

December 15, 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

Dear Chairwoman Klobuchar and Ranking Member Lee,

We applaud this Subcommittee for its ongoing examination of the competitive dynamics of tech-driven markets, including the Subcommittee on Competition Policy, Antitrust, and Consumer Rights hearing, "The Impact of Consolidation and Monopoly Power on American Innovation." 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.

Your constituents undoubtedly seek answers to the questions this hearing poses. The scale of some companies, including social media, search, retail, and software platforms, has positioned them to enable access to broad marketplaces. As a result, many of them feature into our daily lives as we access everything from healthcare and education to entertainment and shopping for the perfect gift. The antitrust and antitrust-adjacent legislation pending before the Subcommittee addresses numerous aspects of the markets in which these platforms compete. Perhaps most relevant to the subject matter of the present hearing are measures like the Consolidation Prevention and Competition Promotion Act of 2021 (S. 3267), which would lower the threshold for challenging mergers. Deterring merger activity has high potential costs, especially in markets where App Association members are active. As Emily Hart from member company MotionMobs puts it, "We have a number of clients who have full intent that their exit strategy is to sell to somebody larger. . . . in the software industry, you get somebody who has just a unique enough idea that they can build something that's not currently offered elsewhere. They grow it, they catch the attention of somebody bigger, they make the deal, they sell, they get out, and then they do it again. . . . We want to see that continue."² Success for smaller companies in the app economy comes in many forms, from passing a business along to offspring, to being acquired, to offering public shares via an initial public offering. Diminishing the value of one of those options by expanding liability for acquiring firms simply closes off one of the main avenues for success—an avenue that often helps fund the next venture, as Ms. Hart alluded to in her comments.

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 COMP. POL. INT'L, "Antitrust in the Digital World: Does it Work?, Episode 3: Analyzing the Antitrust Remedies in Digital Markets" (Mar. 11, 2021), *available at* <https://www.competitionpolicyinternational.com/analyzing-the-antitrust-remedies-in-digital-markets-recording/>.

As the Subcommittee considers expanding antitrust liability for mergers, we note that just as expansion of merger liability could close down exit options for smaller app makers, nondiscrimination legislation would similarly diminish or remove distribution options for App Association members. For example, the American Innovation and Choice Act (S. 2992) is a well-intentioned measure that ultimately creates more problems for small app makers than it would solve.³ To smaller companies that opt to reach customers and consumers through software platforms, S. 2992 and similar measures are rooted in a conception of platform markets as being divided between the interests of small companies and consumers on one hand; and the interests of large platforms on the other. But that premise, among others that undergird S. 2992, as well as its proposed remedies, do not reflect reality for App Association members. In fact, App Association members demand and pay for services S. 2992 would prohibit, while posing the grave threat of a 15-percent-of-revenue penalty that would cause companies of any size to give a wide berth around the text of the law.

We hope that the Subcommittee rejects the overly simple idea that in markets with natural consolidation, large company interests are categorically incompatible with small company interests. Note that the proponents of software platform nondiscrimination are the largest sellers on the app stores,⁴ while the smallest—like SwineTech in Iowa—oppose legislation that would prohibit software platforms’ gating functions.⁵ There are a few potential consequences of S. 2992 that are worth considering, from the perspective of App Association members:

1. **S. 2992 would prohibit a range of software platform activities and offerings that App Association members pay for at lower cost than they could produce themselves.** App Association members are not necessarily well-known to consumers across the globe and both demand and pay for access to a marketplace in which consumers trust that software small companies offer is safe to download and that they meet baseline privacy requirements, despite the lack of a prominent profile. Preventing software platforms from removing bad actors by prohibiting conduct that would “materially restrict or impede the capacity of a business user to access or interoperate” with the platform would effectively stop platforms from cultivating an environment that consumers trust. Over time, this arrangement would result in higher barriers to entry for small app makers and increased costs in the form of cultivating trust on their own without the help and much lower cost distribution avenue provided by software platforms.
2. **S. 2992 would make it easier for targeted behavioral advertising-supported businesses to further the aspects of their business models that disrespect privacy expectations and choices.**⁶ For example, Meta (formerly Facebook) has indicated that it does not want to be

³ See Graham Dufault, “Antitrust and You Part 3: Nondiscrimination Provides a Platform for Me but Not for Thee,” ACT | THE APP ASSOCIATION BLOG (Nov. 12, 2021), *available at* <https://actonline.org/2021/11/12/antitrust-and-you-part-3-nondiscrimination-provides-a-platform-for-me-but-not-for-thee/>.

⁴ See Hearing before the Senate Judiciary Committee, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, “Antitrust Applied: Examining Competition in App Stores,” 117th Cong., 1st Sess., (Apr. 21, 2021) (statements of Spotify, Match Group, Inc., and Tile, Inc.).

⁵ See letter from Matthew Rooda, Chief Executive Officer, SwineTech, to the Honorable Chuck Grassley, United States Senator (Aug. 16, 2021).

⁶ See Graham Dufault, “The Great Manipulation: Are Dark Patterns Leading Congress to Help its Biggest Targets?” ACT | THE APP ASSOCIATION BLOG (Oct. 13, 2021), *available at* <https://actonline.org/2021/10/13/the-great-manipulation-are-dark-patterns-leading-congress-to-help-its-biggest-targets/>.

subject to platform-level privacy controls software platforms provide for users. Apple's App Tracking Transparency (ATT) feature, for example, asks users whether they want to be tracked across apps, and if they opt out, Meta must honor that choice. Meta responded harshly, suggesting that ATT may force the company to charge for access to its social network,⁷ which its ad business supports. Despite competing characterizations of the bill, S. 2992 would certainly presume the illegality of ATT because it would "materially restrict or impede a business user from accessing data generated on the covered platform by the activities of the business user, or through an interaction of a covered platform user with the business user's products or services." Creating a pathway for Meta to evade privacy preferences of smartphone users, as S. 2992 would do, is plainly counter to this Subcommittee's own work to prevent the harms of social media. But it is also counter to the interests of App Association members that rely on a marketplace cultivates trust by respecting and empowering consumers to enforce privacy expectations.

3. **S. 2992 would invite the proliferation of security threats like stalkerware, which would undermine the trust consumers have in the app ecosystem.**⁸ In one example, the Federal Trade Commission (FTC) recently entered a consent order with SpyFone, a stalkerware app that required its customers to sideload the apps it offered in order to avoid platform controls. But, as described above, S. 2992 includes provisions that appear to bar a software platform from removing any app, unless it can offer a rather narrow affirmative defense. Similarly, the bill creates a presumption that removing bad actors found to be surreptitiously stealing consumer data or money, like the recent Anatsa trojan horse apps,⁹ is prohibited. The overall effect of S. 2992 in this context would be to create a default presumption barring the removal of stalkerware like SpyFone or trojan horse apps like Anatsa's from a platform, unless the platform is able to overcome that presumption, likely in narrower forms, in a very expensive process of case-by-case litigation. Although some software firms may have grown large enough that their reputations stand on their own, App Association members generally depend on software platforms to bar bad actors from the marketplace so that consumers feel comfortable downloading software made by otherwise unknown app makers.
4. **S. 2992 would prohibit the removal of stolen content and the harmful activity of bad actors using stolen content as bait.**¹⁰ For example, if a fraudster specializing in stolen video content, posing as a fake Disney+, sought to have consumers sideload their video apps in order to upload malware onto as many personal devices as possible, S. 2992 would bar a software platform from removing that app and from blocking its access to device features

⁷ Kim Lyons, "Facebook and Instagram notices in iOS apps tell users tracking helps keep them 'free of charge,'" THE VERGE (May 2, 2021), *available at* <https://www.theverge.com/2021/5/2/22415824/facebook-instagram-notice-ios-apps-free-privacy-tracking>.

⁸ See Letter from Morgan W. Reed, president, ACT | The App Association, to United States Senate Judiciary Committee (Sept. 15, 2021), *available at* <https://actonline.org/wp-content/uploads/2021-09-15-ACT-Antitrust-and-Spyware-FINAL.pdf> (discussing the consequences of requiring software platforms to allow sideloading in the stalkerware context).

⁹ Dan Goodin, "Google Play apps downloaded 300,000 times stole bank credentials," ARSTECHNICA (Nov. 29, 2021), *available at* <https://arstechnica.com/information-technology/2021/11/google-play-apps-downloaded-300000-times-stole-bank-credentials/>.

¹⁰ See Debbie Rose, "Sideloaded Apps: Mandating That Software Platforms Allow It Will Cost Copyright Owners and Their Customers," ACT | THE APP ASSOCIATION BLOG (Sept. 17, 2021) *available at* <https://actonline.org/2021/09/17/sideloaded-apps-mandating-that-software-platforms-allow-it-will-cost-copyright-owners-and-their-customers/> (discussing the consequences of requiring software platforms to allow sideloading in the copyright context).

or personal information. The presumption of illegality applies even if Disney filed a takedown notice under Section 512 of the Digital Millennium Copyright Act. Although the software platform could theoretically overcome the presumption by showing the narrow affirmative defense applies, the legal hassle and expense is more likely to deter a platform from squeezing itself between the two sets of obligations just to help out the smallest app makers. As a result, our member companies would lose a key service in the form of removal of content bad actors steal from them and the maintenance of a trustworthy marketplace.

5. **S. 2992 could deter software platforms from providing the accessibility features App Association members use to serve clients and consumers with accessibility needs.** As Betsy Furler of App Association member For All Abilities describes, “Apple’s App Store has built-in accessibility features, developer tools, and [application programming interfaces] for everything from speech and Guided Access to VoiceOver and display customization. Features like these ensure that the app works with other accessibility features built into the operating system and are crucial to creating apps for people of all abilities.” The provision of these wraparound services may run afoul of a couple of S. 2992’s provision, including that prohibition on conduct that would “unfairly preference the covered platform operator’s own products, services, or lines of business over those of another business user . . . in a manner that would materially harm competition on the platform.”¹¹ Certainly, a software platform offering its own Guided Access feature as part of its bundle of developer services provides a clear advantage for the platform’s own offering over a potential competitor offering such a feature on a standalone basis for developers. Doing so might even “harm competition on the covered platform” because other would-be entrants are deterred by its success and adoption. If the offering meets the definition of prohibited conduct, it would be a shame because software platforms’ accessibility offerings are popular and even provide important connective tissue to make software of all kinds more accessible. Put differently, the offerings, as part of the developer services bundle, apparently benefit the platform’s consumers on both sides of the market (both end users and app makers) as well as competition, especially in markets defined more broadly than only the offerings on a single platform—a market definition courts continue to reject.¹²

¹¹ ACT | The App Association, “Developed: The App Economy Tour – Houston, TX,” ACT | THE APP ASSOCIATION BLOG (Sept. 14, 2019), available at <https://actonline.org/2019/09/14/developed-the-app-economy-tour-boulder-co-2-2/>.

¹² See *Epic Games, Inc., v. Apple Inc.*, Case No. 4:20-cv-05640-YGR (N.D. Cal. 2021), at 131.

As the Senate Judiciary Committee 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. In general, our member companies are worried that large, well-resourced companies may successfully bend the market in their favor by reorienting antitrust law so that it protects larger competitors to the detriment of smaller companies and consumers. We urge Congress not to accede to these demands because doing so would create unacceptable risks to the app ecosystem and the smallest app makers would suffer the most as a result. 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,

A handwritten signature in black ink that reads "Morgan Reed". The signature is fluid and cursive, with the first name "Morgan" and the last name "Reed" clearly distinguishable.

Morgan W. Reed

President

ACT | The App Association