

December 9, 2022

The Honorable Charles E. Schumer
Majority Leader
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

Re: Senate Floor Consideration of the Open App Markets Act (S.2710)

Dear Majority Leader Schumer and Leader McConnell:

We write to express our concerns about the Open App Markets Act (OAMA). We previously noted OAMA’s potential to be weaponized against content moderation.¹ We appreciate that the bill’s sponsors have implemented the first amendment we suggested: OAMA should not create liability in instances where an app has been excluded from an app store for violating acceptable content policies. But OAMA’s sponsors did not implement our second amendment, which would ensure that OAMA focuses exclusively on economic self-preferencing, its ostensible purpose.

Section 3(e) currently provides that a “[c]overed Company shall not provide unequal treatment of apps in an app store through ranking schemes, user interface features, or algorithms that unreasonably preference or rank the apps of the covered company or any of its business partners over those of other apps in organic search results.” This new version helpfully omits open-ended language implying that OAMA applied to *more* than “ranking schemes or algorithms that prioritize apps”—such as decisions to ban an app completely. It is also helpful that Section 3(e) now focuses on “organic search results.” This should ensure that app stores cannot be sued for making curated recommendations of apps in other contexts, such as on the app store home page or pages for specific categories.

¹ Letter from TechFreedom to Richard J. Durbin, Chair of the Senate Judiciary Committee, and Richard Blumenthal, Senate Judiciary Committee (Feb. 2, 2022), <https://techfreedom.org/wp-content/uploads/2022/02/Coalition-Letter-re-S.2710-Content-Moderation.pdf>.

But even with these amendments, OAMA still has the potential to be weaponized against content moderation. For example, One America News Network (1+ million downloads), Breitbart (500k+), Daily Caller (100k+) and Townhall (50k+) have been called the top “conservative” news apps for Android,² yet none appear among the organic search results in the Play Store for the word “news,” while multiple apps with fewer downloads (10k+ and 5k+) do. Among apps that *do* appear in those search results are Truth Social (500k+), Fox News (10M+), Fox Nation (1M+), Fox Business (500k+) multiple local Fox broadcast affiliates, and Conservative News America (5k+). Clearly, Google is making an editorial judgment about what qualifies as “news,” and doing so in a way that is not simply partisan against conservative viewpoints.

Such editorial judgments should be outside OAMA’s scope because the bill is supposed to be about competition. Under the second part of the amendment we proposed in February, Section 3(e) would prohibit “unequal treatment” among apps only insofar as that treatment is “based on a criterion of ownership interest by the Covered Company or its business partners.”³ In other words, OAMA would bar discrimination among apps only as a form of economic self-dealing, *i.e.*, preferencing apps offered by the owner of the app store or by its business partners *because* of that affiliation. This would reflect a fundamental constitutional principle: the First Amendment protects the editorial judgments of media companies but not their business practices.⁴

Omitting such a provision invites endless litigation over subjective editorial judgments. Most obviously, app developers might sue, arguing that their complete exclusion from search results for “news” constitutes “unequal treatment.” Courts may well agree with them. Likewise, any app developer might challenge where their apps appear in other search results. Similar suits could be brought by an endless range of other developers whose apps are “downranked” for essentially editorial reasons. For example, search results on both app stores for “trans” includes many apps encouraging teens to explore their gender identity but apparently none discouraging such exploration. While small app developers may lack the resources needed to sue, the same is not true for state attorneys general, many of whom have a keen issue in such Culture War battles.

² *Best conservative news apps for android*, Softonic, <https://en.softonic.com/top/conservative-news-apps-for-android> (last visited Dec. 8, 2022).

³ This was adapted from the original definition of “unreasonably preferencing” that has been dropped from the current version: “includes applying ranking schemes or algorithms that prioritize Apps based on a criterion of ownership interest by the Covered Company or its business partners.”

⁴ *Associated Press v. United States*, 326 U.S. 1 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

Section 3(e)'s ban on discrimination among apps is far broader than it may seem because plaintiffs may complain not merely that their apps have been discriminated against relative to the app store's own apps (pure self-preferencing) but also those of the app store's "business partners." This term, which OAMA does not define, will likely include huge numbers of apps and the vast majority the most popular apps: any app that sells ads in the app or allows in-app purchases from which the app store profits is clearly a "business partner" of the app store. The same goes for developers that pay to promote their app in an app store.

What we said in our February letter about apps removed from an app store remains true of any developer aggrieved by the treatment of their app within the app store: They will be able to argue that any justification provided was pretextual—by pointing to examples of other apps not subject to the same content moderation decisions despite carrying supposedly equivalent content. By allowing such plaintiffs to frame any such allegedly disparate treatment as "unreasonable preferencing," Section 3(e) invites endless litigation over content moderation. It is far from clear that such lawsuits would be dismissed under Section 230⁵ and they would raise the same kind of First Amendment questions that have been raised by Texas and Florida laws banning viewpoint discrimination—questions that have produced a circuit split that the Supreme Court may soon choose to resolve.⁶

The threat of such litigation may in fact result in *more* removal of controversial or unpopular views in app stores. Content moderation actions like downranking or demonetization allow platforms to take a more careful approach protecting their own legitimate business interests while taking a less severe step than simply banning content wholesale. An app store might do so by downranking an app in search results if it contains what the app store considers overly objectionable or harmful content. If carrying such apps will result in continuous litigation over exactly where those apps appear in search results, app stores may be incentivized to simply exclude them altogether. Again, OAMA can achieve its pro-competitive aims without creating this perverse incentive by focusing only on ranking decisions based on criterion of ownership interest by the app store or its business partners.

This bill is not ready for floor action in its current form. Section 3(e) should be revised as we have recommended to prevent these unnecessary adverse effects.

⁵ Letter from TechFreedom to Senators Schatz, Wyden, Luján, and Baldwin (June 27, 2022), <https://techfreedom.org/wp-content/uploads/2022/06/2992-Response-to-Cicilline-letter.pdf> (discussing the applicability of Section 230 to the American Innovation and Choice Online Act).

⁶ *NetChoice v. Paxton*, No. 21-51178 (5th Cir. 2022); *NetChoice v. Florida*, No. 21-12355 (11th Cir. 2022).

Sincerely,

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