No. 23-344

In The
Supreme Court of the United States

APPLE, INC.,

Petitioner,

v.

EPIC GAMES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NETCHOICE AND CHAMBER OF PROGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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October 30, 2023

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

NetChoice is a trade association of online businesses that share the goal of promoting free enterprise and free expression on the internet. NetChoice's members operate a variety of popular websites, apps, and online services, including Meta, YouTube, and Etsy.[2] NetChoice's guiding principles are promoting consumer choice, continuing the successful policy of "light-touch" internet regulation, and fostering online competition to provide consumers with many choices.

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all people benefit from technological leaps. Chamber of Progress seeks to protect Internet freedom and free speech, to promote innovation and economic growth, and to empower technology customers and users. In keeping with that mission, Chamber of Progress believes that allowing a diverse range of app-store models and philosophies to flourish will benefit everyone—the consumer, the store owner, and application developers.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

[2] A list of NetChoice's members is available at https://tinyurl.com/2tew6xna.

Chamber of Progress's work is supported by its corporate partners, but its partners do not sit on its board of directors and do not have a vote on, or veto over, its positions. Chamber of Progress does not speak for individual partner companies, and it remains true to its stated principles even when its partners disagree.[3]

As organizations dedicated to promoting well-informed and competition-enhancing regulation of online commerce, *amici* write to explain that if the Ninth Circuit's judgment is allowed to stand, it will effectively blind future courts to some of the most important evidence, public-policy issues, and legal precedent when evaluating UCL claims—undermining competition and consumer welfare in the process.

INTRODUCTION AND SUMMARY OF ARGUMENT

Before the Ninth's Circuit's decision, no federal appellate court upheld an injunction on businesses enforcing anti-steering rules, and for good reason. This Court recently recognized anti-steering rules as procompetitive, and it is undisputed among the parties that virtually all digital transaction platforms enforce similar anti-steering rules. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2289 (2018) [hereinafter "*Amex*"] (sustaining similar anti-steering rules from credit card

[3] A list of Chamber of Progress's partners is available at https://tinyurl.com/2huya26s.

companies as procompetitive); Petitioner's Br. at 5. To achieve its finding, the panel placed a novel federal restriction on California's Chavez doctrine, a commonsense rule that a business practice cannot be both reasonable and unfair in the context of UCL claims. *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001). But rather than promoting fair competition, the panel's UCL holding will undermine it.

As organizations dedicated to promoting well-informed and competition-enhancing regulation of online commerce, *amici* urge this Court to review the Ninth Circuit's faulty "categorical legal bar" rule because it will effectively blind future courts to some of the most important evidence, public-policy issues, and legal precedent implicated by parallel UCL claims—compromising competition and consumer welfare in the process.

First, evidentiary negation. Petitioners proved that there were strong procompetitive rationales for Apple's anti-steering provision, that bars apps that route users to sites outside the App Store's "walled garden" when making in-app purchases.[4] Apple, App Store Review Guidelines, Business, In-App Payments 3.1.1

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[4] *Amici* do not mean to suggest that Apple's "walled garden" approach is the only safe or desirable one—only that Apple should be free to differentiate its store from others by promising enhanced security and privacy, and that consumers should be free to choose between competing app store models (as Chamber of Progress argued in the merits-phase amicus brief that it submitted to the Ninth Circuit, which is available at https://tinyurl.com/226eenr3).

(last accessed Oct. 15, 2023) [hereinafter "Guideline 3.1.1"].[5] The anti-steering provision provides direct support for two App Store rules that were found to be procompetitive and that are critical to Apple's business model: the rule that in-app purchases can be made only through Apple's in-app payment processor; and the rule that apps can be distributed to iOS devices only through the App Store. But this evidence was effectively negated by the panel's "categorical legal bar" rule in the context of adjudicating Epic's parallel UCL claim.

This was not merely error, but the inauguration of a new legal framework that guarantees *future* error in the Ninth Circuit. Here, evidence of the anti-steering provision's procompetitive rationales was both abundant and vital to the proper adjudication of Epic's flawed UCL claim. Besides device security and privacy, those rationales included protecting app users from dangerous frauds, such as the financial exploitation of minors through unsupervised in-app purchases that use third-party payment processing mechanisms.

Second, negating evidence not only resulted in the wrong result under the UCL, but also makes the public worse off by improperly labeling commercial practices "unfair" when they are in fact procompetitive. *See generally Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023). Although large developers like Epic might have the resources to provide or access alternatives, small developers (which is most developers) may well

[5] Available at https://tinyurl.com/3jwrhcdk.

prefer that the anti-steering provision remain in place to reduce transaction friction on the App Store, thereby improving the platform's quality generally and attracting more users. *See Amex*, 138 S. Ct. at 2289 (sustaining similar anti-circumvention rules as procompetitive for these reasons).

Further, the injunction will undermine the "freemium" business model for mobile applications—the most popular model today—which "lowers the barrier for users to try an app," by offering a basic version of it for free, giving users "the option to pay if they want to engage more deeply." *See* Apple, Using the Freemium Model (last visited Oct. 15, 2023); Vineet Kumar, *Making "Freemium" Work*, Harv. Bus. Rev. Magazine (2014) (last accessed October 15, 2023) (explaining "freemium" is the dominant business model among internet start-ups and smartphone app developers). If Apple—and future defendant operators in the Ninth Circuit—cannot enforce anti-steering rules for in-app purchases, app developers will seek alternative payment processors charging lower fees and cutting Apple out of the transaction entirely. The loss of this revenue would demand a significant shift in its charging structure. For continued viability of app platforms' business models, Apple might have to start charging developers for the initial, formerly free, download of the developers' app. As a result, developers would now bear higher deployment costs and would need to either discourage downloads or they would need to charge users for downloads. This would diminish developers' abilities to acquire new customers due to the new costs for

previously freemium apps, dampen innovation and reduce competition between apps and increase barriers to entry, the burden of which falls particularly heavily on smaller developers.

Third, legal negation. The panel's new "categorical legal bar" also negates consideration of relevant legal precedents and policies bearing on the legality of anti-steering provisions. There is no way that this Court's decision upholding a credit card anti-steering policy in *Amex* can be simply brushed aside as categorically irrelevant to Epic's UCL anti-steering claim. But that is what the panel reasoned here, chiefly because *Amex* did not announce a "blanket approval" of anti-steering provisions. *Epic Games, Inc. v. Apple, Inc.*, 559 F. Supp. 3d 898, 1002 (N.D. Cal. 2021).

The "categorical legal bar" rule also forecloses critical consideration of whether a court's forcing Apple to host links and invitations to competing, but potentially less-safe and less-secure, payment processors constitutes "unjustified and unduly burdensome" compelled speech in violation of the First Amendment. *See*, *e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (compelling a private speaker to host or disseminate the message of another violates the First Amendment). To correct the panel's reasoning and avert continuing harm to competition

and consumer welfare in the Ninth Circuit, this Court should grant certiorari.

ARGUMENT

I. THE NINTH CIRCUIT'S FAULTY REASONING NEGATED KEY EVIDENCE THAT APPLE'S ANTI-STEERING PROVISION IS PROCOMPETITIVE

The procompetitive rationales that justify Apple's in-app purchases and distribution restrictions likewise justify the anti-steering provision. At trial, Apple submitted substantial evidence of the procompetitive rationales for its "walled-garden" approach to hosting third party apps. The district court cited a number of those rationales in the second and third steps of its Rule of Reason analysis. Among other things, the court found that Apple implemented its various "walled garden" policies "to improve device security and user privacy—thereby enhancing consumer appeal and differentiating iOS devices and the App Store from those products' respective competitors." Thus, Apple's practices promoted interbrand competition that "antitrust laws are designed primarily to protect." *Epic Games, Inc.*, 559 F. Supp. 3d at 921. And on appeal, the panel agreed that, "throughout the record, Apple ma[de] clear that by improving security and privacy features, it is tapping into consumer demand and differentiating its products from those of its competitors—goals that are plainly procompetitive rationales." *Epic Games, Inc.*, 67 F.4th at 987.

The two "walled garden" policies challenged by Epic are Apple's rules that: (1) in-app purchases on iOS devices must use Apple's in-app payment processor ("the IAP restriction") and (2) apps may be distributed to iOS devices exclusively through Apple's App Store ("the distribution restriction"). As the district court correctly discerned, the procompetitive rationales offered for those practices and the procompetitive rationales offered for its anti-steering provision are "coextensive"—because without the anti-steering provision, there can be no "walled garden." *See Epic Games, Inc.*, 559 F. Supp. 3d at 1013 (N.D. Cal. 2021).

Metaphorically, the anti-steering provision in App Guideline 3.1.1 prohibits app developers from installing their own exit doors and escape hatches in the "wall" that Apple's IAP and distribution restrictions have erected around the App Store's garden. The anti-steering provision thus preserves the wall's integrity by banning from the App Store any app featuring "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase." *Epic Games, Inc.*, 559 F. Supp. 3d at 944 n.191. Without the anti-steering provision, there would be no "wall" to speak of because consumers could be lured outside the wall to make their in-app purchases, effectively defeating the IAP restriction as well as the relatively stringent app-review procedures that the distribution restriction enables.[6]

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[6] Although the anti-steering provision relates more directly to the IAP restriction than to the distribution restriction, what's

Accordingly, the anti-steering provision is justified by the same procompetitive rationales that justify Apple's IAP and distribution restrictions. Those rationales include Apple's contention that "prohibitions on third party app stores helps ensure a safe and secure ecosystem," which in turn "benefits both users, who enjoy stronger security and privacy, and developers, who benefit from a larger audience drawn by these features." *Id.* at 1002. More specifically, the district court found that the challenged practices further security in the "broad" sense of enhancing privacy, quality, and trustworthiness, and in the "narrow" sense of thwarting social-engineering attacks that evade a mobile device's operating-system defenses by tricking users into granting access. *Id.* at 1003, 1006-07.

The appellate panel largely accepted these safety-and-security rationales in affirming the district court's rejection of Epic's Sherman Act claims. But those same rationales, as a matter of logic and common sense, should have played some role—possibly a decisive one—in determining whether Epic's claim that Apple's anti-steering provision violates the UCL could survive after Epic failed to prove an unreasonable restraint of trade under the antitrust laws. But the panel's new

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at issue here are the procompetitive rationales for "Apple's design of the [entire] iOS ecosystem." *Epic Games, Inc.*, 67 F.4th at 994-95. As the district court noted, "[b]ecause Apple has created an ecosystem with interlocking rules and regulations, it is difficult to evaluate any specific restriction in isolation or in a vacuum." *Epic Games, Inc.*, 559 F. Supp. 3d at 1013. Because the anti-steering provision represents a critical component of that ecosystem, it effectively supports the distribution restriction as well.

"categorical legal bar" rule effectively negated Apple's evidence of procompetitive rationales, distorting the panel's analysis and likely altering its ultimate decision.

Without the new rule, applying the traditional Chavez doctrine would have automatically resulted in granting full weight to a substantial body of evidence bearing on the procompetitive rationales for Apple's anti-steering provision. As Apple pointed out to the district court, Guideline 3.1.1 has formed one of the backbones of the App Store's protections and has been critical to Apple's ability to offer a curated app-store environment. Guideline 3.1.1 enables Apple to ensure that users who buy digital goods or services in an app receive what they paid for, on the actual terms that they were informed of and agreed to, and that the payment will occur in a secure manner, protected against fraud and theft of their personal information. Along with Apple's IAP restriction, Guideline 3.1.1 equalizes the playing field for every user and every developer, so that every user knows that any IAP purchase from any developer's app available in the App Store will occur in a safe and verified manner.

By contrast, steering consumers to external payment mechanisms exposes them much more frequently to the risks of external payment links and consequently undermines user confidence in the safety, security, and reliability of digital content purchases and mechanisms. By preventing end-runs around Apple's IAP restriction, Guideline 3.1.1 also makes it possible for the App Store to effectively deploy a "content check"

feature that protects users against unintended or fraudulent purchases and an "ask to buy" feature that allows parents to approve or block a child's in-app purchases. The latter feature, in particular, comports with the growing public concern—reflected in recent legislation—over children's online safety and privacy. Yet the panel effectively negated all this evidence when it upheld the district court's ruling that the anti-steering provision violates the UCL. *See generally Epic Games, Inc.*, 67 F.4th 946. It is as though the antitrust analysis occurred in a different legal universe than the one in which the UCL analysis took place, making it impossible for key facts to travel from one realm to the other. What split the antitrust and UCL realms apart was, of course, the categorical legal bar rule.

II. THE PANEL'S NEW RULE NEGATES PUBLIC POLICY RATIONALES BEARING ON WHETHER A UCL CLAIM CAN SURVIVE THE FAILURE OF A PARALLEL ANTITRUST CLAIM

The "categorical legal bar" rule's evidence-negating effect not only resulted in the wrong result under the UCL, but also made the public worse off by improperly labeling commercial practices "unfair" when they are in fact procompetitive. Although large developers like Epic might have the resources to provide or access alternatives, small developers (which is most developers) may well prefer that the anti-steering provision remain in place to reduce transaction friction on the App Store, thereby improving the platform's quality

generally and attracting more users. *See Amex*, 138 S. Ct. at 2289 (sustaining similar anti-circumvention rules as procompetitive for these reasons).

It is unprecedented and unduly burdensome to require a business to host a link to a competing service when use of that service could undermine the safety and privacy measures for which the hosting business is known—and by which it differentiates its product and justifies its higher commissions. Indeed, such a requirement appears to be unprecedented. *Epic Games, Inc.*, 67 F.4th at 987 ("[B]y improving security and privacy features, [Apple] is tapping into consumer demand and differentiating its products from those of its competitors—goals that are plainly procompetitive rationales."). It's like requiring Volvo—a luxury-car company that touts the safety of its cars—to post ads inside its cars for the economical Ford Fiesta, a car reputed (fairly or unfairly) to be among the least safe, on the theory that omitting mention of the cheaper but less-safe product "decrease[s] consumer information" and "enabl[es] supracompetitive profits." *Epic Games, Inc.*, 67 F.4th at 1001; *See* Volvo, *"What If Feeling Safe Can Make You Feel Truly Free"* (last accessed Oct. 15, 2023);[7] *see*, *e.g.*, Harding Mazzotti LLP, *Car Safety: Which Cars are the Safest, & Which Cars are the Least Safe?* (last accessed Oct. 15, 2023).[8] Safety considerations aside, requiring any business to advertise or facilitate access to its competitors' products is

[7] Available at https://tinyurl.com/47p36x4a.

[8] Available at https://tinyurl.com/2t4m4x5j.

unprecedented. To use another analogy: It's like forcing all of Disneyland's restaurants to display QR codes guiding visitors to Uber Eats alternatives available for pickup just outside the park, thus reducing Disney's control over park visitors' food experience.

Further, the panel's reasoning will undermine the "freemium" business model for mobile applications—the most popular model today—which "lowers the barrier for users to try an app," by offering a basic version of it for free, giving users "the option to pay if they want to engage more deeply." *See* Apple, Using the Freemium Model (last visited Oct. 15, 2023);[9] Vineet Kumar, *Making "Freemium" Work*, Harv. Bus. Rev. Magazine (2014) (last accessed October 15, 2023) (explaining "freemium" is the dominant business model among internet start-ups and smartphone app developers).[10]

The Apple App Store platform is an essential link in the chain between developers and users. It connects developers with a user base, provides advertising, development resources, safety and security protection, and review and feedback mechanisms to share with other users and with developers. Braden Newell, *Here's why Apple's App Store is better than Google's Play Store*, MobileSyrup (Mar. 6, 2023) (last accessed Oct. 15, 2023) (explaining that developers who seek to prioritize development time and revenue will benefit most from iOS, for reasons including cross-platform

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[9] Available at https://tinyurl.com/2p8m3nv3.

[10] Available at https://tinyurl.com/48uhv4j4.

availability and security). Anti-steering rules are an essential source of funding for platforms to provide those services. For this reason, virtually all digital transaction platforms enforce similar anti-steering rules to Apple's. Petitioner's Br. at 5. The freemium model, which enables users to try out products without an initial purchase, has come to dominate cellphone-based app sales. *See generally* Kumar, *Making "Freemium" Work* (last accessed October 15, 2023). This benefits users and developers and facilitates greater adoption, and facilitates competition between similar apps by substantially lowering the barrier to entry for new developers to offer an improved product. 5 Epic Advantages of Freemium (And 3 Roadblocks), Toplyne (Oct. 10, 2022) (last accessed Oct. 15, 2023) (explaining the freemium model offers developers reduced customer acquisition cost, and the potential for brand awareness and virality, among other things). But the freemium model cannot exist without anti-steering provisions as there would be no incentive for platforms to host non-monetizable apps. The Ninth Circuit's injunction will require a shift in the charging structure for platforms. If Apple—and future defendant operators in the Ninth Circuit—cannot enforce anti-steering rules for in-app purchases without running afoul of the UCL, it will require a significant shift in its charging structure. For continued viability of app platforms' business models, they would have to start charging for the initial, formerly free, download. *See generally id.* As a result, platforms would need to charge developers per installation or per use instead. Developers would bear higher deployment costs and would need to either

discourage downloads (except by customers most likely to spend) or they would need to charge users for downloads. This would discourage innovation and reduce competition between apps and increase barriers to entry, which fall particularly heavily on smaller developers. Developers would consequently bear higher deployment costs, and would need to either discourage downloads except by customers most likely to spend, or they would need to charge for downloads. At bottom, the panel's improper labeling of Apple's practices as "unfair" will make the public worse off by encouraging an app ecosystem with fewer options for consumers as well as higher prices. This Court averted this outcome when it recently Respondent's request to vacate application of the Ninth Circuit's stay while this petition pends. Supreme Court of the United States, *Epic Games, Inc. v. Apple Inc.*, No. 23A78, application denied by Justice Kagan (Aug. 9, 2023).[11] To ensure this public benefit from the status quo endures, this Court should grant review.

III. THE PANEL'S NEW RULE NEGATES SUPREME COURT PRECEDENT BEARING ON WHETHER A UCL CLAIM CAN SURVIVE THE FAILURE OF A PARALLEL ANTITRUST CLAIM

On top of precluding consideration of public policy arguments, the panel's categorical legal bar rule also effectively negates legal precedent that should inform

[11] Available at https://tinyurl.com/56ad9s2a.

the analysis of parallel UCL claims. In so doing, the new rule again makes it difficult or impossible to bring important policy concerns to bear on whether a UCL claim can survive the failure of a parallel antitrust claim. In the courts below, for example, Apple argued that this Court's *Amex* decision precluded UCL liability. There were many reasons why this argument deserved at least serious consideration. Like this case, *Amex* concerned the legality and competitive effects of an anti-steering policy implemented by a two-sided transaction platform. *Amex*, 138 S. Ct. at 2285-87. The decision explained in broadly applicable terms the unique economics of such platforms, explaining general principles that, on their face, appear at least potentially relevant here. And this Court concluded that, far from having anticompetitive effects, Amex's business model, including its anti-steering policy, had "spurred robust interbrand competition" and "had increased the quality and quantity of [the relevant] transactions," that is, "after all, . . . the primary purpose of the antitrust laws." *Id.* at 2290.

But the panel's categorical legal bar rule allowed it—indeed, required it—to brush *Amex* aside with little or no analysis. In the panel's view, the *Amex* argument failed because Apple could not "explain how Amex's fact-and-market-specific application of the first prong of the Rule of Reason establishes a categorical rule approving anti-steering provisions, much less one that sweeps beyond the Sherman Act to reach the UCL." *Epic, Inc.*, 67 F.4th at 1002. Thus, the panel found *Amex*

irrelevant mainly because it did not announce a "blanket approval" of anti-steering provisions. *Id.*

Our point here is not to argue that *Amex*, a Sherman Act case, necessarily dictated the fate of Epic's UCL claim, or that no conceivable basis existed for distinguishing *Amex* on its facts. Our point, rather, is that the categorical legal bar rule effectively supplanted any serious discussion of those questions—to the detriment of sound decision making informed by relevant precedent, economic principles, and business realities. Whatever *Amex* could have taught us about the competitive effects of anti-steering policies implemented by two-sided transaction platforms was lost—never brought to bear on a case that was highly similar. Even a decision explaining why *Amex* is distinguishable would have provided more useful guidance to lower courts and to the public than a decision wielding the comparatively blunt instrument of a previously nonexistent categorical rule.

Another legal issue that the categorical legal bar rule would foreclose is whether forcing Apple to host links to non-IAP payment methods on its App Store constitutes a form of "compelled speech" that violates the First Amendment. *See generally Hurley*, 515 U.S. 557; *Pac. Gas & Elec. Co.*, 475 U.S. 1 (compelling a private speaker to host or disseminate the message of another violates the First Amendment). Apple did not brief this theory on appeal—but if it had, the categorical legal bar rule would have eliminated it from consideration. Presumably the rule will have a similar analysis-truncating effect in future cases. To be sure,

laws compelling the disclosure of "purely factual and uncontroversial information about the terms under which services will be available . . . should be upheld" unless "unjustified or unduly burdensome." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018). But if this case doesn't present an instance of "unjustified and unduly burdensome" compelled commercial speech, it's hard to imagine one that would.

In sum, the panel's categorical legal bar rule has the effect of placing blinders on a court—occluding its view of important evidence, precedents, and policies—when deciding the important question whether a UCL claim can survive the failure of a parallel antitrust claim.

CONCLUSION

For these reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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October 30, 2023