

January 18, 2022

The Honorable Chuck Schumer  
Majority Leader  
United States Senate  
Washington, District of Columbia 20510

The Honorable Mitch McConnell  
Minority Leader  
United States Senate  
Washington, District of Columbia 20510

The Honorable Nancy Pelosi  
Speaker of the House  
United States House of Representatives  
Washington, District of Columbia 20515

The Honorable Kevin McCarthy  
Minority Leader  
United States House of Representatives  
Washington, District of Columbia 20515

Dear Leader Schumer, Leader McConnell, Speaker Pelosi, and Leader McCarthy,

As organizations representing small businesses in all congressional districts across the nation, **we urge you to oppose the American Innovation and Choice Act (S. 2992) and its House companion, the American Choice and Innovation Act (H.R. 3816)**. These bills seek to increase competition litigation by expanding regulation for a variety of platforms. Unfortunately, they would cripple the platforms small firms use as a launchpad at a time when small businesses need all the help they can get. On this front, small businesses and voters find alignment, as they both seek to fend off growing security and privacy threats and economic challenges amid an ongoing global pandemic and a fitful economic recovery.

In industries from digital health and smart agriculture to furniture making and fashion, **the entry of online platforms presented new distribution options and market access for small firms**. These platform offerings upended the old model—which involved sourcing a long list of services from separate providers in order to distribute virtual and physical goods—by bundling secondary services together<sup>1</sup> at lower costs, with built-in consumer trust and much wider market access. **Unfortunately, S. 2992 and H.R. 3816 would prohibit many of the most valuable platform services small, innovative companies demand—and even offerings that some app makers rely on to do business—which would hurt small competitors, while benefiting some of the largest sellers with specific lobbying goals.**<sup>2</sup>

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<sup>1</sup> See Letter from Bruce Gustafson, President and CEO, Developers Alliance, to Members of the House Committee on Commerce, Louisiana State House of Representatives Re: House Bill No. 518 (May 10, 2021), available at

<https://static1.squarespace.com/static/53864718e4b07a1635424cdd/t/60940dd3847689703aa287a6/1620315605356/Re-+House+Bill+No.+518+will+harm+developers+.pdf> (“The ecosystem around app stores frees-up developers to focus their work on harnessing software to build better lives, unburdening them from secondary activities such as setting up systems to collect and remit sales taxes, establishing fraud-proof payment systems, scanning their network for malware, protecting customer data, and managing engagement with users.”).

<sup>2</sup> See Letter from Morgan Reed, president, ACT | The App Association, to Sen. Amy Klobuchar, Chairwoman, Subcommittee on Competition Policy, Antitrust, and Consumer Rights (Dec. 15, 2021),

In the retail context, S. 2992 and H.R. 3816 would demolish the platform service bundles, which benefit smaller sellers the most because they benefit more heavily from offloading the core overhead costs of competing. In fact, the legislation would disproportionately advantage the largest sellers on the platforms by raising costs for the smallest companies that threaten to outcompete them.<sup>3</sup> For example, Fulfillment by Amazon (FBA), which enables even small sellers on the platform to guarantee two-day shipping to customers, saved small firms an average of 30 percent on shipping costs.<sup>4</sup> S. 2992 and H.R. 3816 would prohibit FBA as a component of Prime by barring Amazon from offering sellers this valuable service. The bills would therefore remove retail platform services that help level the playing field for the smallest sellers as they vie against well-resourced rivals.

In the software context, the bills would also run counter to your constituents' interests, raising a variety of costs on small companies and thwarting consumer protections, including those associated with privacy, security, and intellectual property (IP). App makers depend on consumers trusting that the software they make does what it purports to do and is not either a copycat app or malware that would infect their device. **S. 2992 and H.R. 3816 would dismantle the trust framework on smart devices by requiring software platforms to allow fraudsters, copyright thieves, malware, and security threats on their stores.** Moreover, the legislation would force the allowance of multiple software marketplaces on a single platform, which would ultimately increase costs without meaningfully expanding the market for the smallest developers. The bill would accomplish this by prohibiting platform conduct that would "unfairly limit the ability of another business user's products, services, or lines of business to compete on the covered platform relative to the covered platform operator's own products, services, or lines of business,"<sup>5</sup> even if the other business user intends to harm consumers. **The bill would even require the platform to allow these bad actors unfettered access to consumers' personal information** by barring platform conduct that 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 . . . ."<sup>6</sup> **As a result, S. 2992 and H.R. 3816 would directly introduce unacceptable cybersecurity, privacy, and national security threats to Americans through their own smartphones. Small companies in your states and districts bear the brunt of those risks,**

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available at <https://actonline.org/wp-content/uploads/2021-12-15-ACT-FTR-Senate-Consolidation-Hearing.pdf>.

<sup>3</sup> 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/>.

<sup>4</sup> Amazon, 2021 Amazon Small Business Empowerment Report (2021), available at <https://assets.aboutamazon.com/9b/84/05cb2fc14da18e4574a5132f675a/amazon-smb-report-2021.pdf>.

<sup>5</sup> The American Innovation and Choice Online Act (S. 2992) 117th Cong. (the analogous prohibitions in H.R. 3816 appear to be broader).

<sup>6</sup> Id.

and the bills would force them to cede hard won success to larger rivals that can more easily overcome the costs and challenges of a threat-ridden marketplace.

The examples described here are the tip of the iceberg when it comes to the wide array of problems S. 2992 and H.R. 3816 would create for small American companies that leverage platforms. We strongly urge you to avoid the assumption that government intervention in this space would yield no unintended consequences<sup>7</sup> and review the concerns small companies have voiced since the beginning stages of the various House and Senate committees' inquiries on competition around online platforms.<sup>8</sup> There you will find concrete examples too numerous to recount here, many of them described without the context of an actual bill since S. 2992 has not received a legislative hearing. We hope that you will take these views to heart and summarily reject S. 2992, H.R. 3816, and substantially similar proposals.

Sincerely,

ACT | The App Association  
Connected Commerce Council  
Developers Alliance  
Small Business Entrepreneurship Council

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<sup>7</sup> See SBE Council, "A Beacon of Common Sense in an Otherwise Messy Senate Antitrust Hearing," SMALL BUS. & ENTREPRENEURSHIP COUNCIL BLOG (Dec. 21, 2021), available at <https://sbecouncil.org/2021/12/21/a-beacon-of-common-sense-in-an-otherwise-messy-senate-antitrust-hearing/>.

<sup>8</sup> Hearing before the U.S. House of Representatives Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law on "Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship," (116th Cong., 1st Sess.), statement of Morgan Reed, president, ACT | The App Association, available at <https://actonline.org/wp-content/uploads/Online-Platforms-and-Market-Power-Part-2-Innovation-and-Entrepreneurship-1.pdf>; Hearing before the U.S. House of Representatives Small Business Committee on "A Fair Playing Field? Investigating Big Tech's Impact on Small Businesses," (116th Cong., 1st Sess.), statement of Graham Dufault, senior director for public policy, ACT | The App Association), available at <https://actonline.org/wp-content/uploads/A-Fair-Playing-Field-Investigating-Big-Techs-Impact-on-Small-Business.pdf>; Id., statement of Jake Ward, president, Connected Commerce Council, available at [https://smallbusiness.house.gov/uploadedfiles/11-14-19\\_mr\\_ward\\_testimony.pdf](https://smallbusiness.house.gov/uploadedfiles/11-14-19_mr_ward_testimony.pdf); Id., statement of Theo Prodromitis, co-founder and CEO, Spa Destinations, available at [https://smallbusiness.house.gov/uploadedfiles/11-14-19\\_ms\\_prodromitis\\_testimony.pdf](https://smallbusiness.house.gov/uploadedfiles/11-14-19_ms_prodromitis_testimony.pdf); 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).