No. 23-344

In the Supreme Court of the United States

APPLE INC.,
Petitioner,

v.

EPIC GAMES, INC.,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ACT | THE APP ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Founded in 1998, ACT | The App Association ("App Association") is an international not-for-profit grassroots advocacy and education organization representing thousands of small business software application developers and technology firms that create the software applications used on mobile devices and in enterprise systems around the globe. Organization members leverage the connectivity of smart devices to create innovative solutions that make our lives better. Today, the ecosystem the App Association represents is valued at approximately $1.8 trillion and is responsible for 6.1 million American jobs.[2]

As the App Association has explained in comments filed with the FTC and testimony before Congress, mobile platforms provide a solution to many of the problems that developers faced in the early Internet economy.[3] Before mobile platforms, app developers

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intent to file this brief pursuant to Rule 37.2.

[2] *State of the U.S. App Economy: 2023*, ACT | The App Association (8th ed. 2023), https://tinyurl.com/yvhbnn7s.

[3] *See Comments of ACT | The App Association to the Federal Trade Commission on Competition and Consumer Protection in the 21st Century (Question 3)*, ACT | The App Association, at 3–

were required to pay publishers and other intermediaries and engage in time-consuming marketing campaigns to reach users.[4] These costs imposed formidable barriers to entry, resulting in higher prices and fewer choices for consumers.[5] Mobile software platforms, which provide one-stop shops where developers and consumers transact directly, lower these barriers to entry.[6] There are now several hundred thousand companies active in the mobile app market in the United States and nearly three million apps available on major app platforms.[7]

Today, developers overwhelmingly use mobile platforms—such as the App Store and Google Play—to distribute their applications. A "mutually beneficial" relationship has flourished between developers and platform companies.[8] Platforms rely

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4 (Aug. 20, 2018) (hereinafter "*App Association FTC Comments*"), https://tinyurl.com/yufbh6yd. *See also Online Platforms and Market Power, Part 2: Testimony Before the U.S. House of Representatives Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law* (2019) (Testimony of Morgan Reed, President ACT | The App Association), at 3-6 (hereinafter "Reed Testimony"), https://tinyurl.com/2ynpvx4s.

[4] *App Association FTC Comments*, *supra* n.3, at 3–4, https://tinyurl.com/yufbh6yd.

[5] *Id.*

[6] *Id.*

[7] Mobile App Download Statistics & Usage Statistics, buildfire (2023), https://tinyurl.com/4a952te7.

[8] *See App Association FTC Comments*, *supra* n.3, at 2, https://tinyurl.com/yufbh6yd.

on developers to create the applications that consumers and businesses demand, while platforms provide developers with low overhead costs, simplified market entry, consumer trust, dispute resolution, data analytics, flexible marketing and pricing models, strengthened IP protections, and tools for enhancing disability access.[9]

The App Association has a keen interest in the legal rules governing software platforms where the apps created by developers are downloaded by users. The App Association provides this brief to highlight how small and midsized developers in particular benefit from their mutually beneficial relationship with Apple Inc. and to explain how the district court's injunction barring enforcement of the anti-steering provision would upend Apple Inc.'s business model to the detriment of these developers.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The district court in this case issued a nationwide injunction barring Apple Inc. ("Apple") from enforcing its anti-steering provision against *any* of the countless developers that distribute apps through the App Store, even though most app developers benefit from the current Apple ecosystem. Small and midsized developers were not parties to the litigation, and the district court did not take evidence on how the injunction would affect them. Nor were these developers adequately represented by Epic

[9] *Id.*

Games, Inc. ("Epic"), as Epic's interests are not aligned with those of the thousands of small and midsized developers that use the App Store. This is because Epic's payments (like those of other large game developers) help support Apple's measures to make the iOS ecosystem beneficial for all developers. Amicus could have presented these arguments to the district court had Epic purported to represent a class of developers. But Epic did not seek class certification or demonstrate that such a broad injunction was necessary to remedy its alleged injuries.

The nationwide injunction is especially inappropriate here because it effectively overrides the settlement that Apple reached with a class of app developers in *Cameron v. Apple Inc.*, No. 19-CV-3074-YGR (N.D. Cal.). Although Apple provided $100,000,000 in monetary relief and provided meaningful injunctive relief, the developer class in *Cameron* did not insist that the anti-steering provision be lifted. Nor would it have made sense for them to do so given that most developers are not affected by the anti-steering provision. Accordingly, by granting nationwide relief to Epic, the district court effectively rewrote the *Cameron* settlement to include a term that neither Apple nor the developer class requested. This Court should grant review and make clear that opt-outs like Epic cannot obtain what amounts to class-wide relief in solo litigation where the affected parties are neither present nor adequately represented by the plaintiff.

II. The nationwide injunction at issue here is doubly problematic because it ignores the

heterogeneity of the developer community and the fact that most developers benefit significantly from Apple's ecosystem—which includes the iPhone and iPad, iOS (Apple's operating system), and the App Store—and the mechanism by which Apple monetizes these investments. Apple charges large developers that generate more than $1 million annually a 30% commission, while it charges all other developer a 15% commission. Apple generates *no commissions* from the majority of developers because they do not charge users a download fee or offer in-app purchases. The anti-steering provision prevents the largest developers from free-riding on Apple's investments—specifically, by encouraging users to purchase upgrades and other enhancements outside of Apple's In-App Purchase ("IAP") mechanism, thereby cutting out Apple's commission on the transaction.

The developers most likely to steer users away from Apple's IAP are large developers that generate substantial revenue in the App Store. Although these developers might benefit (at least in the short-term) from an injunction barring enforcement of the anti-steering provision, allowing these developers to avoid Apple's commission would threaten Apple's ability to monetize its investments in the iOS ecosystem and likely prompt Apple to change its business model. For example, Apple could increase the annual licensing fee it charges all developers, require developers to charge a minimum per-download fee, or increase the commission on small and midsize developers above 15%. Such changes would harm the small and midsized developers that rely on the iOS ecosystem to

reach consumers. These changes would also harm the public, which depends on app competition and innovation to improve the mobile internet services they rely on every day.

Because the district court failed to appreciate the diversity of interests within the developer community and the potential impact of its injunction on the thousands of small and midsized developers that were members of the *Cameron* class action but were not parties to Epic's lawsuit, this Court should grant review and reverse the nationwide injunction affirmed below.

ARGUMENT

I. THE DISTRICT COURT'S INJUNCTION WOULD AFFECT MILLIONS OF DEVELOPERS NOT REPRESENTED IN THE LITIGATION, EVEN THOUGH AND A CLASS OF DEVELOPERS HAD JUST SETTLED A CLASS ACTION AGAINST APPLE WITHOUT INSISTING ON CHANGES TO THE ANTI-STEERING PROVISION

A. As Apple has explained, a federal court may issue a nationwide injunction only if (a) a class is certified, or (b) such relief is necessary to redress the plaintiff's injury. Yet here the district court *sua sponte* issued a nationwide injunction permanently barring Apple from enforcing the anti-steering provision against *all* developers—not just Epic. Pet. App. 416a. The injunction thus affects Apple's relationship with millions of app developers even though Epic brought this case as an individual action and the district court

never found that a nationwide injunction was necessary to redress Epic's alleged injury. Indeed, Epic never identified a class it purported to represent, sought to certify any class, or sought to join any other developers—including its own subsidiaries—as plaintiffs. On the contrary, it effectively opted out of the contemporaneous class action in *Cameron* and sought only individual injunctive relief.

The district court, for its part, did not invite small and midsized developers to offer evidence as to the impact its injunction would have on them. If it had, amicus could have explained that the injunction provides no benefit to most such developers because they do not typically rely on in-app purchases to generate revenue and are subject to only a 15% commission when they do. Amicus could further have explained that the proposed injunction threatens to injure its members. As explained in more detail below, *see infra* Part II, the handful of large developers that generate significant revenue from in-app purchases help fund Apple's investments across the iOS ecosystem—investments that benefit *all* developers. If these large developers can avoid paying Apple a commission on in-app purchases, Apple will likely be compelled to increase its annual licensing fee on all developers, require a per-download fee for all apps—thus preventing small developers from offering their apps for free to generate consumer interest—or increasing the commission on small and midsize developers above 15%.

Amicus and its members were never afforded an opportunity to make these arguments, however,

because Epic controlled the litigation. The district court thus overlooked the heterogeneity within the developer community and mistakenly concluded that the nationwide injunction would benefit all app developers.

B. The district court's nationwide injunction in this case is especially problematic because in June 2022, the district court approved a separate class action settlement between Apple and a certified class of iOS developers who alleged that Apple's app distribution policies were anticompetitive and unlawful under state and federal law. *See Cameron v. Apple Inc.*, No. 19-CV-3074-YGR (N.D. Cal.). The certified class covered most U.S. app developers. *See* Order, *Cameron*, No. 19-CV-3074-YGR (June 10, 2022), Dkt. No. 491. The class settlement included both $100,000,000 in monetary relief and class-wide injunctive relief—but it *did not* require Apple to remove or modify the anti-steering provision. *See* Stipulation of Settlement, *Cameron*, No. 19-CV-3074-YGR (Aug. 26, 2021), Dkt. No. 396-1 Ex. A. Both the settlement class and the district court agreed that the settlement was "fair, adequate, and reasonable." *See* Order, *Cameron*, No. 19-CV-3074-YGR (June 10, 2022), Dkt. No. 491; Stipulation of Settlement, *Cameron*, No. 19-CV-3074-YGR (Aug. 26, 2021), Dkt. No. 396-1 Ex. A. The settlement also comported with Federal Rule of Civil Procedure 23(b)(2) because the class alleged that Apple "acted . . . on grounds that apply generally to the class, so that final injunctive relief . . . [was] appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Epic, though an app developer, effectively opted out of the class by bringing an individual antitrust action against Apple while the class action was pending. Indeed, Epic confirmed that it would be satisfied by a special exemption from the challenged App store rules even if no other developers benefited. Pet. App. 126a–127a. In issuing a nationwide injunction, the district court thus improperly rewrote the terms of the settlement in *Cameron* to give developers additional relief they did not seek. The district court's order thus violates the bedrock principle that, "absent fraud, collusion, or the like," courts "should be hesitant to substitute [their] own judgment for that of [the parties]" when considering the adequacy of settlement agreements. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (citation omitted).

The district court's injunction, if allowed to stand, could threaten settlements in future class actions by raising the possibility that a single opt-out could later obtain class-wide injunctive relief even if both the settlement class and the reviewing court agreed that such relief was unnecessary to redress the class's alleged injuries. The nationwide injunction at issue here thus undermines the "strong public policy [], which is particularly muscular in class action suits, favoring settlement of disputes." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010); *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 337 (S.D.N.Y. 2005) ("[P]ublic policy favors settlement, especially in the case of class actions."). This Court should thus grant review and make clear that

nationwide injunctions cannot be issued without satisfying Rule 23 and the requirements of Article III.

II. THE DISTRICT COURT'S INJUNCTION IGNORES THE COMMERCIAL REALITIES OF THE RELEVANT MARKET AND THREATENS TO HARM THE MILLIONS OF SMALL AND MIDSIZED APP DEVELOPERS THAT BENEFIT FROM APPLE'S INVESTMENTS IN THE iOS ECOSYSTEM

This Court should review (and reverse) the district court's injunction for a second reason: it is based on a fundamental misunderstanding of the "commercial realities" Apple confronts in its operation of the App Store and incorrectly treats developers as a homogenous group. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2282 (2018) ("*Amex*"). The injunction may benefit large developers, like Epic, that generate substantial revenues from in-app purchases and thus have an interest in side-stepping Apple's commissions on those transactions. But small and midsized developers—including amicus's members[10]—would not benefit from the injunction because most of the apps they produce do not offer in-app purchases. In fact, the injunction could affirmatively *harm* small and midsized developers by prompting Apple to change its business model. If Apple can no longer leverage commissions on in-app purchases—the bulk of which are paid by large, successful developers—to

[10] *Membership*, ACT | The App Association, https://tinyurl.com/yp9r54xr (last visited Oct. 31, 2023).

support its platform curation efforts, it will likely be compelled to increase prices on all developers or cut back on the benefits it provides developers at no charge. In addition to contradicting any justification for a nationwide injunction, any such change would also injure app users—that is, almost all members of the public. *Cf. eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (court must consider "public interest" in grant of permanent injunction).

A. Apple Invests Billions of Dollars to Attract Developers to Design Apps for the App Store, And These Investments Directly Benefit Small and Midsized Developers

To understand how the district court's injunction could impact amicus's members, it is essential to understand the nature of Apple's two-sided platform and the competitive environment in which it operates.

1. Apple's App Store, which connects app developers with iPhone and iPad users, is "what economists call a 'two-sided platform.'" *Amex*, 138 S. Ct. at 2280 (citing Evans & Schmalensee, *Markets With Two–Sided Platforms*, 1 Issues in Competition L. & Pol'y 667 (2008) (Evans & Schmalensee); Evans & Noel, *Defining Antitrust Markets When Firms Operate Two–Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 668 (Evans & Noel); Filistrucchi, Geradin, Van Damme, & Affeldt, *Market Definition in Two–Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 296 (2014) (Filistrucchi)). "As the name implies, a two-sided platform offers

different products or services to two different groups who both depend on the platform to intermediate between them." *Id.*

The distinctive feature of a two-sided platform is that the value to "one group of participants depends on how many members of a different group participate." *Id.* (citation omitted). "In other words, the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases." *Id.* at 2281. To ensure that the platform remains viable, "two-sided platforms must be sensitive to the prices that they charge each side." *Id.* This is because raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. *Id.* "If participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand." *Id.*

A corollary to this economic principle is that operators of two-sided platforms must *invest* in both sides of the market. An operator cannot compensate for a failure to invest in one side of the market by over-investing in the other side. For example, if a credit card were wholly unattractive to users, the market for transactions would dry up even if the number of merchants willing to accept the card increased dramatically. For similar reasons, the operator of a two-sided platform must "be concerned not only with its own quality and advertising, but also

that of the vendors who operate over its network."[11]

2. Critically, Apple is not the only software platform in the market. For example, individuals with smart phones and tablets that run on the Android operating system can download apps through the Google Play store. There are nearly three million apps currently available through Google Play.[12] As the district court recognized, dissatisfied developers have the option of "reallocating engineering or marketing resources" to other channels if Apple treats them unfairly or fails to provide sufficient value. Pet. App. 181a. Any exodus from the iOS ecosystem by developers would make the iPhone less attractive to consumers (and to the remaining developers), undercutting Apple's ability to compete in the smartphone market. Apple's business model thus depends in part on convincing developers to devote their resources to designing high quality apps compatible with iOS.

To compete for developers' attention, Apple must do several things. Most importantly, it must ensure that there are enough iPhone and iPad users on the other side of the two-sided platform to make iOS app development worthwhile. But beyond that, Apple must ensure that the iOS ecosystem itself—including

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[11] Mark Rysman, *The Economics of Two-Sided Markets*, 23 J. Econ. Persp. 125, 136 (2009).

[12] *Number of available applications in the Google Play Store from December 2009 to June 2023*, Statista, https://tinyurl.com/zewltg5 (last visited Oct. 31, 2023); *Android – statistics & facts*, Statista, https://tinyurl.com/ylj542lp (last visited Oct. 31, 2023) (2.3 billion Android users worldwide).

the iPhone and iPad, iOS, and the App Store—is attractive to developers. And it must provide developers with the tools they need to efficiently develop iOS compatible apps. Apple spends billions of dollars annually in this effort. These investments directly benefit the thousands of app developers that create apps for distribution through the App Store, including amicus's members.[13]

a. First, Apple competes for developers by making the iPhone an appealing device on which to run apps. Apple investments go towards improving the functionality and performance of the iPhone. *See* Pet. App. 276a ("Apple's R&D spending in FY 2020 was $18.8 billion"). In addition to benefitting iPhone users, these investments *directly benefit developers* by enhancing their ability to create compelling and useful apps.

b. Apple also competes for developers by creating and licensing extensive software tools that developers can use to create apps that run on the iPhone. Once a developer signs the Developer Program License Agreement ("DPLA") and pays the $99 fee to enroll in Apple's developer program, it receives access to application program interfaces (APIs) and a software development kit (SDK) that it can incorporate into its apps. These APIs and SDKs allow apps to run seamlessly on iOS and unlock various iPhone features, such as location awareness functionality, media applications, video playback, retina display,

[13] Reed Testimony, *supra* n.3, at 3, https://tinyurl.com/mrxwm6tu.

camera, internet connectivity through 4G and 5G networks, and numerous other tools to enhance the developer's ultimate product.

These APIs and SDKs significantly reduce app development costs. As recognized experts on multi-sided markets have explained, "[s]oftware platforms facilitate a market for applications by reducing duplicative costs. … Rather than each application developer writing the code for accomplishing each task, the software platform producer incorporates code into the platform … through an application program interface. The user benefits from this consolidation as well since it reduces the overall amount of code required on the computer, reduces incompatibilities between programs, and reduces learning costs."[14]

c. Apple also runs conferences to educate developers about how to use Apple's APIs and SDKs. Apple holds about 200 training sessions per year, and those sessions are recorded and shared for free with any interested developer. Apple also provides hands-on sessions where a developer can speak with an Apple engineer about how to solve coding problems. Apple is building a facility at Apple Park in Cupertino designed entirely to support developers who need assistance in developing their applications. Similar facilities have been created around the world as part of Apple's "Developer Accelerator," where more

[14] David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, 1 Issues in Competition Law and Policy 667, 673 (2008).

advanced developers can take part in programs that help them improve their apps and take advantage of Apple's newer technologies.

Although these services cost millions of dollars a year, Apple provides them to developers for free. It does not do this out of charity, of course. Rather, Apple makes APIs, SDKs, and engineering support available because it *needs* developers to create apps for iPhone customers.

d. Apple also competes with other platforms by investing in the security of its ecosystem. One of the core services that platform companies provide developers is "customer trust."[15] Customer trust is "fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition,"[16] because customers will not download and use apps if they cannot confidently "disclose essential information to [the developer]."[17] In the early days of software development, each developer had to earn customer trust itself, but now "platforms are the trusted product," and "Platforms' trusted brands allow developers to clear the critical hurdle of achieving

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[15] *Competition Policy Priorities*, ACT | The App Association, at 1, https://tinyurl.com/b5hjx3c5.

[16] *Id.* at 2; *see also The Symbiotic Relationship Between App Developers and Platforms: A Ten-Year Retrospective*, ACT | The App Association, at 3 (July 25, 2018) (hereinafter "*Symbiotic Relationship*"), https://tinyurl.com/bde65bnm.

[17] *App Association FTC Comments*, *supra* n.3, at 5, https://tinyurl.com/2p88kb66.

trust from consumer adoption."[18]

Apple's creation of a reliable and secure mobile ecosystem took years and billions of dollars of investment.[19] Apple's rigorous standards, app review process, and in-app payments build "consumer trust," which allows even small app developers to distribute their apps widely through the App Store.[20] Today, iPhone users can download millions of apps from the App Store with confidence that these apps are not likely to crash their phones, compromise their confidential information, expose their children to inappropriate material, spy on them, or otherwise defraud them. This built-in consumer trust attracts developers to Apple's platform and has led to consistent growth in the number and quality of apps available on the App Store.[21]

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[18] *Id.* at 6; *see also Symbiotic Relationship*, *supra* n.18, at 3, https://tinyurl.com/bde65bnm.

[19] *Symbiotic Relationship*, *supra* n.18, at 3 ("Consumer trust requires constant maintenance and vigilance because loss of trust hurts both the platforms and the developers who depend on them."), https://tinyurl.com/bde65bnm.

[20] Reed Testimony, *supra* n.3, at 4, https://tinyurl.com/mrxwm6tu.

[21] *Number of available apps in the Apple App Store from 2008 to July 2022*, Statista, https://tinyurl.com/yck2jmwe (last visited Oct. 31, 2023) (hereinafter "App Data"); *see also App Association FTC Comments, supra* n.3, at 5, https://tinyurl.com/yufbh6yd; *see also* Reed Testimony, *supra* n.3, at 4, https://tinyurl.com/mrxwm6tu.

B. The Anti-Steering Provision Enables Apple to Monetize Its Investments Without Burdening Small and Midsized Developers

As noted above, Apple charges all developers—large and small alike—a flat $99 annual licensing fee. That nominal fee obviously does not cover the billions of dollars that Apple invests to attract developers and compete with Google Play and other software platforms. Accordingly, Apple also monetizes its investments by charging a commission on paid app downloads and in-app purchases. Developers that exceed $1 million in annual revenue pay a 30% commission, while those developers with less than $1 million in annual revenue pay a 15% commission.[22] (Most developers pay nothing in commissions because they do not charge for downloads or offer in-app purchases.) The anti-steering provision prevents developers—especially large developers like Epic that generate enormous revenues from iPhone and iPad users—from bypassing Apple's commission.

1. Unlike two-sided platforms in which the operator sets the price of the transaction, developers set the prices consumers pay to download their apps from the App Store (though most apps are offered for free). If an app allows users to purchase upgrades or features within the app, the developer again sets the price and Apple takes a commission on the purchase.

[22] Even developers that make generate $1 million annually are allowed to charge a 15% commission on subscriptions where the user has subscribed for more than a year.

For example, a racing game might offer users the ability to upgrade their vehicles or drivers' skills.

Some developers—including Epic and other game developers—provide users the ability to purchase these upgrades outside of the App Store. This occurs most often when an app has cross-platform functionality, meaning that users can log in and play the same game on multiple different platforms—such as an iPhone, a personal computer, or another gaming console (such as PlayStation or Xbox). In these games, upgrades purchased while playing on a PlayStation or PC can be accessed when the player resumes play on the iPhone or iPad. Users of games with cross-platform functionality can thus decide which platform to use when purchasing upgrades and other features. App developers that derive substantial revenue from these types of purchases have an obvious incentive to direct users to whichever platform charges the lowest commission.

That is where Apple's "anti-steering provision" comes in. Apple's licensing agreement prohibits apps from "includ[ing] buttons, external links, or other calls to action that direct customers to purchasing mechanism other than" Apple's in-app purchase ("IAP"). Pet. App. 282a. Although developers can mount marketing campaigns *outside the app* to alert users that they can purchase upgrades and features on alternative platforms, the anti-steering provision has proven effective at channeling most in-app purchases to the App Store. Pet. App. 241a. The anti-steering provision thus protects Apple's ability to derive revenue from apps downloaded from the App

Store and used on the iPhone. And it ensures that developers who benefit most from the iOS ecosystem contribute the revenues Apple needs to maintain that ecosystem for all developer and users.

C. The District Court Failed to Appreciate the Investments Apple Makes to Enhance the iOS Ecosystem and the Harms the Injunction Will Cause Small and Midsized Developers That Depend on Those Investments

1. The district court justified its nationwide injunction on the ground that "Apple's anti-steering restrictions artificially increase Apple's market power by preventing developers from communicating about lower prices on other platforms." Pet. App. 241a. According to the district court, the anti-steering provision supports Apple's purported ability to generate "excessive operating margins" while "decreas[ing] innovation relative to the profits being made." *Id.* 368a. The district court believed that the "commission rate driving the excessive margins has not been justified." *Id.*

The district court thus held that "the anti-steering provisions 'threaten[] an incipient violation of an antitrust law' by preventing informed choice among users of the iOS platform." *Id.* 370a (alteration in original) (citation omitted). And it held that "the anti-steering provisions violate the 'policy [and] spirit'" of the antitrust laws "because anti-steering has the effect of preventing substitution among platforms for

transactions." *Id.* The district court believed that "[t]hese provisions c[ould] be severed without any impact on the integrity of the ecosystem." *Id.* 369a. In affirming the injunction, the Ninth Circuit reiterated the district court's conclusion that Apple's anti-steering provision enabled it to reap "supracompetitive profits" and "decreased innovation." *Id.* 78a.

2. The lower courts' conclusion that Apple reaps supracompetitive profits on the App Store is flawed because it ignores the vigorous inter-platform competition for users and developers that Apple confronts and overlooks the investments Apple makes throughout its ecosystem to compete with other platform providers. *See supra* II.A. Although Apple is compelled to make substantial investments in the iOS ecosystem to attract developers, these investments are not attributed to the App Store as an accounting matter and the district court ignored them when concluding that Apple earns "supra-competitive" profits on the App Store—*e.g.,* in concluding that the revenue Apple generates from the App Store greatly exceeds the costs of operating the store. But even if it costs Apple relatively little to operate the App Store itself, the costs of *ensuring the competitiveness of the platform* must be factored into the analysis. As the leading economists (in work cited in *Amex*) state: "Price equaling marginal cost (or average variable cost) on a particular side is not a relevant economic benchmark for two-sided platforms for evaluating either market power, claims of predatory pricing, or excessive pricing. … [I]t is incorrect to conclude, as a

matter of economics, that deviations between price and marginal cost on one side provide any indication of pricing to exploit market power or to drive out competition."[23] Professor Julian Wright likewise identifies the fallacy of concluding that "a high price-cost margin indicates market power" in the context of a two-sided market.[24]

Because the district court ignored the "commercial realities" of the multi-sided market in which app developers and consumers interact, *Amex*, 138 S. Ct. at 2285, the court's calculations of Apple's profit margin are economically meaningless.

3. The district court also failed to grapple with the implications of its injunction on Apple's business model. Apple utilizes a common form of price discrimination to generate revenue from the App Store. Specifically, Apple licenses its IP for a nominal fee to all developers and charges a commission only when developers monetize their applications through paid downloads or in-app purchases. Apple further charges a lower 15% commission to developers who generate modest revenues through paid downloads and in-app purchases, while charging a higher 30% commission to developers whose applications yield greater revenues. Apple generates the majority of its App Store commissions from downloads and in-app

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[23] Evans & Schmalensee, *supra* n.16, at 689.

[24] Julian Wright, *One-sided Logic in Two-sided Markets*, 3 Rev. Network Econ. 44, 47 (2004) ("[I]t is not true that competition, even perfect competition, will necessarily drive the price charged to each type of user to cost.").

purchases on gaming applications created by a small handful of successful developers, including Epic. This arrangement makes sense because gaming applications use the iPhone's features very intensively and gamers derive substantial value from the iPhone and iOS ecosystem.

There is nothing inherently anticompetitive about price discrimination. All companies—regardless of whether they have monopoly power—would prefer to charge higher prices to those consumers who most highly value their products and services.[25] Such price discrimination strategies can increase output by permitting lower value (or lower income) users to enter the market.[26] And Apple's price structure is especially reasonable given that the 30% commission applies only to the most successful developers, many of whom generate tens or even hundreds of millions in revenue through the App Store.

Indeed, many game developers, including Epic, use the same strategy to segment the market and charge a premium to high-intensity, high-value users. These developers thus earn most of their revenue

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[25] *See generally* Hal R. Varian, *Price Discrimination*, 1 Handbook of Indus. Org. 597, 598-600 (R. Schmalensee & R.D. Willig eds. 1989).

[26] *See*, *e.g.*, Hal R. Varian, *Price Discrimination and Social Welfare*, 75 Am. Econ. Rev. 870 (1985) (price discrimination can increase output and thereby increase total welfare); Lars A. Stole, *Price Discrimination and Competition*, 3 Handbook of Indus. Org. 2221 (2007) (discussing price discrimination and increased output in the context of imperfectly competitive markets).

from those users who most enjoy their games and play them most intensely.[27] See Pet. App. 158a (consumer spending in the online gaming industry is "primarily concentrated on a narrow subset of consumers: namely, exorbitantly high spending gamers.").

This is the essence of the well-established "freemium" business model, which has been a boon for developers of gaming apps. "Over the past decade 'freemium'—a combination of 'free' and 'premium'—has become the dominant business model among internet start-ups and smartphone app developers."[28] This model promotes entry by "allow[ing] a new venture to scale up and attract a user base without expending resources on costly ad campaigns or a traditional sales force."[29] Freemium can also enhance consumer value by offering consumers a wide variety of paid options. Like other forms of price discrimination, the freemium model is output enhancing. And digital gaming transactions on Apple's platform have skyrocketed as gaming

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[27] *See, e.g.*, Julia Glum, *How Does Fortnite Make Money? All the Ways the Free Video Game Cashes in on Its 200 Million Players*, Money.com (Jan. 15, 2019), https://tinyurl.com/2p9zbn8z; Ben Gilbert, *There's a Simple, Obvious Reason 'Fortnite' Is the Biggest Game in the World Right Now*, Business Insider (May 3, 2018), https://tinyurl.com/8mj4spmx.

[28] Vineet Kumar, *Making "Freemium" Work*, Harv. Bus. Rev. (May 2014), https://tinyurl.com/5ak8xcm4.

[29] *Id.*

developers have adopted it.[30]

4. As Apple explained to the district court, Apple's pricing model enables it "to monetize its intellectual property against the entire suite of functions as well as to pay for the 80% of all apps which are free and generate no direct revenue stream from the developers other than the annual $99.00 developer fee." Pet. App. 197a. The district court's injunction would upend that model by allowing established developers—which have reaped hundreds of millions of dollars from transactions on Apple's platform—to freeload off Apple's investments by directing consumers to other platforms to purchase upgrades, thereby eliminating Apple's ability to earn a commission on those purchases.[31] In other words, the injunction would allow the most successful developers, who have taken full advantage of Apple's iOS ecosystem, to avoid paying the commissions

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[30] In *Amex*, the Supreme Court explained that "'[m]arket power is the ability to raise price profitably by restricting output,'" and it found that Amex's fee structure was not anticompetitive because it increased output. 138 S. Ct. at 2288 (quoting Philip Areeda & Herbert Hovenkamp, Fundamentals of Antitrust Law § 5.01 (4th ed. 2017) (Areeda & Hovenkamp)).

[31] Epic has similarly sought to prevent Google from charging a commission on in-app purchases. In comments recently submitted to several State Attorneys General that brought antitrust claims against Google, Epic urged that any settlement bar Google from charging *any fee* on app transactions. *See* Letter from Epic Games Inc. to Elinor Hoffman, Melissa Holyoak, Paula Blizzard, and Sarah Boyce, *In re: Google Play Store Antitrust Litig.*, at 4–5 (July 19, 2023), https://tinyurl.com/4jwj9jsy.

necessary to maintain and improve that ecosystem.

By depriving Apple of its primary revenue stream on the developer side of the market, the injunction would likely prompt Apple to change the way it monetizes its investments. Epic has suggested, for example, that Apple could substantially increase the $99 annual fee for developers or charge all developers a per-download fee. Mot. for Prelim. Injunction, *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, at 29 (N.D. Cal. Sept. 4, 2020), Dkt. 61. Apple could also increase the commission on small and midsize developers above 15% to compensate for the lost revenue from the largest developers. Those changes would increase barriers to entry and hinder small and midsized developers' ability to use the output-enhancing freemium model. The inevitable result of shifting the costs of the platform onto smaller developers would be a *decrease* in the output of useful apps.

In short, while the district court's injunction may benefit large, established developers that generate substantial revenue from in-app purchases, it could be devastating to the many small and midsized developers that benefit from Apple's pricing model and rely on the iOS ecosystem. The district court did not hear from these developers before issuing its injunction, and Epic—whose interests plainly diverge from the thousands of small and midsized developers that offer their apps for free and do not generate meaningful revenue from in-app purchases—plainly did not represent them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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