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 INTERNATIONAL CENTER FOR LAW & ECONOMICS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF INTERNATIONAL CENTER FOR LAW & ECONOMICS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Amicus respectfully submits this brief in support of Petitioner Apple Inc.[1]

INTEREST OF AMICUS CURIAE

The International Center for Law & Economics ("ICLE") is a nonprofit, non-partisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law and economics methodologies and economic learning to inform policy debates and has longstanding expertise evaluating antitrust law and policy.

ICLE has an interest in ensuring that antitrust law promotes the public interest by remaining grounded in sensible rules informed by sound economic analysis. That includes fostering consistency between antitrust law and other laws that proscribe unfair methods of competition, such as California's Unfair Competition Law, and advising against far-reaching injunctions that could deteriorate the quality of mobile ecosystems, thereby harming the interests of consumers and app developers.

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[1] Amicus notified counsel for the parties of its intent to file this brief more than ten days before the deadline. No counsel in this matter for any party authored this brief in whole or in part, and no person other than amicus or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has admonished that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also* Application for a Stay at 5, *Murthy v. Missouri*, No. 23-411 (Sept. 14, 2023) (review granted on government's stay motion arguing "the injunction sweeps far beyond what is necessary to address any cognizable harm to respondents"). The nationwide injunction issued in this case, which applies to millions of non-party app developers, cannot be reconciled with that principle.

The lower court's use of a nationwide injunction to address narrow alleged injuries has severe consequences that are best understood through the lens of law and economics principles. The district court recognized that Apple's walled-garden ecosystem yields procompetitive consumer benefits, including greater privacy and data security, and that such benefits are cognizable under federal antitrust law. Pet. App. 261a-270a. Yet the district court's nationwide injunction undercuts precisely those benefits. Apple's practice of vetting unsafe payment systems and malware on its App Store depends on its ability to prevent third parties from "steering" consumers towards purchase mechanisms other than Apple's secure in-app purchasing ("IAP") system. In addition, the anti-steering policy prevents free-riding and protects Apple's incentive to invest in its platform to improve the curation of apps, privacy, safety, and security.

These harms to Apple's platform are not offset by benefits to consumers, or even to developers taken as a whole. All the injunction does is alter the allocation of app store fees between developers, because even if Apple's ability to collect a commission through its IAP is limited, Apple would *still* have the right to collect a commission in other ways for the use of its proprietary software and technology. It could do so by readjusting whom it charges for access to the App Store, and how much it charges.

For instance, rather than charge a commission to developers on paid downloads of apps and on in-app purchases of digital goods and services, as it does now, Apple could instead charge *all* developers a fee for accessing the App Store. While this might ostensibly benefit big developers who rely heavily on in-app purchases and paid downloads to monetize their apps, it is not at all clear that the net effects would be positive. One thing does seem clear, however: The current model, in which small, free apps pay few fees, would likely cease to be tenable under a nationwide federal injunction.

Put differently, despite not violating federal antitrust law, the district court's sweeping remedy risks harming the vast majority of app developers, who have not requested the injunction and are now operating on the iOS for free. And it may ultimately harm tens of millions of consumers using Apple's App Store and iOS.

ARGUMENT

I. The Injunction Is Unnecessarily Broad and Would Affect Millions of Developers, Not Just Epic

The district court imposed an injunction that affects Apple's anti-steering provisions across the board, and thus redefines Apple's relationship with many developers—not just Epic. As it stands, the injunction is overly broad and at odds with established jurisprudence. *Gill v. Witford*, 138 S. Ct. 1916, 1933-34 (2018); *Califano*, 442 U.S. at 702. And it reduces consumer welfare by precluding more beneficial conduct than the harmful behavior it deters.

There are about thirty million registered app developers of native iOS apps. Pet. App. 10a. There are about two million apps available in the United States storefront for the App Store, and most of them were created by third-party developers. *See Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019). All the developers have signed Apple's guidelines regarding the exclusive use of Apple's IAP and the related anti-steering provisions. By contrast, the trial evidence established that a little over 100 developers use Epic's Epic Store. *See* Pet. App. 115a (citing Trial Tr. 1220:18-20). Yet, the anti-steering injunction would affect *all* App Store developers. The plaintiff is not even among these developers, because Epic was jettisoned from the App Store in 2020 for introducing an in-app payment system that bypassed Apple's IAP. Epic has only one subsidiary that is active on the App Store. *See* Pet. App. 12a; D.Ct. ECF No. 825-8.

It is thus unclear why the district court found it necessary to issue an injunction covering *all*

developers who are licensed to make iOS apps for the App Store's U.S. storefront, not just Epic's subsidiary and the approximately 100 developers who use the Epic Store.

Two considerations are especially pertinent. First, *Califano* precludes the Ninth Circuit's erroneous assertion that an injunction need only be "tied to Epic's injuries." Pet. App. 82a; *Califano*, 442 U.S. at 702. Indeed, as the government argued in a recently granted petition that raises similar issues, an overbroad injunction cannot be justified on the theory that the non-parties are simply incidental beneficiaries of the injunction for the prevailing parties. Application for a Stay, *supra*, at 34-36; *see* Order Granting Review & Order Granting Stay, *Murthy v. Missouri*, No. 23-411 (Oct. 20, 2023). Instead, "[i]njunctive relief may 'be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Id.* at 34-35 (quoting *Califano*, 442 U.S. at 702).

Second, Apple already settled a class-action lawsuit with developers regarding developer-consumer communications. As part of the *Cameron v. Apple Inc.* settlement, Apple deleted a prohibition on targeted communication between developers and consumers outside of the app, meaning that developers are now free to communicate outside the apps about external purchasing options (or anything else). *See* Order: Granting Motion for Final Approval of Class Action Settlement; Granting in Part and Denying in Part Mot. for Attorney's Fees, Costs, and Service Award; and Judgment at 13, *Cameron v. Apple Inc.*, No. 19-cv-03074 (N.D. Cal. June 10, 2022), ECF No. 491. That settlement, spurred by a properly certified Rule 23 class action representing around 6,700 app

developers, did not, however, require Apple to modify or remove the anti-steering provision at issue here (links and buttons *within* apps). *See* Declaration of Steve W. Berman in Support of Developer Plaintiffs' Motion for Preliminary Approval of Settlement with Defendant Apple Inc. at 7-41, *Cameron v. Apple Inc.*, No. 19-cv-3074 (Aug. 26, 2021), ECF No. 396-1.

It is jarring that the courts would now issue a much broader injunction in a case involving *a single plaintiff*. This could cause serious harm to nonparties who had no opportunity to argue for more limited relief. Zayn Siddique, *Nationwide Injunctions*, 117 Colum. L. Rev. 2095, 2125 (2017). And it also raises the question whether such a blanket remedy is even necessary given that *Cameron v. Apple* strikes a balance between Apple's ability to safeguard its investments and maintain the safety and security of its ecosystem, and app developers' ability to steer users to alternative payment systems. That agreement was found acceptable by Apple and some 6,700 app developers. Why should it be overridden by an injunction in a case involving a single plaintiff, when app developers have already had the opportunity to join a properly certified class action before, and have either chosen not to do so or have agreed to a different settlement? Further, if a single plaintiff's allegations of harm can undercut a court-approved, negotiated settlement involving a much larger number of plaintiffs, that diminishes the incentives of parties to fashion and negotiate reasonable settlements in the first instance.

A broad injunction may well be warranted when it is difficult to separate the parties affected by the enjoined conduct from those that are not. But this is not

the case here. The identity of the parties that have supposedly been harmed is clear—they are, at most, Epic's subsidiary and the approximately 100 developers that use the Epic Store. Even if the district court's conclusions regarding harm to Epic's subsidiary and other developers with apps on the Epic Store were correct, it would be easy—and necessary—to carve a much narrower remedy than the one the district court imposed. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2354-55 (2020).

Overly broad injunctions represent a Constitutional threat, as several members of this Court have warned. *See, e.g.*, *United States v. Texas*, 143 S. Ct. 1964, 1980 (2023) (Gorusch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); *see also Lewis v. Casey*, 518 U.S. 343, 360 (1996). "[G]ranting a remedy beyond what [is] necessary to provide relief to [the plaintiff is] improper." *Lewis*, 518 U.S. at 360. In addition to such constitutional implications, overly broad injunctions also raise problems from a law and economics perspective such as hindering and even destroying beneficial conduct. If an injunction is not properly tailored, the beneficial conduct which it precludes may be greater than the harmful conduct which it prevents, resulting in a loss to both total social welfare and consumer welfare.

II. Platforms Have Legitimate Business Reasons for Anti-Steering Provisions

By casting an overly wide net, the district court's injunction throws the proverbial baby out with the bathwater. Anti-steering provisions are commonly used by digital platforms and other businesses

because they serve a series of legitimate aims, such as allowing for the recoupment of investments. They also result in tangible procompetitive benefits, such as increased privacy, security, and market-wide output. These rules can be procompetitive, as this Court has recognized. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2289 (2018) [hereinafter *Amex*].

Absent intervention by this Court, Apple will have to comply with a nationwide injunction that risks diminishing these benefits. If the decision is not corrected, the precedent could have a harmful ripple effect, subjecting other platforms to overly broad injunctions against anti-steering provisions, even though those anti-steering provisions may help sustain and improve the overall quality of those platforms.

A. The framework for assessing competitive effects in a two-sided market requires a broad examination of the market as a whole

The district court properly found that Apple's procompetitive justifications for the anti-steering provisions in its IAP system outweighed any anticompetitive effects of those provisions. In fact, Epic failed to make even a prima facie case under the requisite rule-of-reason analysis, as Epic failed to show that Apple's app distribution and IAP system caused the significant, market-wide competitive harm that the Supreme Court deemed necessary to a showing of anticompetitive harm in *Amex*.

In *Amex*, the Court recognized the importance of platform economics and network effects to

understanding the market and competitive effects at issue. Two-sided platforms intermediate between two groups, offering a different product or service to each. 138 S. Ct. at 2280 (citing *e.g.*, David Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, 1 Issues in Competition L. & Pol'y 667 (2008); David Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667 (2005)).

The Court noted that two-sided platforms are characterized by indirect network effects, where the value of the platform to each group depends on the scale of, or number of members in, the other. *Id.* at 2280-81. Specifically, the Court observed that "two-sided *transaction* platforms exhibit more pronounced indirect network effects and interconnected pricing and demand." *Id.* at 2286 (emphasis added) (citing Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L.J. 571, 583 (2006)). Hence, "[e]valuating both sides of a two-sided transaction platform is . . . necessary to accurately assess competition." *Id.* at 2287.

B. Anti-steering provisions can be procompetitive

At issue in *Amex* were various anti-steering provisions American Express had placed in its contracts with merchants. The plaintiffs had alleged that the anti-steering provisions violated Section 1 of the Sherman Act. 138 S. Ct. at 2283. But in *Amex*, the Court recognized that "there is nothing inherently anticompetitive about . . . antisteering provisions." *Id.* at 2289. Those vertical provisions can, among other

things, prevent merchants from free-riding, thereby increasing the availability of "'tangible or intangible services or promotional efforts' that enhance competition and consumer welfare." *Id.* at 2290 (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890-91 (2007)).

As in *Amex*, understanding the competitive effects of conduct between the platform and parties on either side of the platform—for example, vertical agreements between the IAP and app developers—requires examining effects on the system as a whole. And just as in *Amex*, there are legitimate, procompetitive reasons for anti-steering provisions.

First, as discussed above, anti-steering provisions help prevent free-riding. Simply put, "free-riding" occurs when someone uses a valuable resource without paying for it. Free-riding—even the potential for free-riding—tends to undermine incentives to provide the resource in the first place, as well as incentives to improve it in later development. It presents an especially serious challenge to the provision of goods or services where it is difficult to exclude those who have not paid, as with city parks or policing. Everyone, even those who would be willing to pay if they had to, has an incentive to avoid fees. Thus, where free-riding is possible, desirable goods and services tend to be underfunded, reducing their provision (or, in antitrust terms, output), or, in the alternative, are provided dependent on government subsidy. The most common solution to free-rider problems is to create ways to exclude those who are unwilling to pay.

In this case, Apple owns a valuable resource that it has created and steadily improved—the iPhone and

iOS ecosystem, including the App Store. Apple currently charges commissions between 15% and 30% for digital goods sold through the App Store, including for certain in-app purchases. Epic would like to access that ecosystem without paying. But while Epic may benefit from its long-term strategy to reduce the fees it pays to Apple, consumers might not. If reductions in revenue from the iOS ecosystem mean that Apple has less incentive to invest in it, Epic's gain may come at the consumer's expense.

The district court correctly rejected Epic's main claim, as Epic failed to establish cognizable harm under the antitrust laws. That foreclosed Epic's ability to directly circumvent the App Store and pay a lower commission, or none at all. In granting a nationwide injunction against Apple's anti-steering provisions, the district court facilitated precisely the type of free-riding that failed to gain traction under federal antitrust law. Doing so will greatly exacerbate any free-rider problem Epic itself might have caused Apple, to the likely detriment of many developers and most consumers.

The situation is further complicated by the fact that the district court's injunction is vaguely written and is thus likely to be interpreted quite differently by different parties. Ultimately, if it allows app developers to link users outside of the in-app payments flow, and bypass Apple's IAP fees, it will further enable free-riding and undermine Apple's incentives to invest in iOS, iPhones, and iPads. And the injunction could undermine the incentive for Apple's competitors to develop whatever products might someday displace the current ones through competition.

Second, as a two-sided market, the App Store is valuable only because it is used by both consumers and developers, and Apple has to balance both sides of the market. The risk of developers leaving the iOS ecosystem creates a built-in ceiling on the prices Apple can charge, as users will be less inclined to pay for Apple products if valuable apps are not there. The commission-fee business model gives Apple and other platforms significant incentives to develop new distribution mediums (like smart TVs, for example) and to improve existing ones. Such development expands the audience that software can reach.

Apple's "closed" distribution model also allows the company to curate the App Store's apps and payment options. For example, Apple's guidelines exclude apps that pose data security threats, threaten to impose physical harm on users, or undermine child-safety filters. These rules increase trust between users and previously unknown developers, because users do not have to fear their apps contain malware. They also reduce user fears about payment fraud. Rivals could free-ride on Apple's curation by mimicking its decisions and undercutting it on price. Doing so does not enhance competition on the merits: It eviscerates it by eroding Apple's incentives to enforce such rules.

Apple's closed business model also enables it to maintain a high standard of performance on iOS devices by excluding apps and payment systems that might slow devices or crash frequently. Users may not know when device performance is affected by a given app or purchase mechanism, so an open system would mean the potential for apps that crash the entire device. Apple's closed model ensures that unscrupulous

developers cannot impose negative externalities on the entire ecosystem.

By increasing the total value of the platform, these benefits also increase the number of market-wide transactions. In a two-sided market, it is output—not prices—that tells us what is happening on the market *as a whole*, and it is therefore output that should be used as the relevant parameter to determine whether conduct is procompetitive or anticompetitive. "What is material is whether Apple's overall pricing structure reduces output by deterring app developers from participating in the market or users from purchasing apps (or iOS devices at all) because of the amount of the app developer commission." Geoffrey A. Manne & Kristian Stout, *The Evolution of Antitrust Doctrine After* Ohio v. Amex *and the* Apple v. Pepper *Decision That Should Have Been*, 98 Neb. L. Rev. 425, 457 (2019). Notably, the district court found that it could not ascertain whether Apple's alleged restrictions had "a negative or a positive impact on game transaction volume." Pet. App. 253a; *see also id.* ("no evidence that a *substantial* number of developers actually forego making games because of Apple's commission."); *id.* at 319a (finding Epic failed to show reduction in output and that "[t]he record contains substantial evidence that output has increased.").

Ultimately, however, the benefits of anti-steering provisions are obvious only if one adopts the correct, holistic vision of app stores as a two-sided market; conversely, they appear less relevant if one applies "one-sided logic in two-sided markets." Julian Wright, *One-sided Logic in Two-sided Markets*, 3 Review of Network Econ. 44, 45-51 (2004), https://www.degruyter.com/document/doi/10.2202/1446-9022.1042/pdf.

In this sense, in a two-sided market, anti-steering provisions can reduce transaction friction and bolster security and safety, thereby improving the platform's overall quality and, ultimately, attracting more users. *See Amex*, 138 S. Ct. at 2889 (sustaining similar anti-circumvention rules as procompetitive for these reasons). Developers may get a smaller share of revenues, but it is a smaller slice of a much larger pie. Thus, while the ability to circumvent Apple's commission fee can, on the surface, appear to benefit some developers, in the longer term most developers and consumers will be worse off.

Apple's anti-steering provisions increase safety and curation, and an injunction against them can reduce the overall value of Apple's platform. That would in turn discourage developers and users from using the iOS ecosystem, and would prompt a downward spiral in quality and choice for both sides of the market—which would depreciate the value of the platform even further.

C. Open and closed platforms are not inherently good or bad: They represent alternative business models with potential advantages and disadvantages

Any comparison between "open" and "closed" platforms should account for the fact that there are tradeoffs between the two; it should not simply assume that "open" equals "good" while "closed" equals "bad." Such analysis also must consider tradeoffs among consumers, and among developers, in addition to tradeoffs between developers and consumers. More vigilant users might be better served by an "open"

platform because they find it easier to avoid harmful content; less vigilant ones may want more active assistance in screening for malware, spyware, or software that simply isn't optimized for the user's device.

There are similar tradeoffs on the developer side: Apple's model lowers the cost to join the App store, which especially benefits smaller developers and those whose apps fall outside the popular gaming sector. In short, the IAP fee cross-subsidizes the delivery of services to the approximately 80% of apps on the App Store that are free to consumers and pay no IAP fees.

Centralized app distribution and Apple's "walled garden" model (including IAP) increase interbrand competition because they are at the core of what differentiates Apple from Android, the other major competing platform. 1-ER-148–49. They play into Apple's historical business model, which focuses on being user-friendly, reliable, safe, private, and secure. 1-ER-86; *see also* 1-ER-107 (recognizing that the safety and security of Apple's closed system is a "competitive differentiator for its devices and operating system"). Even Epic recognized that Apple would lose its competitive advantage if it were to compromise its safety and security features. 1-ER-48 n.250 (noting Epic's expert, Susan Athey, testified that "privacy and security are competitive differentiators for Apple").

For Apple and its users, the touchstone of a good platform is not "openness," but carefully curated selection and security, understood broadly as encompassing the removal of objectionable content, protection of privacy, and protection from "social engineering," and the like. 1-ER-148–49. By contrast,

Android's bet is on the open platform model, which sacrifices some degree of security for the greater variety and customization associated with more open distribution. These are legitimate differences in product design and business philosophy. *See* Andrei Hagiu, *Proprietary vs. Open Two-Sided Platforms and Social Efficiency* 2-3 (AEI-Brookings Joint Ctr. for Regul. Stud., Working Paper No. 06-12, 2006) [hereinafter *Proprietary vs. Open Platforms*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=980755 (explaining that there is a "fundamental welfare tradeoff between two-sided proprietary . . . platforms and two-sided open platforms, which allow 'free entry' on both sides of the market" and thus "it is by no means obvious which type of platform will create higher product variety, consumer adoption and total social welfare") (emphasis omitted); Jonathan M. Barnett, *The Host's Dilemma: Strategic Forfeiture in Platform Mkts. for Informational Goods*, 124 Harv. L. Rev. 1861, 1927 (2011) ("Open systems may yield no net social gain over closed systems, can impose a net social loss under certain circumstances, and . . . can impose a net social gain under yet other circumstances.").

Because consumers and developers could reasonably prefer either ecosystem, it is not clear that loosening Apple's control over the App Store would necessarily lead to more app transactions market wide. Indeed, in a two-sided market context, a proprietary platform like Apple's "may in fact induce more developer entry (i.e. product variety), user adoption and higher total social welfare than an open platform." *Proprietary vs. Open Platforms*, at 15-16. In other words, preventing certain apps from accessing the App Store, and preventing certain transactions from

taking place on it, may ultimately have increased the number of apps and transactions on Apple's platform, because doing so made it attractive to a wider set of consumers and developers.

Yet the injunction brings Apple's iOS closer to an "open" system, effectively rendering Apple's platform more similar to Android's. The district court found that Apple did not have a monopoly, yet under the guise of fostering competition on Apple's platform the injunction eliminates competition where it matters most—at the interbrand, systems level between Apple and Android. *See* Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. Econ. Persps. 93, 110 (1994), https://www.aeaweb.org/articles?id=10.1257/jep.8.2.93 ("[T]he primary cost of standardization is a loss of variety: consumers have fewer differentiated products to pick from, especially if standardization prevents the development of promising but unique and incompatible new systems"). By limiting intrabrand competition, in other words, Apple ultimately promotes interbrand competition. 1-ER-148–49. Again, *Amex* provides useful insight here, because the Court noted that the business model had "spurred robust interbrand competition," while increasing both the quality and quantity of transactions. *Amex*, 138 S. Ct. at 2290.

D. Anti-steering provisions are a legitimate way of recouping a platform's investments

Anti-steering provisions are a legitimate way for a platform to recoup its investments. Epic has argued that Apple could simply lift restrictions on the use of third-party IAP processors (e.g., Visa and

MasterCard), but still be appropriately compensated for the use of its intellectual property, ensure that iPhone users' IAP are sufficiently secure, and guarantee quality. 1-ER-153; Epic 9th Cir. Br. 44-47. But exactly how Apple could achieve these ends without increasing its costs is a question Epic has not even tried to answer. *See, e.g.*, 1-ER-151–52 (noting that Epic's requests for relief "leave unclear whether Apple can collect licensing royalties and, if so, how it would do so"); 1-ER-153 & n.617 (noting it would "be more difficult" and more costly for Apple to collect commission without the IAP system). Nor did Epic, the Epic amici, or the district court properly address the effect of the proposed less restrictive alternatives on *consumers* rather than competing developers. *See* 1-ER-148 n.605 (noting it is "unclear the extent or degree to which developers would pass on any savings to consumers").

Consistent with Epic's proposed approach, Apple could allow independent payment processors to compete, and charge an all-in fee of 30% when Apple's IAP is chosen. To recoup the costs of developing and running its App Store, Apple could then charge app developers a reduced, mandatory per-transaction fee (on top of developers' "competitive" payment to a third-party IAP provider) when Apple's IAP is not used. Indeed, where a similar remedy has been imposed already, Apple has taken similar steps. In the Netherlands, for example, where Apple is required by the Authority for Consumers and Markets to uncouple distribution and payments for dating apps, Apple has adopted a policy under which any apps that want to use a non-Apple payment provider must still "pay Apple a commission on transactions" that is 3% less than

normal (so 27% for most transactions), a slightly "reduced rate that excludes value related to payment processing and related activities." Apple, *Distributing Dating Apps in the Netherlands*, https://developer.apple.com/support/storekit-external-entitlement/ (last visited Oct. 26, 2023).

III. A State Law Should Not Undermine the Fundamental Goals of *Federal* Antitrust Policy

When assessing the effects of Apple's anti-steering provisions, the courts should not ignore Federal antitrust law and, especially, the effects on competition and consumers. In other words, the fact that anti-steering provisions are procompetitive should be a relevant factor in whether a federal court grants nationwide injunctive relief. To interpret California's Unfair Competition Law ("UCL") as the district court has done—in a way that is at loggerheads with federal antitrust law but yet permits a nationwide injunction—is to undermine the fundamental goal of antitrust policy, and to do so on a national level. As the Court has observed, "The heart of our national economic policy long has been faith in the value of competition." *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

The district court recognized Apple's security arguments as a key procompetitive factor that determines Apple's success and increases output across the platform, ultimately benefitting both consumers and developers. Yet the court issued an unnecessarily broad injunction against Apple's anti-steering provisions that risks chilling procompetitive conduct by

deterring investment in efficiency-enhancing business practices, such as Apple's "walled-garden" iOS (*see* sections II.B and II.D on the procompetitive benefits of anti-steering provisions). *See also Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("[F]alse condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

Even more egregiously, perhaps: It risks undermining federal antitrust law by enjoining conduct under state unfair competition law that is recognized as benign—and even beneficial—under federal antitrust law. If the district court's remedy is left to stand, state laws will be stretched beyond their territorial remit and used to contradict federal antitrust laws nationally, thus eviscerating federal antitrust policy from the bottom-up. This is not a hypothetical threat, either: California has already expressed its intent to use the UCL to "seek nationwide injunctions" on the same theory as the ruling below. Michael Acton, *Epic Games-Apple US Appeals Court Ruling Shows Power of California's Competition Law, Blizzard Says*, MLex (May 10, 2023), https://mlexmarketinsight.com/news/insight/epic-games-apple-us-appeals-court-ruling-shows-power-of-california-s-competition-law-blizzard-says.

The district court erred in finding Apple's anti-steering provision "unfair" despite a concurrent finding that there is no incipient antitrust violation. And a nationwide injunction based on that finding lifts what could have been a relatively contained mistake to the national level, and thereby magnifies it.

This is misguided from an antitrust perspective because it undermines some of the procompetitive benefits that anti-steering provisions in closed two-sided platforms can give to consumers and app developers. A national injunction that subverts Apple's ability to charge a commission for the use of its software and technology through paid apps and in-app payments might also alter the current balance between the two sides of the App Store, to the detriment of smaller developers of free apps. In this zero-sum game, the gain of a handful of developers who rely on paid downloads of apps and frequent in-app purchases by users will come at the expense of the majority who do not.

CONCLUSION

For the foregoing reasons, this Court should grant Apple's petition for a writ of certiorari.

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October 2023