March 31, 2025

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

The Honorable Cory Booker
Ranking Member
Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
United States Senate
Washington, District of Columbia 20510

RE: Subcommittee hearing, "Big Fixes for Big Tech"

Dear Chairman Lee and Ranking Member Booker,

We appreciate your leadership in examining how proposed remedies (and alleged antitrust liability) for conduct in digital markets would affect competition and consumers. ACT | The App Association represents an ecosystem valued at approximately $1.8 trillion domestically, supporting 6.1 million American jobs.[1] App Association members are innovators that create the software bringing your smart devices to life. They also make the connected devices that are revolutionizing healthcare, agriculture, public safety, financial services, and virtually all other industries.

As some of the leading consumers, developers, and adapters of digital services across a range of markets, the App Association's members have a major stake in how antitrust enforcers and regulators approach these markets. Some of the world's most well-resourced competitors have succeeded in pushing enforcers to declare their rivals' curated online marketplace (COM) management practices illegal. However, as giants like Epic Games and Y Combinator battle in courts and before policymakers against their even larger nemeses, App Association members are fighting against proposed remedies to disintegrate and strip down COMs. Doing so would reduce distribution costs for the world's largest companies, but unfortunately, it would also pull up the ladder and diminish key service offerings for App Association members.

I. *Epic Games v. Google, LLC* – Google Play

Emblematic of how tech antitrust remedies can directly harm small business developers are the remedies adopted in the permanent injunction following a liability determination in *Epic Games v. Google*.[2] Several issues stand out with the permanent injunction, but most worrisome for the Subcommittee's purposes is a mandate for all app developers' work to be accessible to any third-party store on Android. Notably, neither the App Association nor any of its members were party to this case. And yet, all of our members would be forced into a

[1] https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL-1.pdf.
[2] https://storage.courtlistener.com/recap/gov.uscourts.cand.364325/gov.uscourts.cand.364325.702.0.pdf.

world where their apps are no longer their own property, but instead freely available to any third-party store forced into existence by the same injunction. Instead of having complete control over where their apps are sold and distributed, plus the branding, and user experience inside the app, App Association members would be allowed an after-the-fact objection when they appear on the marketplaces of intellectual property thieves or porn empires.

Unfortunately, in treating app developers as mere products on a shelf rather than independent businesses, there are downstream effects to app developers' prospects beyond the immediate deletion of autonomy. For example, if a third-party app store integrates poorly with the Play store ecosystem, users might experience buggy downloads, mismatched app versions, or even malware issues. When these problems arise, the small developer—not the app store—will likely bear the blame, damaging their reputation and eroding user trust. Thus, the remedies adopted in this case likely go beyond legally permissible bounds and would dramatically affect the entire ecosystem, almost all of which was not a party to the suit.

Nowhere is it truer than in this context that when judicial power is used to reshape markets to limit one player's dominance, there are unintended consequences for everyone in the ecosystem. For these reasons, we highlighted these concerns in an amicus brief[3] and we urge that the Subcommittee carefully evaluate proposed remedies like these as it conducts ongoing oversight of antitrust enforcement in digital markets.

II. *United States v. Google, LLC* – Google Search

In October 2024, the United States Department of Justice (DoJ) filed its proposed remedy framework[4] and then initial proposed final judgment (PFJ)[5] following a federal judge's finding that Google monopolized the market for search services. In March 2025, DoJ filed an updated PFJ,[6] dropping some of the proposed remedies and retaining others. In its updated PFJ, DoJ continues to ask for broad and deep interventions to address the liability determined in Judge Amit Mehta's opinion, and they're worth analyzing in context. DoJ cites the *Microsoft* case from the late 1990s and early 2000s to support its proposition that it can prevent even the unlikeliest of potential anticompetitive conduct with its proposed measures. This is a bit ironic, however, since the *Microsoft* example illustrates most vividly that DoJ's proposed remedies in the present case are not a great fit. And we should know. The App Association, founded in 1998 as the Association for Competitive Technology (ACT), advocated vigorously against the more far-reaching proposed remedies (many of them from competitors) against Microsoft because of how they would affect small businesses' ability to access key technologies and compete in the relevant markets.

[3] https://actonline.org/2024/12/05/act-the-app-association-files-amicus-brief-in-epic-v-google-case-in-support-of-googles-appeal/.
[4] https://s3.documentcloud.org/documents/25196894/doj-filing-re-google-antitrust-remedies.pdf.
[5] https://www.justice.gov/atr/media/1378036/dl.
[6] https://www.justice.gov/atr/media/1392601/dl; https://www.justice.gov/atr/media/1392606/dl.

Better, but Still Concerning. In its updated PFJ, DoJ has narrowed down its proposed structural remedies, proposing only the spin-off of Chrome instead of other units as well; and it also backed off of its proposed blanket prohibition on investment in AI markets. Instead, DoJ seeks "Prior Notification" before Google seeks to "acquire any interest in, or part of, any company; enter into a new joint venture, partnership, or collaboration; or expand the scope of an existing joint venture, partnership, or collaboration, with any company that competes with Google in the GSE or Search Text Ads markets or any company that controls a Search Access Point or GenAI Product."[7] Thus, instead of an outright ban on Google investing or taking similar competitive measures in adjacent markets, DoJ now proposes a sort of prior review of any such measures, which could still significantly chill competition from Google in these adjacent markets.

Overall, there remain some concerning concepts in the updated PFJ and they look a little bit like the ideas dreamed up by competitors during the Microsoft litigation process. But in this case, the proposals come from the putative adult in the room, DoJ, as it presses the cases of competitors rather than small businesses and consumers. For example, DoJ continues to propose that Google provide broad access to its search index. Requiring availability of this vast dataset at marginal cost to any "Qualified Competitor" creates privacy and security risks and seeks to commoditize a service that not all competitors may want to see commoditized.

While DoJ may earnestly seek better competitive prospects for other companies in this lawsuit, disintegrating and closely scrutinizing future investment by companies that own COMs would harm small business prospects in the app economy. Small businesses must be able to tap the global markets, seller and developer services, and deep wells of consumer trust that large managed marketplaces provide. They further demand that the artificial intelligence (AI) tools and other building blocks for their own offerings benefit from significant investment and competition from those best positioned to do so in capital-intensive input markets. With the benefit of hindsight, viewing the DoJ's proposed remedies through the historical context of the *Microsoft* case helps us all evaluate how its grand plan would undermine the economic dynamism it seeks to protect.

This is not to say the online marketplaces are perfect or always going to do the right thing. However, there is reason for concern that COMs will be less responsive to and able to meet App Association member demands in a post-Google remedies world, if DoJ gets everything it wants.

Forecasting the Future. The *structural* proposal to split Chrome off from the rest of the company, for example, underappreciates that Chrome underlies complementary pieces of the Google ecosystem. As International Center for Law and Economics' Geoff Manne notes, "[Chrome is] deeply intertwined with Google's development infrastructure, security and anti-malware tools, and revenue model (search ads and related services). These synergies allow

[7] https://www.justice.gov/atr/media/1392601/dl.

Google to invest heavily in Chrome—funding rapid iteration, security patches, speed improvements, and experimental features like privacy sandboxes. It also allows Chrome to remain free for users while leveraging revenue from Google Search deals."[8] Going with that nuclear option seems rooted partially in a desire to exact revenge on Google for doing so much better than rivals but also to serve a highly speculative notion that continued control of Chrome will result in Google finding brand new ways of advancing its search offering in anticompetitive, rather than procompetitive ways. Thin threads like these should not be a basis for chopping up a company, especially when the integrated nature of its offerings is a primary source of their value.

In order to follow through on DoJ's proposed "flexible" administrative approach to the *behavioral* remedies, Judge Mehta would have to identify a business practice as fitting into the category of carving a "novel path to preserving dominance,"[9] perhaps in an adjacent market that is not searchable. How would the court, guided by DoJ, do this? In practice, the remedy would likely push the court to view any of Google's significant investments in adjacent markets as presumptively anticompetitive and prohibited, creating an exceptionally myopic, anti-consumer, and anti-small business outcome. Adjacent markets to search, such as the development of generative AI, are resource-intensive and, therefore, will naturally exhibit concentration when economic conditions are healthy (as they are now). Ensuring that competitors, be they well-resourced like Google or smaller startups, have a strong incentive to move into new markets should be among the highest priorities for antitrust lawyers and economists. Otherwise, the incumbents in those new markets will not face *credible* challenges, and competition will not yield the benefits it should.

Small businesses are perhaps the most important consumers of various vertical levels of generative AI, from the apps themselves down to computing power, data, and foundation models. Their ability to compete with larger rivals in their own markets will depend at least in part on robust investment in the various vertical links in the chain by firms with the know-how and resources to do so in generative AI. Casting a substantial portion of this investment under a specter of enforcement uncertainty would undermine small companies' competitive prospects. In proposing its "flexible" behavioral remedies, DoJ's foray into prophesy could bring about the possible AI dystopia it tries to ascribe to Google's success in search.

Lessons from the Past. In November 2001, DoJ and Microsoft reached a settlement on the final antitrust remedies[10] (the revised proposed final judgment or RPFJ) that would bind Microsoft in the coming years. Pursuant to the Tunney Act, DoJ opened up its RPFJ to public comment, unleashing a flood of "helpful" suggestions from Microsoft's competitors to more completely eliminate Microsoft's ability to compete in their markets. DoJ's succinct rejection of these entreaties stands in stark contrast to the Department's current posture: "The most

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[8] https://truthonthemarket.com/2025/03/04/avoiding-misguided-remedies-in-the-google-search-antitrust-case/.

[9] https://www.justice.gov/atr/media/1392606/dl.

[10] https://www.justice.gov/atr/case-document/file/504111/dl.

persistent complaint is that the fencing-in and restorative provisions are not absolute prohibitions on competitive activity by Microsoft or absolute requirements that Microsoft surrender its technology for the benefit of competitors. . . . *Protecting competitors from legitimate competition from Microsoft is not a goal of public antitrust enforcement*"[11] (emphasis added).

We fully agreed with DoJ's dismissal of competitor demands to turn Microsoft into a public utility and eliminate its competitive overtures in other markets. In a Senate Judiciary Committee statement for the record,[12] specifically taking issue with an alternative proposed settlement from a handful of state attorneys general, ACT argued that "requiring that Windows 'must carry' Java does nothing for consumers who can download it with one click and only serves to thwart competition by giving Sun Microsystems a special government-mandated monopoly with which other Middleware companies will have to compete. . . . [R]equiring Microsoft to port its Office product to Linux is tantamount to making it a 'ward of the state.' There are already several office productivity suites available to Linux users, and some are even free." We opposed open-ended mandates for Microsoft to deal with rivals because they would eliminate Microsoft's investment and innovation incentive, a necessary precondition for its continued contributions in adjacent markets that have demonstrably benefited small businesses that use their enterprise platforms, tools, and services.

In the present Google search case, DoJ's proposed open Search Index access regime also evinces an intent that the remedy be a form of forced dealing with rivals. Such a requirement would typically flow from a type of liability that does not apply in this case and is a remedy antitrust law does not often dispense. And for good reason. Forcing rivals to deal with one another, all else being equal, tends to lead to restricted output, higher prices, or both—the opposite of what antitrust law and policy seek. Small business users of Google search tools often find them most effective because they enable accurate and powerful advertising services. Moreover, now that generative AI tools are competing directly with traditional search, the market will benefit from continued investment in ad networks that complement or are embedded in them. Stripping core search assets for parts and effectively removing Google's ongoing incentive to outdo its rivals would diminish the end product for small businesses using those tools.

What Can the Past and Present Teach us About the Future? As our 2001 hearing statement noted, Microsoft's competitors stoked fears that it would enter adjacent markets like "instant messaging and digital media."[13] To prevent this, their proposed remedies mirrored the general approach of DoJ's Google plan, to give the court carte blanche flexibility to smack down any future play into an adjacent market. With the benefit of hindsight, DoJ was absolutely right to take our advice in 2002 and reject calls to give the court free rein to stop competition from

[11] https://www.federalregister.gov/documents/2002/03/18/02-5354/united-states-v-microsoft-corporation-notice-of-availability-of-public-comments-memorandum-of-the.
[12] https://www.govinfo.gov/content/pkg/CHRG-107shrg82938/html/CHRG-107shrg82938.htm.
[13] https://www.govinfo.gov/content/pkg/CHRG-107shrg82938/html/CHRG-107shrg82938.htm.

Microsoft. The fears of Microsoft's dominance in instant messaging, digital media, "personal digital assistants (PDAs), cell phones, set-top boxes/game consoles, web terminals and powerful servers that connect them all" were unfounded. To the extent these markets exist in the forms they were contemplated 20 years ago, Microsoft has generally not been a meaningful competitor, with the exception of gaming consoles. Even in that market, Microsoft is not dominant and is even striving for access to mobile platforms to sustain its gaming business.

Most importantly, the decision in *Microsoft* not to mandate nearly unfettered open access and eliminate competition in adjacent markets was a good thing for small businesses. Microsoft continued to innovate on its core operating system and enterprise software while also building a robust and dynamic set of cloud services that small businesses everywhere rely on, especially those in software and connected device markets. All of this tells us that the future is hard to predict, especially in dynamic industry sectors. Small businesses in the app economy stand to gain immensely from Google's continued investment and resource allocation to emerging markets like those around generative AI. The court stands at a critical phase as it considers DoJ's proposed remedies and should appropriately interpret the dynamic characteristics of the relevant markets to mean it should err on the side of consumers benefiting from evolving market forces, rather than eliminating competition from Google.

III. *United States v. Apple* – Challenging iOS

On March 21, 2024, DoJ joined 16 state attorneys general to sue Apple for monopolization of the "performance smartphone" (or if the court doesn't buy that, the "smartphone") market.[14] The complaint includes five counts of alleged monopolization that superficially appeal to consumer welfare, the current legal standard. In this regard, DoJ appears chastened by Epic Games' resounding loss in the 9th Circuit, seemingly resigned to the notion that the most distant stars are out of reach. However, the framework of the lawsuit ultimately reveals exactly the kind of effort to protect specific competitors the federal court system generally rejects. More relevantly for developers, each count would deprioritize small app companies' interest in the managed marketplaces that competition itself has produced. Similar to the Federal Trade Commission's (FTC's) recent campaign[15] aimed at marketplace management[16] and the European Union's Digital Markets Act adventure,[17] DoJ is challenging the basic steps Apple takes to protect privacy, security, and the user experience to differentiate the iPhone from competitors like Samsung, Google, and others abroad. If successful, the complaint could also knock down the fundamental measures curated online marketplaces (COMs) in general take to distinguish their distribution services from rival storefronts.

[14] https://www.justice.gov/d9/2024-03/420763.pdf.
[15] https://actonline.org/2023/10/05/issue-brief-why-app-developers-care-about-ftc-v-amazon/.
[16] https://actonline.org/2023/12/11/deceptive-advertising-the-ftc-has-trouble-backing-up-its-claims/.
[17] https://actonline.org/2024/02/12/buyers-remorse-app-giants-reap-what-they-sow-in-europe/.

Each count selects and advances the specific demands of Apple's extraordinarily well-resourced competitors. In doing so, the counts seek remedies that subvert the iPhone's long-standing features that stem the tide of security, privacy, and other consumer protection problems on smartphones. This function is exceedingly overlooked and taken for granted—but crucial to sustain a marketplace that works for smaller app companies.

"Super Apps." The competitors this count is designed to benefit include companies like Meta and X (formerly Twitter). These companies have complained that the App Store blocks their plans to develop their own versions of "super apps," an undefined term in itself. They appear to argue that developer guidelines somehow restrict them from enabling a WeChat-style experience—with features like financial services, ride-hailing, and food delivery—in the United States. DoJ reflects this grievance in its complaint, suggesting that Apple is threatened by "enormously popular super apps in Asia" [para. 66]. WeChat is likely the app in question, as it serves 1.08 billion monthly average users in China or around 80 percent of China's entire population.

The stated problem is confusing for two reasons: 1) the App Store currently carries WeChat, and 2) other super apps are also not disallowed from the major app stores. Thus, this count is swinging at a straw man. DoJ's purpose here appears to be much more in the vein of taking Meta's and X's sides as they seek free and unconstrained distribution on iPhones. Enforcers should not be pursuing goals like this since the App Store's guidelines in no way actually restrict these companies' ability to add financial services, ride-hailing, or other features to their apps. The obstacle these companies face in reality is that it is exceptionally costly to begin or buy ride-hailing businesses, financial service offerings, and other elements that might constitute a WeChat-style super app. In those separate markets, the United States already has formidable competition from entities that have succeeded in serving consumers, making it relatively more challenging for a social media platform to enter those markets than it appears to have been for WeChat in China.

With the lack of any potential benefit derived from this count in mind, its costs would be a completely unnecessary increase in risks to privacy, security, and other consumer protection harms the developer guidelines are there to prevent. DoJ presents no clear antitrust justification for taking social media platforms' side in their dispute with Apple, especially given their comparable bargaining power, but more importantly, their comparatively *much worse* track records on privacy and security. Consumers are comfortable downloading software from smaller, relatively unknown companies—especially those that collect sensitive personal information—in large part because they adhere to app store guidelines, which the app stores enforce. Mandating that these guidelines be unenforceable with respect to social media firms' demands would obviously create a giant loophole for bad actors, especially since app stores have historically constrained social media's privacy and security excesses.[18]

[18] https://actonline.org/2022/04/26/antitrust-and-privacy-part-1-the-market-for-privacy-on-mobile-platforms/.

Cloud Streaming Apps. The specific competitors DoJ seeks to benefit on this count are the big gaming companies. A notable problem with this count is the same as the above: cloud streaming games are not disallowed on the major app stores. Thus, here again, DoJ's intervention creates and tries to knock down a straw man. The lawsuit takes place in the midst of negotiations between game developers and the App Store over the specific form of cloud streaming certain companies want the app stores to carry—and takes the big game developers' side. The justification for this count also appears to put the largest companies' interests before those of small app companies that derive relatively more value from app store management. Not all game developers are keen to observe developer guidelines or federal children's privacy laws and, if unencumbered by app store guidelines, could certainly take advantage. DoJ's insistence that the App Store bend to the demands of gaming companies is, again, an attempt to convince the court to impose a duty to capitulate on Apple (but not the big gaming companies). Inexplicably, DoJ comes down in favor of flattening the App Store's demands, which have generally frustrated certain gaming apps' efforts to circumvent App Store guidelines to further ongoing privacy and security abuses.[19]

Digital Wallets. The specific competitors DoJ seeks to benefit on this count are big banks like Chase, Wells Fargo, and Bank of America. Central to its claim here is that Apple charges banks 0.15 percent for transactions executed through Apple Pay on iPhones. DoJ argues that charging card-issuing banks for swipe fees is anti-competitive, even though thousands of banks make their cards available on the Wallet app. Simultaneously, DoJ argues that by limiting access to the near field communication (NFC) chip and carefully limiting credential management, Apple closes off credential management software and NFC processing provided by other companies on iPhones. As the complaint notes, Apple steers consumers to make Apple Wallet the default credential management tool, including for digital car keys. These measures tend to make the consumer experience more seamless and user-friendly, meaning they are examples of competition with other mobile platforms. Meanwhile, imposing privacy and security requirements in return for access to sensitive device features like the NFC chip and credential management on iOS is plainly pro-competitive. Thus, if DoJ succeeds on this count, the resulting requirement for Apple to open its NFC chip and credential management would introduce new privacy and security risks, specifically with some of the most sensitive hardware and software on iPhones.

Messaging. The specific competitors DoJ seeks to benefit on this count are large messaging app makers, including Meta. DoJ argues that imposing restrictions on messaging services and smartwatch makers violates antitrust law. Notably, iMessage is not the global leader in end-to-end encrypted (E2EE) messaging; that distinction belongs to WhatsApp, which is owned by a company DoJ is siding with in this complaint, Meta. On DoJ's allegation that Apple restricts access to rich communication service (RCS), a messaging standard, Apple has already rolled it out. Given that RCS standard developers are still ironing out kinks and

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[19] https://apnews.com/article/technology-business-media-courts-apple-inc-aa675287c810657b9f9293c652500f67.

that the dominant messaging services globally are not owned by Apple, it is not clear at all how a court order for iPhones to support RCS for all messaging would be better for competition or consumers than how messaging on iPhones has developed in free market conditions.

Smartwatches. The specific competitors DoJ seeks to benefit on this count are Apple's rival smartwatch makers. It is obvious that maintaining a closed posture to third-party wearable devices has privacy and security benefits. Strava provides a stark example[20] of why consumers should have a choice of smartphones that, by default, limit access by wearables to track sensitive physiological and location data. Smartwatches and wearables are exceptionally important rails on which small digital health companies are and will be, building their products and services. The security and privacy protectiveness of these devices and the software that runs them is the number one factor in whether or not consumers actually adopt them at the scale and to the extent necessary for them to meaningfully enable preventive measures and chronic condition management. If—whether for competition or other reasons—the federal government decides to eliminate the closed model that truly enables this consumer trust, the alternative is for companies to monetize that data. This option involves selling the customer's data, which is great if it means the product is cheaper or free, but (as the headlines have revealed) it often comes with dubious privacy and security practices. Such a result would rob consumers of the currently more popular option for their digital health and condemn the FTC to many, many more rounds of whack-a-mole[21] with digital advertisers and health data.

Just like with some of the Google remedies discussed above, the antitrust theory DoJ is chasing here is for a court to impose on one competitor a "duty to deal" with the other competitor. Again, there is generally no duty for competitors to deal with one another and, in fact, it is often potentially anticompetitive, as collusion is separately prohibited by antitrust law.

Crucially, DoJ wants the court to buy its characterization of Apple as having first "invited third-party investment on the iPhone *and then* imposed tight controls on app creation and app distribution" [section header above para. 41, emphasis added].[22] If this were true, DoJ could have an incrementally stronger case to make, but it is not. Apple never represented to the marketplace that its messaging service, operating system, or smartwatch support would be available to everyone. In fact, third-party apps were only allowed on the platform from the beginning of the App Store subject to tight controls,[23] in order to facilitate a consumer-friendly and Apple-curated experience. Fast-forward to today, and the support page plainly

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[20] https://www.lemonde.fr/en/pixels/article/2024/10/27/strava-the-exercise-app-filled-with-security-holes_6730709_13.html.
[21] https://www.ftc.gov/legal-library/browse/cases-proceedings/ftc-v-kochava-inc.
[22] https://www.justice.gov/d9/2024-03/420763.pdf.
[23] https://www.wired.com/2013/07/five-years-of-the-app-store/#:~:text=On%20July%2010%2C%202008%2C%20Apple,the%20history%20of%20personal%20computing.

states that if you're seeing a green bubble in your text messages, it could be because the person you sent the message to "doesn't have an Apple device."[24] No reasonable person could call this a bait-and-switch. For living examples of the conduct DoJ ascribes to app stores, see instances where standard-essential patent (SEP) holders promise to license *standardized* technologies on terms that are fair, reasonable, and non-discriminatory (FRAND) and then disregard those promises, seeking injunctions against willing licensees (an area of activity that has seen, and should continue to see, enforcement under U.S. competition laws). At no point did Apple represent to the market that its operating system or App Store are standardized technologies subject to open access, and that is because the product itself is in large part exclusivity and curation. That product has in turn created massive value for small app companies looking to tap global markets.

In Summary. By seeking the homogenization of distribution across the mobile ecosystem, DoJ's complaint is an attempt to create pantomime versions of competition on top of those distribution options. In doing so, the arguments Apple and Google make to attract consumers to curated, managed marketplaces are suffocated in exchange for much less compelling markets-in-a-DoJ-created-box relegated to platforms that are less effective because they're no longer allowed to compete. Exhibiting DoJ's fundamental hostility to app stores competing on the merits, one of the smoking guns comes from an internal presentation in which an Apple executive worried that bending to Meta's demands could lead to an "[u]ndifferentiated consumer experience . . ." [para. 66].[25] And how isn't this an example of competing on the merits? It is precisely this *differentiated experience* that small app companies don't want to sacrifice in order for WeChat-style Meta to receive its own government-mandated special treatment on the App Store.

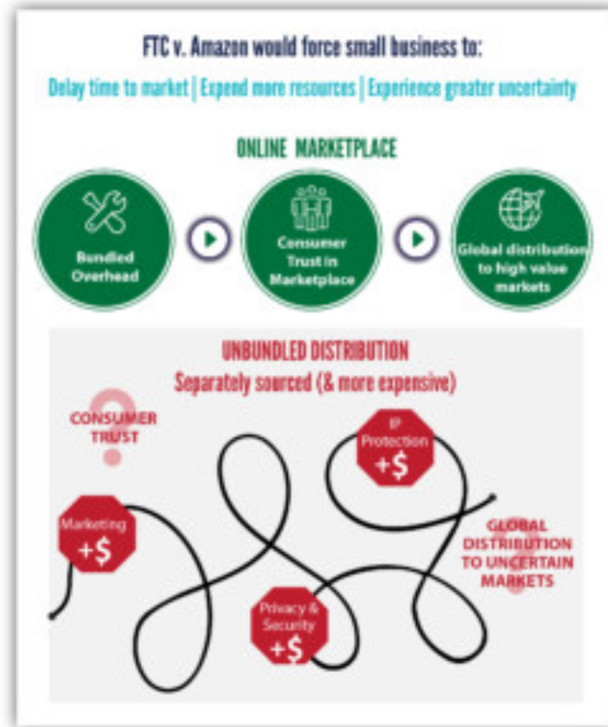
This is a world in which large, well-resourced interests, both on and off the app stores—like Meta, Epic Games, and the large banks—receive a short-term benefit, which in all likelihood eventually fades as platforms are mandatorily unresponsive to their demands. It is also a world in which small app companies can expect fewer choices, costlier distribution, and a far harder-to-acquire customer base.

IV. *FTC v. Amazon* – Challenging low prices and two-day shipping

In any federal antitrust claim, the plaintiff generally has to a) define the relevant market(s), and b) show that the defendant has the requisite market power in those markets to c) harm consumers (*not competitors*) through distortions to competition itself, and that d) the defendant did in fact cause those harms. This is a high bar, and for good reason, because Congress doesn't want federal agencies to punish companies for being successful. A noteworthy aspect of this case is that it does not try hard to meet this bar, and yet in the unlikely event the FTC succeeds, there will be serious negative consequences for small businesses that leverage online marketplaces. Specifically, creating a precedent that it is

[24] https://support.apple.com/en-us/105087.
[25] https://www.justice.gov/d9/2024-03/420763.pdf.

illegal for COMs to offer wraparound services to sellers—and that it is presumptively illegal to take steps to make the marketplace more attractive to consumers—would eliminate many of the most important integrated benefits COMs offer small companies. In turn, this could effectively close off the streamlined, integrated distribution option and force small companies to distribute via the unbundled route, which can take more precious time, cost more, and involve much more uncertainty.



In this case, the FTC is challenging two of Amazon's practices, among others:

- *Fast Shipping Commitment.* The FTC claims that Amazon unlawfully raised prices and artificially eliminated competitors in the relevant market by requiring Prime-eligible sellers to commit to 2-day shipping, which the FTC says effectively requires Prime-eligible sellers to use Fulfilment by Amazon (FBA).

- *Low-Price Guarantee.* The FTC claims that Amazon unlawfully raised prices and artificially eliminated competitors in the relevant market by only featuring sellers' items if they guarantee their lowest price for that item on Amazon.

Fast Shipping Commitment. On this count, the FTC takes issue with Amazon setting a requirement for Prime-badged sellers to commit to 2-day shipping. The FTC claims that because the most viable option for sellers to meet this is by using Amazon's own marketplace fulfilment service, FBA, it is essentially coercing sellers into accepting FBA along with plain distribution on the marketplace. This argument is unlikely to succeed

because a) Amazon doesn't require FBA for distribution on the platform or even the Prime badge and b) the ability for small sellers to use FBA and actually commit to 2-day shipping anywhere in the United States is undeniably good for competition and consumers. Realistically, most sellers, especially the smallest ones, will need to use FBA, which is able to reliably meet that 2-day shipping commitment. This is a high bar and naturally (without distortions in the market), the ability to ship to anywhere in the United States within two days is an exceedingly expensive proposition. The fact that Amazon has invested prodigious amounts of capital in its shipping network, including warehouse and distribution space, to be able to offer previously impossible shipping commitments for small companies is not anticompetitive. In fact, it's one aspect of a vertically integrated bundle that has accelerated success and growth for small companies.
Small companies that make mobile software benefit from marketplace services like these just as much as sellers of physical goods and services on Amazon's retail marketplace. For example, the major mobile app stores provide developer services for app makers, including access to application programming interfaces (APIs), accessibility tools, built-in privacy and security controls, built-in marketing through search, ratings, and comments from users, and developer tools. The fact that the online marketplaces design these tools with *end consumers* in mind just as much as app makers is a good thing. Consumer trust in the app stores and retail marketplaces that provide those services benefits small companies selling through them because it keeps those consumers coming back to marketplaces where they can be found. Therefore, baseline security, privacy, and quality guarantees are not only pro-consumer—they are also rather pro-small company. Perversely, the FTC claim—if successful—would require small companies to take the more circuitous, costlier, and less certain distribution path that exists now as the "unbundled" alternative to the major online marketplaces.

Low-Price Guarantee. On this count, the FTC's argument is that by requiring any seller seeking to have Amazon feature its offered product must guarantee the lowest price for that item on Amazon, it could be seen as requiring higher prices to be offered on other platforms. The problem is that if Amazon allowed sellers to offer higher prices on its marketplace and *still* agreed to feature those items, the seller would be essentially advertising for free on Amazon's platform[26] and convincing consumers to buy the product on another platform at a lower price. With the low-price guarantee, Amazon is taking steps to make its own platform a more attractive place to shop, and that is an example of competing vigorously with other marketplaces. If Amazon were forced to promote sellers' higher prices, in short order, Amazon's value to sellers generally would start to erode as consumers get wise to the scheme.

The arithmetic is simple in this case. The natural, smaller number of high-value marketplaces on which to sell—where sellers know consumers want to shop—benefits smaller sellers more than larger sellers. While there are valid concerns with concentration in

[26] https://www.mercatus.org/research/policy-briefs/california-antitrust-lawsuit-evading-consumer-welfare-standard.

any market, at least some degree of natural concentration in the market for marketplaces—that is, online app stores or retail marketplaces—tends to benefit the smallest sellers. For sellers, having at least a couple options is essential, especially where those marketplaces have meaningful differentiation.[27] However, their prospects begin to dwindle rapidly when they must bargain with several different marketplaces to reach *the same number* of high-propensity consumers they could previously reach on one marketplace or a handful of them. An artificially high number of marketplaces where consumers would not want to shop—if not for government intervention—adds costs that are disproportionately borne by smaller, younger companies. This is true whether you are a small company selling candles or a small company that makes augmented reality apps for smartphones. Both kinds of companies need to sell where consumers are, and the more transaction costs and friction the government adds with lawsuits like these, the worse off smaller companies are across industries.

App Developers and COMs. It's not anticompetitive for Amazon to have created a vast shipping fulfillment network that can commit to 2-day shipping for Prime users. That's pretty remarkable, and the fact that small businesses can leverage it to reach their customer base makes it worth protecting. Similarly, the fact that Amazon makes it more attractive for consumers to buy from Amazon benefits small sellers, who need to assure their investors that they can reach high-propensity consumers. The flexibility and *incentive* to maintain an online store that consumers want to use is crucial for the smallest businesses that leverage online marketplaces. The FTC's case against Amazon threatens to increase the smallest companies' costs to market by increasing overhead and transaction costs and degrading the value of managed marketplaces as a distribution option.

What if the Neo-Brandeisians Kill COM Management? If COM management is illegal, there are some hints as to what kind of online marketplace would receive the FTC's golden stamp of approval. The most vivid illustration materialized just when reports emerged late last year that the FTC had relied on interviews with Pinduoduo-owned Temu to build its pricing claim against Amazon.[28] Temu's complaint to the FTC was that Amazon would not allow it to raise its prices on Amazon and still benefit from being featured. If Amazon let sellers get away with doing this, consumers would quickly get wise to the scam and look elsewhere. This would make Amazon a less attractive place to do business, especially for small businesses that want assurance that their distribution channels provide access to high-propensity consumers. But the real problem is the FTC's lawsuit, by favoring Temu and seeking to restrict the marketplace management practices Amazon uses, sends the clear message that *Temu's model is legal—while Amazon's model is illegal***.** This would force small businesses to rely more on Temu and marketplaces like it that do not take steps like guaranteeing low prices and providing two-day shipping fulfillment. Bare-bones distribution channels are fine, and small businesses want them as an option—however, the evidence

[27] https://actonline.org/2022/02/02/on-open-app-markets-act-sponsors-make-progress-but-the-bill-still-diminishes-developers-prospects-on-app-stores/.
[28] https://www.theinformation.com/briefings/ftc-questions-temu-about-amazon-pricing-policy.

overwhelmingly shows that they *do not want them to be the only option.* Compounding the issue, Temu does not prioritize privacy or security at all and was actually caught spying on consumers in a major scandal a couple of years ago.[29] Forcing small businesses to rely on less privacy-protective marketplaces, especially those based in countries where companies are partially owned by government agencies that want unfettered access to data about Americans, is unwise from a consumer protection and national security standpoint. But it also defeats any antitrust interest in ensuring access to high-quality, cost-effective options.

V. Conclusion

In every antitrust case, well-resourced competitors are eager to suggest remedies that would fit their specific business models, and it can be attractive to simply go along with their demands. After all, many of them have compelling stories about how they failed to extract good terms or fair deals from the antitrust defendant in question. But enforcers must look beyond the entreaties of *specific competitors* and understand how proposed remedies (and new forms of proposed liability) would affect the broader ecosystem, including small business competitors and individual consumers. App Association members have much to lose with ill-conceived antitrust remedies in dynamic markets and we hope that these considerations inform your review of the antitrust enforcers' work in digital markets.

Sincerely,

Graham Dufault

General Counsel
ACT | The App Association

[29] https://actonline.org/2023/04/07/they-did-what-brazen-and-skullduggerous-spyware-attacks-add-to-the-case-against-antitrust-bills/.