions). However, while our member companies are always pushing software platforms to provide more value for the amounts they pay for developer services, they are concerned about how government intervention to solve disputes between well-resourced firms and software platforms will affect them. We appreciate that showcasing the breadth of views on app store competition presents challenges. However, the cross-section of issues these witnesses highlight provides only a narrow sliver of how competition is working in app store markets. To the extent that advocates are using perceived unfair treatment of multibillion-dollar firms like Spotify as evidence to support an expansion of antitrust law to protect non-platforms, our member companies have concerns and urge you to consider the impacts of such intervention on their businesses, the value they get from developer services, and their clients and consumers.

I. Competition is Alive and Well in the Markets Relevant to App Stores

The consumer-facing side of the market. Some commenters have argued that the major app stores do not compete with each other for consumers.² According to the proposed logic, the App Store does not compete with the Google Play store because an Apple customer cannot immediately access the Google Play store and vice versa.³ However, dynamics like this do not insulate market actors like app stores from competition. For example, consider local markets for discount retail clubs or other services that require memberships. Costco members cannot

¹ ACT | THE APP ASSOCIATION, STATE OF THE U.S. APP ECONOMY: 2020 (7th Ed.), *available at* <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>.

² See *id.* at 95.

³ *Id.*

immediately access Sam's Club and vice versa (unless a consumer is a member of both simultaneously). A membership is generally required before you can begin using the services of either store, so there are some time and resource commitments that need to be made before you can switch. Similarly, an Apple iPhone owner must spend the time and resources to trade in their device for another smartphone that runs on Android instead, in order to access the Google Play store. These are properly viewed as switching costs—which are prevalent in markets where network effects are present—but these costs alone hardly justify a conclusion that the competitors in that market “do not compete against one another.”⁴ Critics cite logistical difficulties in switching, but in reality, switching is straightforward and assisted by the app store operators themselves.⁵ In fact, a recent report indicates that it generally costs just \$16 to switch from an iPhone to a Samsung device and \$40 to switch from a Samsung device to an iPhone, including opportunity cost of time spent on switching.⁶ Not only that, but it is also fairly common for someone to have a tablet that runs on Android and a smartphone that runs on iOS, or vice versa. Ultimately, these consumers are likely making their choices based on a combination of the app store offerings, operating systems, device features, and default apps on smart devices. That there are switching costs involved with leaving one app marketplace for another is simply not evidence that they do not compete with each other for consumers.

The developer services side of the market. The Google Play store and the App Store compete vigorously in the other side of the market, for developers and developer services. Google benefits a great deal from attracting the next great app and so does Apple⁷ and the investments these platforms make to attract developers reflect this.⁸ Moreover, Google and Apple have a history of trying to outdo one another with respect to the offerings they provide for developers. As “shopper’s guides” to the two main app stores describe, the App Store and Google Play store respond to each other’s offerings, vying to be the platform that provides better toolkits, APIs, and, of course, quicker (yet rigorous) app review processes.⁹ In fact, over their respective lifespans, the

⁴ See, e.g., Wing Man Wynne Lam, “Switching Costs in Two-Sided Markets,” TOULOUSE SCHOOL OF ECON., Working Paper (Aug. 2014), available at http://publications.ut-capitole.fr/16551/1/wp_tse_517.pdf (examining the characteristics of competition between app stores for consumers, including the impacts on competition and consumer benefits when app stores adjust their various offerings).

⁵ Avery Hartmans, “Here’s the best and easiest ways to switch from an Android device to an iPhone,” Business Insider, (May 21, 2019), available at <https://www.businessinsider.com/switching-from-android-to-iphone-how-to-2018-5#step-1-back-up-all-your-data-1>.

⁶ ELLIOTT LONG, WHY USERS AREN’T LOCKED INTO THEIR SMARTPHONE BRAND, PROGRESSIVE POLICY INSTITUTE (Apr. 8, 2021), available at <https://eadn-wc05-3904069.nxedge.io/cdn/wp-content/uploads/2021/04/Why-Users-Arent-Locked-Into-Their-Smartphone-Brand4.8.21.pdf>.

⁷ *Ohio et al. v. Am. Express et al.*, 585 U.S. ___ (2018) (“Unlike traditional markets, two-sided platforms exhibit “indirect network effects,” which exist where the value of the platform to one group depends on how many members of another group participate.”).

⁸ Opposition brief of Apple Inc., *Epic Games, Inc. v. Apple Inc.*, Case No. 4:20-cv-05640-YGR, at 5 (N.D. Cal. 2020), available at

<https://www.courtlistener.com/recap/gov.uscourts.cand.364265/gov.uscourts.cand.364265.73.0.pdf> (“In the interest of stoking more creativity, and to bring more apps to its users, Apple supports developers in a variety of ways, investing billions in tools that simplify the development process, across Apple’s iOS.”).

⁹ See Yana Poluliakh and Victor Osadchiy, “What to expect from the App Store and the Google Play Store When you Launch Your First App,” YALANTIS, available at <https://yalantis.com/blog/apple-app-store-and-google-play-store/>; Nikita, “Apple App Store vs. Google Play Store: A Comparison,” 21 TWELVE INTERACTIVE, Blog (Sept. 20, 2019), available at <https://www.21twelveinteractive.com/apple-app-store-vs-google-play-store-a-comparison/>; Priya Viswanathan, “iOS App Store vs. Google Play Store,” LIFEWIRE (Mar. 9, 2020), available at <https://www.lifewire.com/ios-app-store-vs-google-play-store-for-app-developers-2373130>.

major app stores have demonstrated a clear track record of competing with each other for developers, as our recent report details.¹⁰ Lastly, the analysis of the relevant developer-facing side of the market does not end with whether there is competition between those two app stores, as there are other software distribution options that can serve as alternatives: smart TV app stores, gaming console app stores, and even video conferencing platforms¹¹ (a development accelerated by the pandemic). The open internet can also be a workable alternative for developers and consumers to the two major app stores (especially for larger developers with an established customer base or market share).¹² And for consumers who favor less data-intensive apps (for example, because they have limited data plans) or want to access certain apps across devices and browsers, progressive web apps¹³ are a means of accessing mobile content and services outside the major app stores. As described above, however, there is plenty of evidence that the general-purpose app stores do compete with each other both for consumers and for developers. And if they are competing, that means the app stores are a) driving better services and offerings for developers, while b) pushing each other to provide the most attractive, diverse, and safe marketplace for consumers. And consumers currently benefit from differentiated products, as the App Store provides a more "premium" offering with tighter privacy and security controls, while the Google Play store boasts a greater variety.

Platforms have helped create or expand markets like digital health services. Just as ridesharing fundamentally changed how we get around, developers and platforms also revolutionized how we access healthcare. Digital health capabilities are maturing at a critical time when the pandemic has forced American patients to rely on virtual visits and remote monitoring. Secure smart devices and the software platforms that animate them are foundational elements to our current ability to manage healthcare wherever we happen to be. But this would not be possible if not for software platforms performing a gating function and securing operating systems and app stores from fraudulent apps and other threats to healthcare data. Those functions make smart devices worthy of the trust we must place in them to keep sensitive health data or conduct virtual physician visits on them.

There is reason to believe digital health will continue to play a central role in care delivery in the United States. A current shortage of about 30,000 physicians in the United States—projected to increase to up to 90,000 in the next five years¹⁴—contributed to the need for caregivers and

¹⁰ ACT | The App Association, A Brief History of Time: The App Stores (Apr. 7, 2021), available at <https://actonline.org/wp-content/uploads/A-Brief-History-of-Time-The-App-Stores.pdf>.

¹¹ See Vishal Mathur, "Apple's Response Proves App Store Isn't Any More a Monopoly Than the Google Play Store," NEWS18 (May 30, 2019), available at <https://www.news18.com/news/tech/apples-response-proves-app-store-isnt-any-more-a-monopoly-than-the-google-play-store-2164875.html>; David Pierce, "Zoom has a plan to dominate the virtual events industry," PROTOCOL (Oct. 14, 2020), available at <https://www.protocol.com/onzoom-virtual-events> (describing Zoom's new Zapps app store).

¹² Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, hearing before the House Judiciary Committee, Subcommittee on Antitrust, Commercial, and Administrative Law (statement of Morgan Reed, President, ACT | The App Association) 7 (Jul. 17, 2019), available at <https://actonline.org/wp-content/uploads/Online-Platforms-and-Market-Power-Part-2-Innovation-and-Entrepreneurship-1.pdf>.

¹³ Sam Richard and Pete LePage, "What are Progressive Web Apps?" WEB.DEV (Feb. 24, 2020), available at <https://web.dev/what-are-pwas/>.

¹⁴ See Connected Health Initiative, "Testimony of Morgan Reed, Executive Director, The Connected Health Initiative, Before the U.S. Senate Committee on Health, Education, Labor, and Pensions (HELP) Subcommittee on Primary Health and Retirement Security," (Sept. 25, 2018), available at <https://actonline.org/wp-content/uploads/CHI-Testimony-Health-Care-in-Rural-America.pdf>.

patients to find new ways of communicating. Compounding the caregiver shortage, 133 million Americans currently live with chronic conditions—most of them residing in rural areas with long drives to their nearest provider.¹⁵ Devices, sensors, and software are now capable of gathering and analyzing physiological data like movement, heart rate, electrocardiogram, or pulse oximetry so that physicians can better monitor their patients at home and address potential problems before they occur or worsen.¹⁶ Studies show that preventive care regimes that use connected health tools are especially useful for patients with chronic conditions like diabetes and heart failure, which tend to affect underserved and rural communities in particular.¹⁷ But how do these capabilities reach patients and consumers, specifically those who need them most? Most Americans already interact with platforms, through a variety of devices. We know that smartphone adoption rates are increasing among underserved populations in the United States and that for many, their handheld device is their only means of accessing the internet.¹⁸ Here again, developers are leveraging the ubiquity and trusted framework of platforms to produce healthcare innovations that address a variety of health conditions. Moreover, in this case, the platform-developer dynamic helps caregivers reach patients in rural and underserved areas.

¹⁵ See *Id.*

¹⁶ *Id.*

¹⁷ See, e.g., Clinical Outcomes, Care innovations, at 2, available at http://www.connectwithcare.org/wp-content/uploads/2017/06/2016_Outcomes_Clinical-1.pdf (showing the results of a study by Care innovations and University of Mississippi Medical Center, indicating that the first 100 patients with diabetes enrolled in a program with a remote monitoring component saved the state \$336,184 in Medicaid dollars over six months); Testimony of Michael P. Adcock, Exec. Dir., University of Mississippi Med. Ctr., Hearing on “Telemedicine in the VA: Leveraging Technology to Increase Access, Improve Health Outcomes & Lower Costs,” (May 4, 2017), available at <https://www.appropriations.senate.gov/imo/media/doc/050417-Adcock-Testimony.pdf> (“The Mississippi Division of Medicaid extrapolated this data to show potential savings of over \$180 million per year if 20 percent of the diabetics on Mississippi Medicaid participated in this program”).

¹⁸ Charkarra Anderson-Lewis, MPH, PhD, et al, “mHealth Technology Use and Implications in Historically Underserved and Minority Populations in the United States: Systematic Literature Review,” (Jun. 18, 2018), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6028762/>.

II. Developers are Pushing for More from the Platforms

Software platforms have historically responded to the needs of developers and consumer demands as those forces have evolved. Right now, app companies are pushing for several things from software platforms that government intervention would likely undermine. Specifically, app companies are seeking:

1. **Expedient removal of scam apps, fake reviews, and fraudulent actors.** Scam and fraud apps have slipped through the review and removal cracks,¹⁹ and our member companies are concerned about these incidents. We strongly disagree, however, with suggestions that software platforms should give up on the exclusive app store model. The fact that app stores have such a high volume of apps to review, posing security review difficulties, is cited as a reason for steamrolling Apple's closed App Store system with a government prohibition on app store exclusivity. If our member companies choose to distribute through the App Store, they expect tough security reviews and fast removal of bad actors. A complete removal of the gatekeeping function would accomplish the exact opposite.

2. **Better security.** App companies depend on software platforms to provide a trusted marketplace. Software platforms ensure security by both reviewing proposed apps and by pushing out security updates for a device operating systems. These functions are exceptionally important for a trusted marketplace, and investment should reflect this importance.

3. **Better privacy.** App companies compete on privacy. They are working hard to produce tech-driven privacy features that address evolving consumer expectations and technical realities, and some of them provide products and services focused solely on privacy protections.²⁰ The privacy functions of software platforms, however, are also critical to foster a trusted ecosystem in which to operate.

4. **More investment in developer relations.** Software platforms have significantly lowered barriers to entry for software sellers. But the app stores can seem vast and impersonal for the smallest app companies, and rejections or other adverse decisions can seem impossible to surmount without proper explanations or personal interactions with software platform staff. A lack of personal attention can lead to dissatisfaction and resentment, so it is in software platforms' best interests to help developers find success on the platform. Conversely, individual attention for the smallest app companies helps nurture the truly robust app marketplace where the best ideas flourish from the most surprising corners—and that is what consumers, software platforms, and app companies alike want most.

Subjecting software platforms to substantially heightened antitrust liability for managing app stores to better protect privacy, security, remove fraudulent actors, and provide individual services would undermine everything our member companies are asking for from software platforms. Similarly, creating nondiscrimination or other regulatory regimes specifically for current incumbents would inadvertently create a regulatory moat around them, protecting each from known competitive

¹⁹ Statement of Morgan Reed, president, ACT | The App Association (Feb. 11, 2021), *available at* <https://actonline.org/statements/>.

²⁰ See, e.g., "The Rise of Privacy Tech Helps Privacy Tech Founders Solve Their Biggest Pain Points," TROPT (Jun. 5, 2020), *available at* <https://www.riseofprivacytech.com/tropt-helps-privacy-tech-founders-solve-pain-points/>.

pressures and from potentially unforeseen entrants providing increasingly analogous services like Square. Such protection removes their incentives to respond to developer demands, supplanting it with bureaucracy and lobbying battles.

II. Antitrust Intervention to Limit Software Platform Functions Would Harm Small App Companies

In the software platform context, policymakers are considering a variety of structural or quasi-structural remedies from a Glass-Steagall-like separation of lines of business to prohibitions on specific kinds of exclusivity. Mostly, concerns about the economic health of these markets animate legislative interest, but policymakers are also examining possible political motives behind app store decisions. Some of those inquiries are already leading to broad ideas of exposing software platforms to additional liability related to speech or other causes of action for trial attorneys.²¹ Although lawmakers are raising these concerns against a backdrop of concentrated markets, expanding antitrust law is not the optimal path to address perceived political externalities arising from app store rejections. We agree that departing from the consumer welfare standard could "cripple our economy at a time when millions are already struggling . . . and . . . undermine one of the foundational principles of our republic."²² The last thing our member companies want is for app store functions to get bogged down in decade-long antitrust litigation over what are essentially political disagreements.

Aside from these concerns, there is a fair amount of interest in examining the ability and "incentive to impede competition in lines of business dependent on" platforms.²³ This is a worthy line of inquiry with a framework that should respect the fact-driven analysis involved with identifying and stopping harms to competition and consumers. Accordingly, an important step in this process is to examine the benefits for smaller software competitors of ongoing and recent activities by software platforms that have drawn antitrust scrutiny in light of proposals to separate them from adjacent markets or restrict their functions as platforms. Those in favor of structural separation and other competition remedies in software markets seem to target two areas of perceived "gatekeeper" power: 1) control over the kinds of software that can be downloaded onto a device's operating system; and 2) control over the kinds of software that can be offered via an app store. These are important functions for our member companies, which caution against weakening them too much to benefit other competitors.

Prohibitions on exclusivity. Several state legislatures have considered or are actively considering proposals that would impose a quasi-structural restriction at the operating system level by prohibiting software platforms from acting as gatekeeper for software installed on a device.²⁴ Among other things, the bills bar operating systems from accepting software unless it is distributed exclusively through a certain app store marketplace and prohibit "retaliation" against software developers that circumvent approval through that distribution channel.²⁵ Although this may sound

²¹ Republican Leader McMorris Rodgers, Big Tech Accountability Platform, House Committee on Energy and Commerce, Memorandum (Apr. 15, 2021), available at <https://republicans-energycommerce.house.gov/wp-content/uploads/2021/01/Big-Tech-Accountability-Platform-Memo.pdf>.

²² Press Release, "Sen. Lee Sets Senate Republican Antitrust Agenda for 117th Congress," Sen. Mike Lee (Feb. 6, 2021), available at <https://www.lee.senate.gov/public/index.cfm/2021/2/sen-lee-sets-senate-republican-antitrust-agenda-for-117th-congress>.

²³ ACAL Report at 35 (citing report accompanying Antitrust Reform Act of 1992).

²⁴ See, e.g., SB 2333, 67th North Dakota General Assembly (2021), available at <https://www.legis.nd.gov/assembly/67-2021/documents/21-1044-01000.pdf>.

²⁵ *Id.*

like it lowers a barrier to entry by weakening the platforms' gatekeeper capabilities, it does the exact opposite and removes a steppingstone to the market. Moreover, the proposals' supporters are some of the largest companies on the app stores that openly seek to avoid their obligations to pay *at all* for the software platforms' developer service bundles.²⁶ The bundles include a wide variety of services for developers and, contrary to how some are characterizing them, are not just a "payment processing fee."²⁷ Specifically, those services include:

- Immediate distribution to hundreds of millions of consumers across the globe;
- Marketing through the platform;
- Accessibility features;
- Platform level privacy controls;
- Assistance with intellectual property (IP) protection;
- Security features built into the platform;
- Developer tools;
- Access to hundreds of thousands of application programming interfaces, or APIs; and
- Payment processing.

From these services, small app companies obtain easy access to a global market, the ability to offload overhead (like managing payment options and preventing piracy), but most importantly, they **can leverage consumer trust**. Consumer trust is fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition. Larger firms, meanwhile, may have the resources to put together the bundle of services and generate consumer trust in a known brand name all on their own. Therefore, they might think of the software platform bundle as less valuable to them than it is to smaller companies, which may help explain their calls for government intervention to diminish those services. They simply have less to lose and more to gain from such intervention than do App Association members and consumers.

The state bills reflect a view that takes for granted the platform functions necessary to fuel a trusted ecosystem that lives on our smart devices now. Consumers now depend on mobile devices to store their most important information, and the ability to protect that data is vital. Banning software platforms' gatekeeping function puts users' most vital data at risk. App Association member companies—much more so than the large companies selling software on the app stores—depend on strong privacy, security, and IP protections at the platform level. Therefore, proposals to require platforms to allow circumvention of these protections would harm consumers and app economy competitors alike. Platforms currently work to keep apps that violate user trust out of their stores.

In one example, some bad actors market their device-monitoring apps designed to track children's mobile device use as a way to track anyone, including adults, without their knowledge or permission. These "stalker apps" operate outside the bounds of what is allowable in app stores or

²⁶ Order Granting in Part and Denying in Part Motion for Preliminary Injunction, *Epic Games v. Apple Inc.*, Case No. 4:20-cv-05640-YGR (N.D. Cal. Oct. 9, 2020) ("Epic Games moves this Court to allow it to access Apple's platform for free while it makes money on each purchase made on the same platform. While the Court anticipates experts will opine that Apple's 30 percent take is anti-competitive, the Court doubts that an expert would suggest a zero percent alternative. Not even Epic Games gives away its products for free.")

²⁷ The full set of developer services software platforms provide includes immediate distribution to tens of millions of consumers globally; marketing through the platform; platform level privacy controls; assistance with intellectual property protection; security features built into the platform; developer tools; access to hundreds of thousands of application programming interfaces, or APIs; and payment processing.

mobile operating systems by accessing troves of personal data including location, messaging, and calls. In 2019, the Federal Trade Commission (FTC) pointed to the important function software platforms perform in its first ever action against a purveyor of stalker apps, Rentina-X. The FTC stated in its enforcement action that “the purchasers were required to bypass mobile device manufacturer restrictions, which the FTC alleges exposed the devices to security vulnerabilities and likely invalidated manufacturer warranties.”²⁸ Similarly, as the FTC has investigated and enforced against consumer protection harms on the app stores, the contemplated—and actual—remedies required the platform to act as gatekeeper.²⁹ Consumer protection efforts encounter difficulty in these marketplaces unless a platform is able to enforce the requirements it imposes on apps, including platform-level controls that prevent videogame companies from taking advantage of children's tendencies toward in-app purchasing if left unchecked.

Limitations on exclusionary conduct. To ameliorate perceived issues with self-preferencing on software platforms, policymakers are considering amendments to antitrust law that fall somewhat short of a set of nondiscrimination rules but expand liability for categories of exclusionary conduct. Again, pointing to the “incentive and ability to abuse”³⁰ their dominant position against third parties, policymakers are considering an “abuse of dominance” standard applied to software platforms (and generally).

Setting aside the particulars of existing proposals, we urge this Subcommittee to consider a couple of factors when contemplating such an expansion of liability. First, many of the actions of software platforms that have drawn antitrust criticism also have countervailing benefits. For example, Apple’s decision to require opt-in consent for ad tracking between apps caught attention in the antitrust space but has a powerful justification in privacy protection. In a stark example of privacy versus antitrust interests, the French Competition Authority recently rejected a competition complaint to enjoin Apple’s opt-in framework, noting that it is part of “Apple’s long-standing strategy to protect the privacy of iOS users.”³¹ Second, self-preferencing activities on software platforms that appear to harm some competitors often benefit others and consumers. For example, the installation of pre-loaded apps on smart devices can greatly benefit developers by enabling them to rely on a single default functionality like a camera app while making the device itself more attractive to the consumers App Association members wish to reach. Said Parag Shah of App Association member company Vēmos in a recent antitrust panel discussion, consumers “want to be able to buy [a smart device] from a store, they want to be able to turn it on, and they want it to work on the basic levels of ‘I can text someone, I can call someone, I can open up a web browser . . . I want some basic functionality.’” In this case, although the pre-installation of apps plainly advantages a software platform’s own offerings over alternative camera, messaging, or browser apps, the benefits to consumers and other competitors of doing so are equally evident.

²⁸ Press Release, Fed. Trade Comm’n, FTC Brings First Case Against Developers of “Stalking” Apps (Oct. 22, 2019), *available at* <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-brings-first-case-against-developers-stalking-apps>.

²⁹ Press Release, “Apple Inc. Will Provide Full Consumer Refunds of At Least \$32.5 Million to Settle FTC Complaint It Charged for Kids’ In-App Purchases Without Parental Consent,” Fed. Trade Comm’n (Jan. 15, 2014), *available at* <https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million>.

³⁰ ACAL Report.

³¹ Press Release, “Targeted advertising / Apple’s implementation of the ATT framework. The Autorité does not issue urgent interim measures against Apple but continues to investigate into the merits of the case,” Autorité de la concurrence (Mar. 17, 2021), *available at* <https://www.autoritedelaconcurrence.fr/en/press-release/targeted-advertising-apples-implementation-att-framework-autorite-does-not-issue>.

The considerations here weigh against tilting liability for exclusionary conduct too far such that conduct that appears to harm a certain class or classes of competitors is foreclosed or strongly discouraged, even though it is ultimately better for App Association members, competition, and consumers.

III. More Resources and Enforcement in Standards-Setting

We support recommendations to "[i]ncreas[e] the budgets of the Federal Trade Commission and the Antitrust Division."³² Antitrust cases are a highly resource-intensive undertaking, and federal enforcers are underequipped to carry out their important task.

One area we urge the Subcommittee to focus on in particular, and where the federal enforcement agencies must bring those resources to bear, is the applicability of antitrust law to standard-essential patent (SEP) abuse. In your respective states and districts, the ability for innovators to create jobs and produce cutting-edge products and services in an increasingly broad set of industry verticals depends on strong technical standards like USB, Wi-Fi, 4G, and 5G. However, in order to safeguard the continued growth and success of these key industries and to protect the consumers of their end products and services, Congress must ensure that antitrust law effectively prevents SEP licensing abuses. Incorporating a patent declared as essential into a standard typically confers market power on a SEP owner, so SEP owners make voluntary commitments pursuant to those declarations to license those SEPs on fair, reasonable, and nondiscriminatory (FRAND) terms.³³ These commitments balance the market power SEP owners obtain with the need for innovators to license the patented inventions essential to use the standard. When kept, FRAND commitments prevent anticompetitive licensing behavior by curtailing, in most cases, the ability of an SEP licensor to leverage its market power through exclusionary relief; by rewarding an SEP owner with damages for infringement of a valid patent that are commensurate with the scope of its patented invention; and by ensuring that an SEP licensor cannot discriminate between firms in the manufacturing supply chain when licensing its SEPs. The SEP context is distinct from situations where companies own unencumbered patents or are competing with each other to provide the best vertically integrated product or service. Through standards-setting, stakeholders supplant part of the competitive process with a mechanism for interoperability, necessitating closer antitrust involvement. Unfortunately, some SEP owners break their FRAND promises and engage in activities that harm competition and consumers by increasing prices, reducing the quality and variety of products and services, and diminishing innovation.³⁴ Breaking these promises implicates antitrust law, in addition to other sources of law.

Conclusion

As this Subcommittee continues its work on antitrust in tech-driven markets, we hope the perspective of small mobile software and connected device companies that leverage software platforms helps guide your work. Antitrust is rightfully a fact-intensive inquiry that must assure the


³² ACAL Report, at 403.

³³ See Brian T. Yeh, "Availability of Injunctive Relief for Standard-Essential Patent Holders," CONG. RESEARCH SERV. Summary (Sept. 7, 2012), *available at* https://www.everycrsreport.com/files/20120907_R42705_9c71ac36b1c0030af0d1bd97b53e8b7ba6fd3e73.pdf.

³⁴ *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318 (3d Cir. 2007), *available at* <https://caselaw.findlaw.com/us-3rd-circuit/1069408.html>.

competitive process serves consumers as well as possible. To that end, we support providing more resources for the two federal agencies tasked with enforcing antitrust law—they are woefully under-resourced to carry out the important and extremely costly task of stopping antitrust harms. In general, our member companies are worried that large, well-resourced companies may successfully create for themselves a new avenue for bending the market in their favor by reorienting antitrust law so that it protects certain (large, well-resourced) competitors to the detriment of smaller companies and consumers. We appreciate this opportunity to weigh in on your important inquiry and look forward to further engagement with you throughout the 117th Congress and beyond.

Sincerely,



Morgan W. Reed
President
ACT | The App Association