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INTRODUCTION

Every person with an iPhone or Android automatically has access to some form of an app store, known as a Digital Application Distribution Platform.[1] These app stores are used to purchase and download applications for smartphones and other mobile devices.[2] The applications can be used for various purposes including social media, education, lifestyle, productivity, entertainment, and gaming.[3] Although one may assume that the quintessential example of an app store is the one used by Apple consumers, many platforms have developed their own version of the app store, like Google Play,

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1. See Jacob Kastrenakes, *Apple Says There are Now Over 1 Billion Active iPhones*, THE VERGE (Jan. 27, 2021), https://www.theverge.com/2021/1/27/22253162/iphone-users-total-number-billion-apple-tim-cook-q1-2021, for a quote by Apple's CEO Tim Cook stating "there are now more than 1 billion active iPhones" with 1.65 billion Apple devices in active use overall; *See also* Canyon Brimhall, *App Stores Make Smartphones Smart.* Epic v. Apple *Could Change That*, RSTREET (Jul. 28, 2021), https://www.rstreet.org/2021/07/28/app-stores-help-make-smartphones-smart-epic-v-apple-could-change-that/.

2. Canyon Brimhall, *App Stores Make Smartphones Smart.* Epic v. Apple *Could Change That*, RSTREET (Jul. 28, 2021), https://www.rstreet.org/2021/07/28/app-stores-help-make-smartphones-smart-epic-v-apple-could-change-that/ [hereinafter Brimhall].

3. Bridget Poetker, *What Are the Different Types of Mobile Apps?*, LEARN G2 (Mar. 13, 2019), https://learn.g2.com/types-of-mobile-apps.

leading to the guise of competition in the market.[4] Further, perhaps unknown to the average consumer, these app stores provide security and convenience on mobile devices, keeping users safe by screening out potentially malicious software and reducing transactions costs for consumers.[5] App stores scan for malware and provide secure transactions and payment systems.[6]

Apple and Google have implemented strict rules regarding app developers' payment and profits. Specifically, businesses or app developers that want to use an app to sell goods, conduct business, or provide services are required to pay a "30 percent payment processing fee."[7] This leads to consumers paying more, competition being stifled in the market, and startups having a tougher time gaining traction because their revenue is undercut by this thirty-percent rule.[8]

The app store fee structure has led to legal battles[9] in recent news, which was likely an inveitable result from growing public resentment against these policies.[10] Specifically, the fee structure for app developers requires that, in exchange for providing a service to developers and a safe marketplace for users, app stores charge a commission of thirty-percent for sales related to the app, including digital content and subscriptions.[11] This is reduced to fifteen-percent each succeeding year of subscription.[12] Two leaders in the technology and app store industries, Apple and Google, allow companies they classify as offering physical goods, like Amazon, Uber, and Airbnb, to

4. Other competitors like Amazon, Samsung, Sony, and Nintendo Switch have their own versions of Digital Application Distribution Platforms. Brimhall, *supra* note 2.

5. *Id.*

6. *Id.*

7. Leah Nylen, *Apple, Google App Store Fights Move to the States*, POLITICO (Mar. 3, 2021 3:57 PM), https://www.politico.com/news/2021/03/03/apple-google-app-store-fights-move-to-the-states-473388 [hereinafter Nylen].

8. *Id.*

9. This specific fee structure has faced challenges in multiple legal proceedings for its monopolistic and anti-competitive characteristics. *See generally* Apple Inc. v. Pepper 139 S.Ct. 1514 (2019); Epic Games, Inc. v. Apple, Inc., No. 20-cv-05640, at 1 (N.D. Cal. Sept. 10, 2021).

10. Nylen, *supra* note 7 (quoting Representative Andy Vargas, a Democrat sponsoring legislation in Massachusetts, "'[c]onsumers deserve fairness and our small app developers – especially people of color often left out of scaling startups – deserve equitable opportunities to pursue their big ideas'").

11. Brimhall, *supra* note 2.

12. *Id.*

process their own payments.[13] But, apps that sell only digital goods, like online gaming features, must use this thirty-percent system of payment processing.[14] Apple and Google also forbid app developers from communicating the underlying features and rules of this fee structure to consumers by stopping them from indicating to app purchasers that the app price might be cheaper if they purchased the apps directly from the source.[15] Apple and Google's anti-steering rules "prohibit app developers from linking to external websites where they can purchase virtual currency or items without using the App Store payments system."[16] In the face of recent public backlash, Apple and Google are still defending their app store practices against state legislation and lawsuits that assert this system is unjust and anti-competitve by nature.[17]

This Comment proceeds in four principle parts. Section II of this Comment details the history of antitrust law, the most important legislation to regulate antitrust behavior, and the caselaw relevant to monopolistic practices in the technology space.[18] Section III highlights proposed state legislation designed to change the structure of digital application distribution platforms, and then discusses federal-level legislation combatting the same issue.[19] Section IV offers potential solutions to ensure protections of competition and consumers in restructuring the structure of these app platforms.[20] Finally, Section

13. Nylen, *supra* note 7.

14. *Id.*

15. For example, a paid Spotify subscription costs $9.99 a month if users sign up on the company's website, versus the $12.99 that users who signed up on their iPhone had to pay. Spotify is even trying to raise awareness around this fact through emailing consumers to make them aware of the price discrepancy. Chris Welch, *Spotify Urges iPhone Customers to Stop Paying Through Apple's App Store*, THE VERGE (Jul. 8, 2015 12:17 PM), https://www.theverge.com/2015/7/8/8913105/spotify-apple-app-store-email.

16. Brendan Sinclair, *Deadline for Apple to Change Anti-Steering Policy Postponed*, GAMESINDUSTRY (Dec. 8, 2021), https://www.gamesindustry.biz/deadline-for-apple-to-change-anti-steering-policy-postponed/.

17. Mike Peterson, *Apple's Lobbying Against Georgia App Store Bill Included Threats to Pull Investments*, APPLE INSIDER (Aug. 20, 2021). https://appleinsider.com/articles/21/08/20/apples-lobbying-against-georgia-app-store-bill-included-threats-to-pull-investments (detailing how Apple lobbied many state governments to stall legislation affecting the app store, including Arizona, North Dakota, Georgia, Louisiana).

18. *See infra* Section II.

19. *See infra* Section III.

20. *See infra* Section IV.

V concludes with a call to action for Congress to pass bills to remedy these potentially anti-competitive practices and to establish a federal regulatory agency to monitor these practices through legislation.[21]

I. LEGAL BACKGROUND

A. History of Antitrust Law and Relevant Legislation

The purpose of antitrust law is to ensure a fair and equitable marketplace, by proscribing unlawful business practices to "protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up."[22] Further, antitrust law aims to protect competition and not competitors themselves. This competition results in "innovation and consumer satisfaction and is essential to the effective operation of a free market system."[23] An integral feature of antitrust law involves defining the relevant market and analyzing whether an actor has infringed on the freedom of this market and impeded healthy competition.[24] Oftentimes in antitrust caselaw, opposing sides will define the relevant market differently to show whether or not a potential monopolistic practice has arisen.[25] Ultimately, in these situations, it is up to the finder of fact to deduce the relevant market and interpret the anti-competitive practices under this broader scheme of market forces.[26]

21. *See infra* Section V.

22. FTC, *Guide to Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [hereinafter FTC].

23. Epic Games, Inc. v. Apple, Inc., No. 20-cv-05640, at 1 (N.D. Cal. Sept. 10, 2021) (Rule 52 order after trial on the merits).

24. *See* Disruptive Competition Project, *Antitrust in 60 Seconds: Market Definition*, PROJECT DISCO, https://www.project-disco.org/competition/090518-antitrust-in-60-seconds-market-definition/ (claiming that "[m]arket definition is an important step in [the] building of an antitrust case or investigating a market for anticompetitive harms").

25. *See* Epic Games, Inc. v. Apple, Inc. No., 20-cv-05640, at 1 (N.D. Cal. Sept. 10, 2021) (discussing how Epic Games asserted that Apple does not compete with anyone and is a monopoly of one in its own market, while Apple asserted the relevant market is for all digital video games so it is not a monopoly of one in that larger market).

26. *Id.*

Congress has passed three core federal antitrust laws: the Sherman Act,[27] the Clayton Antitrust Act,[28] and the Federal Trade Commission Act.[29] These federal antitrust laws are enforced in three ways: (1) "criminal and civil enforcement actions brought by the Antitrust Division of the Department of Justice," (2) "civil enforcement actions brought by the Federal Trade Commission," and (3) "lawsuits brought by private parties asserting damage claims."[30] States also have antitrust laws that are enforced by state attorneys general or private plaintiffs, largely based on claims stemming from these three core federal antitrust laws.[31]

The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy, or combination to monopolize."[32] The Act also makes any of these attempts at monopolizing interstate trade or commerce a felony,[33] and extends to protect trade or commerce among the several states or with foreign nations.[34] Since enactment of the Sherman Act in 1890, courts have interpreted the Act to only apply to "unreasonable restraints."[35] The penalties[36] for violating the

27. 15 U.S.C. §§ 1-7; *See also* Apple, Inc. v. Pepper, 139 S.Ct. 1514, 1525 (2019) (stating that "[e]ver since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890 . . ." the central aim of antitrust regulations has been to protect consumers from monopoly prices).

28. 15 U.S.C. §§ 12-27; 29 U.S.C. §§ 52-53.

29. The Federal Trade Commission Act, 15 U.S.C. § 45 (2021).

30. U.S. DEP'T OF JUST., *Antitrust Enforcement and the Consumer*, https://www.justice.gov/atr/file/800691/download.

31. *See* FTC, *supra* note 22.

32. 15 U.S.C. § 1-2 (2021); *See* FTC, *supra* note 22.

33. 15 U.S.C. § 1-2 (2021); *See also* Legal Information Institute, *Sherman Antitrust Act,* CORNELL LAW SCHOOL,
https://www.law.cornell.edu/wex/sherman_antitrust_act.

34. 15 U.S.C. § 3 (2021).

35. The Sherman Act only prohibits "*unreasonable*" restraints on trade because it would be impossible to prohibit every single restraint on trade, including an agreement between two individuals. FTC, *supra* note 22.

36. The criminal penalties can be up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. These numbers can be increased to twice the amount the "conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts [are] over $100 million." FTC, *supra* note 22; *See also* Antitrust Division, *Sherman Act Violations Resulting in Criminal Fines & Penalties of $10 Million or more,* U.S. DEP'T OF JUST., https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more, for an interesting and eye-opening list on the Department of Justice's website of Defendant corporations' fines for violating the Sherman Act to show the severe penalties regularly imposed for violators of this Act.

Sherman Act can be severe, including both civil enforcement actions and criminal penalties.[37]

Further, potential violations of the Sherman Act may be analyzed by the courts under the "per se" rule,[38] where certain acts are considered by the courts to be "so harmful to competition that they are almost always illegal."[39] These types of agreements have no significant "procompetitive benefit," so they do not warrant the time and expense required for an individualized inquiry into their effects on the market.[40] Thus, these agreements are challenged as per se unlawful in the courts.[41]

Potential violations of the Sherman Act may also be analyzed in the courts under the "rule of reason," which encompasses all other potentially unfair agreements and requires the courts to conduct a factual inquiry into the agreement's overall competitive effect.[42] A rule of reason analysis "entails a flexibile inquiry and varies in focus

37. If an individual or business violates the Sherman Act, they may be prosecuted by the Department of Justice. These types of prosecutions are typically limited to "intentional and clear violations such as when competitors fix prices or rig bids." FTC, *supra* note 22.

38. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 254 (1940) (applying the Sherman Act to hold that a combination formed for purpose and with effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is "per se" illegal); United States v. Sealy, Inc., 388 U.S. 350, 355 (1967) (applying the Sherman Act to find that the territorial restraints as a part of the unlawful price-fixing and policing activities of Sealy constituted a severe trade restraint, and were "per se" illegal).

39. FTC, *supra* note 22.

40. FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

41. *Id.*

42. FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf; *See* National Soc'y of Prof'l. Eng'rs v. United States, 435 U.S. 679, 692 (1978) (utilizing the rule of reason inquiry to determine whether the agreement is one that promotes or suppresses competition); *See also* California Dental Ass'n v. FTC, 625 U.S. 756, 759 (1999) (specifying that the rule of reason standard is a flexible standard that "demands a more thorough enquiry into the consequences of those restraints" and thus does not require a complete analysis of the market in every instance).

and detail depending on the nature of the agreement and market circumstances."[43]

The Clayton Antitrust Act of 1914 addresses practices that the Sherman Act does not clearly prohibit, like mergers and interlocking directorates.[44] Section eighteen[45] of the Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[46] The Robinson-Patman Act of 1936[47] amends the Clayton Antitrust Act to also include bans on discriminatory pricing, services, and allowances in dealings between merchants.[48] The Clayton Antitrust Act also allows private parties to sue for triple damages[49] where they have been harmed by conduct that violates either the Sherman Act or the Clayton Antitrust Act, and to obtain a "court order prohibiting the anticompetitive practice in the future."[50]

Finally, the Federal Trade Commission (FTC) Act bans "unfair methods of competition" and "unfair or deceptive acts or practices."[51] The Supreme Court has also stated that all violations of the Sherman Act concurrently violate the FTC Act.[52] The Federal Trade Commisision has the ability to bring cases under the FTC Act against the same kinds of activities that would normally violate the Sherman Act.[53] The FTC Act also "reaches other practices that harm

43. FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

44. *Id.*

45. 15 U.S.C. § 18.

46. FTC, *supra* note 22.

47. 15 U.S.C. § 13.

48. *See* FTC, *supra* note 22.

49. 15 U.S.C. § 15(a) (stating any person "who shall be injured in his business or property by reason of anything forbidden in antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

50. *Id.*; FTC, *supra* note 22.

51. The Federal Trade Commission Act, 15 U.S.C. § 45 (2021).

52. *See* FTC v. Motion Picture Advertising Service Co., Inc., 344 U.S. 392, 394-95 (1953) (stating that the FTC Act "was designed to supplement and bolster the Sherman Act and the Clayton Act–to stop in their incipiency acts or practices which, when full blown, would violate those Acts").

53. *See* FTC, *supra* note 22.

competition," but these practices may not fit into the "categories of conduct" otherwise prohibited by the Sherman Act.[54]

B. Recent Antitrust Caselaw in the Technology Realm

Historically, antitrust laws have aimed to target unfair market practices in response to the industrial age.[55] However, the overwhelming rise of digital economies coupled with modern companies making their own rules, has resulted in an exposure of the archaic nature of these antitrust laws and their inability to reach the digital market as successfully as they have reached the physical market.[56] In response to exposure of the weakness of the current antitrust infrastructure in regulating big technology companies, many consumers and participants in the technology market have fought back against alleged monopolistic practices that go unregulated through the judicial system.[57]

C. The Standing Issue in Monopolistic Technology Suits: Apple Inc v. Pepper and its Predecessors

The courts have confronted multiple issues in the realm of modern antitrust claims against technology giants, like Apple and Google. The first of these issues involves who has the standing to bring these types of claims against larger-than-life companies, which is the preliminary step before establishing that these consumers have a viable claim on the merits.[58]

Article III[59] standing is the capacity of a party to bring suit in court. To bring a case or controversy, the plaintiff must allege they have suffered an "injury in fact" which is concrete or particularized and

54. *Id.*

55. Tom Wheeler, Phil Verveer & Gene Kimmelman, *The Need for Regulation of Big Tech Beyond Antitrust*, BROOKINGS (Sept. 23, 2020) https://www.brookings.edu/blog/techtank/2020/09/23/the-need-for-regulation-of-big-tech-beyond-antitrust/.

56. *See id.* (claiming that the "rapid pace of digital technology means companies can move rapidly to advantage themselves by exploiting consumers and eliminating potential competition").

57. *See* Apple Inc v. Pepper, 139 S.Ct. 1514 (2019); Epic Games, Inc. v. Apple, Inc., No. 20-cv-05640, at 1 (N.D. Cal. Sept. 10, 2021).

58. *See* Apple Inc v. Pepper, 139 S.Ct. 1514 (2019).

59. U.S. CONST. art. III, § 2, cl. 1.

actual or imminent.[60] There also has to be a causal connection between the injury and the conduct complained of.[61] Finally, it must be likely that a favorable decision by the court can redress the injury complained of.[62] Once plaintiffs establish standing, they may have their case tried in court and proceed on the merits.[63]

The Supreme Court addressed the issue of standing in suits against technology platforms in the landmark case of *Apple Inc. v. Pepper*.[64] Specifically, the Court dealt with the issue of whether four iPhone consumers in a class action suit had standing to bring their suit, where they argued that Apple exercised unlawful, monopolistic power over their app store.[65] The Court asked whether these consumers were "direct purchasers"[66] from Apple who would have legal standing to bring the suit based on past precedent in *Illinois Brick Co. v. Illinois*[67] and the text of antitrust laws, specifically the Sherman Act and the Clayton Antitrust Act.[68] *Illinois Brick*[69] set forth the rule that in order to bring an antitrust suit against a potential antitrust violator, the plaintiff must maintain a direct purchaser relationship with a retailer

60. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (articulating the three-part test used to determine whether a party has standing to sue in federal court).

61. *Id.*

62. *Id.*

63. Legal Information Institute, *Standing,* CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/standing (last visited Oct. 9, 2022).

64. 139 S.Ct. 1514 (2019).

65. *See generally id.*

66. *Id.* at 1521 (stating that the "bright-line rule" set forth in *Illinois Brick* and reiterated later in *UtiliCorp* is that direct purchasers who are the immediate buyers from the antitrust violators may sue).

67. 431 U.S. 720 (1977); *see also* Kansas v. Utilicorp United, Inc., 110 S.Ct. 2807, 2813 (1990) (stating that the "direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers").

68. The Court looked at the text of Section 2 of the Sherman Act, which "makes it unlawful for any person to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . ." Apple Inc. v. Pepper, 139 S.Ct. 1514, 1520 (2019) (quoting 15 U.S.C. § 2). The Court also looked at the text of Section 4 of the Clayton Act, which provides any person injured in "his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages . . ." *Id.* at 1520 (quoting 15 U.S.C. § 15(a)).

69. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

to sue that retailer for damages.[70] In other words, the proper plaintiff in an antitrust case must not be "two or more steps removed from the antitrust violator in a distribution chain."[71] This doctrine has been relatively unsettled since the *Illinois Brick* decision[72] and has faced criticism, leading to its inevitable challenge in *Apple Inc. v. Pepper.*[73]

In *Apple Inc. v. Pepper,*[74] the Supreme Court found that there was no "intermediary in the distribution chain between Apple and the consumer"[75] and thus, under *Illinois Brick,*[76] the iPhone owners were direct purchasers from Apple and were the proper plaintiffs to bring their antitrust suit. Interestingly, the substance of the claims by these consumers involved allegations that Apple's practice of charging independent app developers a thirty-percent commission[77] directly caused app developers to charge uncompetitively high prices for their apps, interfering with the freedom and integrity of the market.[78] This case clarified the modern nature of the relationship between technology platforms and its consumers, and opened the door to new challenges to monopolistic practices by granting standing to these plaintiffs.[79] In recent years, the substance of the arguments set forth

70. *Illinois Brick*, 431 U.S. at 724 (stating that the Court does not allow a "pass-on" theory of liability where illegal overcharges may be passed through a chain of distribution to a third-party, who then sues for the injury).

71. Apple Inc. v. Pepper, 139 S.Ct. 1514, 1521 (2019).

72. *Clayton Antitrust Act and Sherman Antitrust Act – Antitrust Trade and Regulation – Antitrust Standing* – Apple Inc. v. Pepper, 133 HARV. L. REV. 382 (Nov. 3, 2019), https://harvardlawreview.org/2019/11/apple-inc-v-pepper/ [hereinafter HARV. L. REV.].

73. 139 S.Ct. 1514 (2019).

74. *Id.*

75. *Id.* at 1521.

76. 431 U.S. 720 (1977).

77. *See* HARV. L. REV., *supra* note 72 (explaining the system as one where "third-party developers pay Apple a $99 annual membership fee and allow Apple to keep a 30% commission on all sales of their apps through the Store" and Apple does not determine the sale price, just that the price must end in 99 cents).

78. Apple Inc. v. Pepper, 139 S.Ct 1514, 1519 (2019) (stating that the iPhone consumers alleged that Apple unlawfully monopolized the iPhone apps market, by locking iPhone owners into buying apps only from Apple and paying their required thirty-percent fee even if they wish to buy their apps elsewhere for a cheaper price).

79. *See* Apple Inc. v. Pepper, 139 S.Ct. 1514, 1523 (discussing how if Apple were to prevail on their theories in this case, it would "provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade anti-trust claims by consumers and thereby thwart effective antitrust enforcement"); *See also* Kif Leswing, *Apple Failed to Close off a Big Antitrust Threat, but it Probably Won't Feel the Harm for Years,* CNBC (May 13, 2019), https://www.cnbc.com/2019/05/13/apple-v-pepper-supreme-court-loss-little-

by the four consumer-plaintiffs in *Apple Inc. v. Pepper* is being litigated against big technology companies, showing that *Apple Inc. v. Pepper* opened the door for this influx of litigation.

D. The Substantive Issue in Monopolistic Technology Suits: Epic Games v. Apple and the Recent Influx of Litigation

As referenced above in the discussion on the substantive arguments put forth in *Apple, Inc. v. Pepper,*[80] Apple's thirty-percent commission and overwhelming hold on the app store industry has caused backlash from the public and app developers alike. In recent years, many companies have challenged this thirty-percent commission used by both Apple and Google, including billion-dollar companies such as Epic Games, Spotify, and the Match Group.[81] Epic Games, the creator of *Fortnite* and its own Epic Games app store, filed a complaint in 2020 against Apple in the European Union[82] and both Apple and Google in Australia, demonstrating the broad-reaching scope of this issue.[83]

Epic Games has also filed suit in federal district court in the U.S. against both Google and Apple after the technology giants removed the app *Fortnite* for violating their respective terms of service with

harm-now-long-term-threat.html [hereinafter Leswing] (discussing how the decision was "primarily procedural" in *Apple Inc. v. Pepper*, but "future court battles stemming from the decision could rage on for years" as a "major antitrust threat to Apple's App Store business").

80. *Id.*; *See supra* Section II(B)(i).

81. *See* Brimhall, *supra* note 2.

82. Epic Games is not seeking damages against Apple but wants the European Union competition authorities to impose remedies against the iPhone maker's "monopoly channels" and the European Union has opened a formal probe into certain Apple practices in 2020, which is unrelated to this pending litigation. Natasha Lomas, *Epic Games Takes its Apple App Store Fight to Europe*, TECHCRUNCH (Feb. 17, 2021 6:15 a.m.), https://techcrunch.com/2021/02/17/epic-games-takes-its-apple-app-store-fight-to-europe/.

83. *See* Brimhall, *supra* note 2; *See* James Batchelor, *Epic Games Wins Appeal Against Apple in Australia*, GAMESINDUSTRY (Jul. 12, 2021), https://www.gamesindustry.biz/articles/2021-07-12-epic-games-wins-appeal-against-apple-in-australia (reporting that Epic Games won its appeal against Apple in Australia to proceed with the case in July of 2021, where Apple tried to hold off the court proceedings); *See also Epic Games, Inc v. Apple Inc [2021]* FCAFC 122 (Austl.) (showing the Federal Court of Australia's decision to grant appeal for Epic Games in their suit against Apple).

regards to payments.[84] Specifically, Epic Games tried to avoid the rigid payment requirements set by Apple and Google in their app stores on both iPhone and Android devices.[85] As the trigger for the *Epic Games, Inc. v. Apple, Inc.*[86] litigation, Epic Games tried to tweak its hit video game *Fortnite*[87] on iOS so that players could buy in-game V-Bucks[88] via two methods, either through the traditional route on Apple's app store, or through "Epic Games' direct payment option" with a twenty-percent discount.[89] In response, Apple and Google removed *Fornite* from their app stores for failing to use the proper payment processing systems.[90] This led Epic Games to sue Apple and Google in the United States District Court for the Northern District of California.[91] Epic Games alleged that Apple violated federal and state antitrust laws and California's unfair competition law due to the operation of the app store.[92] Epic Games claimed that Apple is an "antitrust monopolist over (i) Apple's *own system* of distributing apps on Apple's *own devices* in the App Store, and (ii) Apple's *own system* of collecting payments and commissions of purchases made on Apple's *own devices* in the App Store."[93] Apple disputed the allegations in response.[94]

On September 10, 2021, the Northern District of California issued a ruling and both sides essentially lost.[95] Judge Yvonne Gonzales Rodgers concluded that Apple was not unfairly monopolizing the

84. Epic Games, Inc. v. Apple, Inc., No. 20-cv-05640, at 3 (N.D. Cal. Sept. 10, 2021); Epic Games, Inc. v. Google, 3:20-cv-05671 at 2 (N.D. Cal. Sept. 19, 2021) (First Amended Complaint for Injunctive Relief).

85. Epic Games, Inc. v. Apple, Inc., 20-cv-05640-YGR, at 3 (N.D. Cal. Sept. 10, 2021).

86. No. 20-cv-05640, at 1 (N.D. Cal. Sept. 10, 2021).

87. "*Fortnite* is Epic Games' most popular game and app, with over 400 hundred million registered players worldwide." *Id.* at 7.

88. "Players can use V-Bucks to purchase digital content within the app . . ." *Id.* at 11.

89. *Id.*

90. *Id.*

91. *Id.* at 1.

92. Epic Games, Inc. v. Apple, Inc., No. 20-cv-05640, at 1 (N.D. Cal. Sept. 10, 2021).

93. *Id.*

94. *Id.*

95. *See* Adi Robertson, *A Comprehensive Breakdown of the* Epic v. Apple *Ruling*, THEVERGE (Sep. 12, 2021 11:03 AM), https://www.theverge.com/2021/9/12/22667694/epic-v-apple-trial-fortnite-judge-yvonne-gonzalez-rogers-final-ruling-injunction-breakdown [hereinafter Robertson].

mobile app space with iOS or their in-app purchasing system and ordered Epic Games to pay damages for violating its developer agreement with *Fornite*.[96] However, Judge Gonazales Rogers found Apple violated California's laws against unfair competition and ordered Apple through a permanent injunction to remove its current anti-steering rules,[97] which served to block consumers from knowing what developers may be offering on their websites, including possible lower prices.[98] As one commentary summarized the results, Epic Games made "10 claims against Apple. Most of them depended significantly on Apple having an unfair monopoly under either the federal Sherman Antitrust Act or California's antitrust-focused Cartwright Act. And although the ruling is sympathetic toward several of Epic's underlying arguments, nearly all its claims were dismissed."[99] Shortly after the ruling, the parties filed cross-appeals: Apple appealed the ruling for issuing a permanent injunction for its anti-steering practices and Epic appealed the overall ruling, focusing on Judge Roberts' definition of the market.[100] The U.S. Court of Appeals for the Ninth Circuit held an appeals hearing on November 14, 2022 for both sides to litigate these issues.[101]

96. Judge Gonzales Rogers ordered Epic Games to pay damages equal to 30% of the $12,167,719 in revenue they collected from users in the *Fornite* app on iOS through their Epic Direct Payment system between August and October 2020, plus thirty-percent of any revenue they collected from November 1, 2020 through date of judgment. Epic Games, Inc. v. Apple, Inc., No. 20-cv-05640, at 1 (N.D. Cal. Sept. 10, 2021) (Judgment).

97. The anti-steering practices included Apple prohibiting developers from including in their apps calls to action that direct consumers to specific purchasing mechanisms. Epic Games, Inc. v. Apple, Inc., No. 20-cv-05640, at 1 (N.D. Cal. Sept. 10, 2021) (Permanent Injunction); *See also* Robertson, *supra* note 95 (explaining that Apple's anti-steering practices included policies "banning developers from telling users about alternatives to Apple's in-app purchase system").

98. *See* Robertson, *supra* note 95.

99. *Id.*

100. *See* Kellen Browning, *Apple Appeals App Store Ruling in Fight With Epic Games*, N.Y. TIMES (Oct. 8, 2021), https://www.nytimes.com/2021/10/08/technology/apple-epic-games-lawsuit.html?referringSource=articleShare; William Gallagher, *Epic Games Versus Apple Appeals to be Heard on October 21*, APPLE INSIDER (Aug. 11, 2022), https://appleinsider.com/articles/22/08/11/epic-games-versus-apple-appeals-to-be-heard-on-october-21.

101. Brian Gordon, *Epic Games Faces Uphill Battle in Apple Fight After Latest Hearing, Economist Says* (Nov. 15, 2022), https://www.newsobserver.com/news/business/article268726387.html (discussing the highlights of the seventy-five minute hearing before the Ninth Circuit, where the United States Department of Justice joined Epic Games, arguing

This case also established that Apple does not currently have a monopoly over the mobile gaming industry, which leaves open the door for future antitrust complaints alleging the alternative.[102] Judge Gonzales Rogers' opinion warns of the troubling lack of competition in the gaming app store market, stating that a "third-party app store could put pressure on Apple to innovate by providing features that Apple has neglected," but this is not the reality due to Apple's restrictions on the gaming distribution market on iPhones.[103] Interestingly, mobile games make up approximately seventy-percent of Apple's app store revenue.[104] Further, iOS and Android hold a near-duopoly in this arena.[105] The legacy of this decision can be integral in defining the rights of technology giants and the legality of their hold over the app store market and the technology industry in general. The thirty-percent cut that Apple takes for apps purchased through its app store "is only one manifestation of its durable control over this mobile app infrastructure"[106] and a tipping point for angry consumers and app developers.

III. RECENT LEGISLATIVE INITIATIVES AGAINST MONOPOLISTIC PRACTICES IN THE TECHNOLOGY REALM

Considering the controversy surrounding the anti-competitive nature of digital application distribution platforms or app stores, notable state and federal-level legislation is in the works to change the current

that "Apple maintains an unlawful monopoly" through its thirty-percent charging mechanism").

102. Epic Games, Inc. v. Apple, Inc., No. 20-cv-05640, at 139 (N.D. Cal. Sept. 10, 2021) (stating "the evidence does suggest that Apple is near the precipice of substantial market power, or monopoly power, with its considerable market share. Apple is only saved by the fact that its share is not higher . . .").

103. *Id.* at 102.

104. *See* Robertson, *supra* note 95.

105. *Id.*

106. Mark MacCarthy, *The Epic-Apple App Case Reveals Monopoly Power and the Need for New Regulatory Oversight*, BROOKINGS (Jun. 2, 2021), https://www.brookings.edu/blog/techtank/2021/06/02/the-epic-apple-app-case-reveals-monopoly-power-and-the-need-for-new-regulatory-oversight/.

structure of app stores, initiated by Epic Games[107] and its developer allies.[108]

A. State-Level Legislative Initiatives Against Big Technology Companies' Monopolistic Practices

State-level bills that would potentially have a sweeping impact on "Apple and Google's ability to collect a cut of financial transactions in smartphone apps"[109] are on the rise across the United States, ranging from Hawaii to Georgia. Companies like Spotify, Match Group, Epic Games, and fifty others joined to form a lobbying group, called the *Coalition for App Fairness*,[110] that target phone-makers, arguing the commissions they compel on in-app purchases are anti-competitive. Much of the state-level proposed legislation focuses on letting app-makers choose their own payment processors.[111] For example, the Arizona House of Representatives, in a landmark 31-29 vote, passed a bill in 2021[112] that would regulate Apple and Google app stores. The Arizona Senate, however, without an explicit public reason failed to vote on the bill.[113] Bills of the same nature have not survived the

107. Mike Peterson, *Apple's Lobbying Against Georgia App Store Bill Included Threats to Pull Investments,* APPLE INSIDER (Aug. 20, 2021), https://appleinsider.com/articles/21/08/20/apples-lobbying-against-georgia-app-store-bill-included-threats-to-pull-investments ("Epic Games and its developer allies have taken to state governments because they tend to move quicker and are more flexible than the federal legislature.") [hereinafter Peterson].

108. *See* Nylen, *supra* note 7; Lauren Feiner, *Lawmakers Unveil Major Bipartisan Antitrust Reforms that Could Reshape Amazon, Apple, Facebook and Google*, CNBC (Jun. 11, 2021 2:40 PM), https://www.cnbc.com/2021/06/11/amazon-apple-facebook-and-google-targeted-in-bipartisan-antitrust-reform-bills.html.

109. Cat Zakrewski, *The Technology 202: State Legislatures Across the Country are Targeting App Stores*, THE WASHINGTON POST (Mar. 5, 2021 9:21 AM), https://www.washingtonpost.com/politics/2021/03/05/technology-202-state-legislatures-across-country-are-targeting-app-stores/.

110. See generally *Coalition for App Fairness*, COALITION FOR APP FAIRNESS, https://appfairness.org/ for the lobbying group's website including their vision, ways to take action to create change, and a list of the founding members of the Coalition.

111. *See* Nylen, *supra* note 7.

112. *See* Ariz. H. of Rep. 2005, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

113. *See* Nick Statt, *Arizona Senate Skips Vote on Controversial Bill that Would Regulate Apple and Google App Stores*, THE VERGE (Mar. 24, 2021 7:46 p.m.), https://www.theverge.com/2021/3/24/22349302/arizona-hb2005-bill-vote-skipped-senate-apple-google-ios-android-app-store.

legislative process in other states like North Dakota.[114] In addition, Georgia's version of the app store bill has recently stalled in the state's House Judiciary Committee.[115] Similar legislation is also currently being considered in Minnesota, New York, Illinois, and Hawaii.[116]

Big technology companies like Apple and Google have lobbied against this proposed legislation across the United States, for the understandable reason that it would be detrimental to their current app store practices.[117] This is likely the reason why not one of these state bills has been able to pass through each state's bicameral structure.[118] Apple has advocated against these bills because the company believes that "the [a]pp store is a core part of its product and . . . its tight control over its rules keeps iPhone users safe from malware and scams."[119] Thus, state-level legislation faces challenges as both conservatives and liberals in state legislatures struggle to define how to adequately regulate big technology practices through the app store.

B. Federal-Level Legislative Initiatives Against Big Technology Companies' Monopolistic Practices

Similarly, members of Congress have proposed legislation to regulate the practices of big technology companies and prevent these app store anti-competitive practices. These congressional members likely proposed these bills in response to a sixteen-month House Judiciary subcommittee on Antitrust, Commercial, and Administrative Law investigation in 2020[120] into the competitive practices at Apple,

114. Leswing, *supra* note 79. ("The North Dakota state senate voted 36-11 . . . not to pass a bill that would have required app stores to enable software developers to use their own payment processing software and avoid fees charged by Apple and Google.").

115. *See* Peterson, *supra* note 107.

116. *See* Nylen, *supra* note 7 (listing the states that are considering similar legislation).

117. "Apple deployed lobbyists and executives to Arizona to fight the bill's passage, and pro-industry lobbying groups have been fighting against similar measures in other states." *See* Zakrewski, *supra* note 109.

118. Statt, *supra* note 113. "One notable Apple critic is now accusing the iPhone maker of stepping in to stop the vote, saying the company hired a former chief of staff to Arizona Gov. Doug Ducey to broker a deal that prevented the bill from being heard in the Senate and ultimately voted on." *Id.*

119. Leswing, *supra* note 79.

120. STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMM. at 6 (Comm. Print 2020).

Amazon, Facebook, and Google. This House subcommitee investigation found that "the four Big Tech companies enjoy monopoly power" that needs to be "reined in" by Congress and enforcers.[121] On June 11, 2021, a bipartisan group of House lawmakers proposed an expansive set of antitrust reforms that could force Amazon, Apple, Facebook, and Google to overhaul their business practices.[122] These bills include the American Choice and Innovation Online Act,[123] sponsored by House Judiciary subcommittee on antitrust Chairman Representative David N. Cicilline, and the Ending Platforms Monopolies Act,[124] sponsored by Vice Chair Pramila Jayapal. Senator Amy Klobuchar introduced The American Choice and Innovation Online Act in the Senate on October 18, 2021, and the Senate referred the bill to the Committee on the Judiciary.[125] On March 2, 2022, the Senate placed the bill on the Senate Legislative Calendar.[126]

These proposed federal bills have drawn both support and criticism. Large companies like Spotify and Roku agree that this federal legislation is an important step in addressing anti-competitive conduct in the app store ecosystem.[127] In addition, the overwhelming bipartisan support for these bills is a "formidable signal to the industry," involving "rare collaboration between Democrats and Republicans, who both believe tech companies have come to hold too much power and worry about stagnating innovation."[128] On the other side, there has been pushback from tech-funded groups that receive their financial support from the likes of Google, Facebook, and

121. *See* Feiner, *supra* note 108; *See* STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMM. at 6-7 (Comm. Print 2020) ("The antitrust agencies failed, at key occasions, to stop monopolists from rolling up their competitors and failed to protect the American people from the abuses of monopoly power" and that "[f]orceful agency action is critical.").

122. *See* Feiner, *supra* note 108.These proposed bills include the Ending Platform Monopolies Act, American Choice and Innovation Online Act, Platform Competition and Opportunity Act, Augmenting Combability and Competition by Enabling Service Switching Act, and Merger Filing Fee Modernization Act. *Id.*

123. H.R. 3816, 117th Cong. (2021).

124. H.R. 3825, 117th Cong. (2021).

125. S. 2992, 117th Cong. (2021).

126. *See* Feiner, *supra* note 108.

127. Feiner, *supra* note 108.

128. *Id.*

Amazon, who believe these monopolistic practices are imperative for them to operate the way they do.[129]

IV. POTENTIAL SOLUTIONS TO ENSURE PROTECTIONS OF COMPETITION AND CONSUMERS

The current remedies to regulate the monopolistic practices of technological giants are insufficient and in fact are virtually ineffective.[130] Further, as demonstrated by the backlash against state legislation in states like North Dakota, Georgia, and Arizona, changes need to come starting at the federal level.[131] These changes can come in the form of instituting a new federal regulatory agency to oversee these matters, coupled with federal legislation enacting regular vigilance and investigation into these practices to regulate the digital technology market.[132]

The inadequacies of only using state-level initiatives for the purpose of regulating anti-competitive practices are evident.[133] State-level mandates of an inherently global market are not practical, since over 175 countries use the app store and regulating specific states one by one will get us nowhere.[134] Further, there may be potential constitutional concerns with these state mandates, especially with respect to their influence on interstate commerce and infringement on private contracts between app developers and the app store technology giants.[135] It is also important to note that some app developers may actually appreciate the stability of the thirty-percent commission rule set by Apple, adding obstacles to state-led initiatives to combat the issue.[136]

In the face of inadequacies and obstacles at the state level, the federal level may be able to institute some catalytic changes.

129. See *id.* for opinions from Geoffrey Manne, president and founder of the International Center for Law & Economics and Adam Kovacevich, CEO of a center-left advocacy group called Chamber of Progress, that argue that consumers would lose out of many integral features from these companies if these bills were passed by Congress.

130. *See* discussion *supra* Section IV.

131. *See* discussion *infra* Section III.

132. *See infra* Section IV for these proposed solutions.

133. *See infra* Section IV.

134. *See* Brimhall, *supra* note 2 (asserting that a patchwork of state regulations will "do more harm than good" and likely form an incohesive slate of regulations).

135. *See id.* (discussing how state-level regulations may "run afoul of the dormant commerce clause by unduly burdening interstate commerce").

136. *See id.*

Although there are already key antitrust statutes in place to prevent these types of practices,[137] these pre-technology boom statutes are "unable to reach many nuanced competition and consumer protection issues created by the digital economy."[138] Thus, it is imperative that Congress create a "purpose-built federal agency with digital DNA."[139] Congress should legislate to create a new federal digital supervisory agency tasked with overseeing the mobile app infrastructure and protecting the public and app developers from abuse by these dominant companies.[140] Congress has taken this type of action in the face of new technologies that require specialized oversight.[141]

This new federal agency should be guided by core principles involving risk management[142] and constant vigilance and oversight.[143] The real reason this has not been done before by the federal government is that "policymakers do not fully understand the operation and effects of digital technology."[144] Further, "there is currently an insufficient focused regulatory authority and expertise to demonstrate and implement how appropriate oversight could be accomplished."[145] In terms of oversight, the new agency's domain

137. *See generally* 15 U.S.C. §§ 1-7; 15 U.S.C. §§ 12-27; 29 U.S.C. §§ 52-53; 15 U.S.C. §§ 45; 15 U.S.C. § 13.

138. *See* Tom Wheeler, Phil Verveer & Gene Kimmelman, *The Need for Regulation of Big Tech Beyond Antitrust*, BROOKINGS (Sept. 23, 2020) https://www.brookings.edu/blog/techtank/2020/09/23/the-need-for-regulation-of-big-tech-beyond-antitrust/ ("Regulation, done with agility, can be an important refinement to the blunt force of the antitrust laws while being able to protect competition and consumers alike.") [hereinafter Wheeler, et al.].

139. *Id.*

140. *Id.*

141. *See id.* (demonstrating how Congress created new expert agencies for railroads, broadcasting, air transport, and finance seen by the creation of the Interstate Commerce Commission, the Federal Communications Commission, the Federal Aviation Commission, and the Consumer Financial Protection Bureau).

142. *See* Wheeler, et. al., *supra* note 138. This is integral since today's pace of technological change is so rapid and unpredictable. *Id.*

143. *See* Press Release, Letitia James, Attorney General, New York, Attorney General James Gives Update on Facebook Antitrust Investigation (Oct. 22, 2019), https://ag.ny.gov/press-release/2019/attorney-general-james-gives-update-facebook-antitrust-investigation (showing an example of investigate measures taken against technology giant Facebook, demonstrating the current need for federal oversight to take over these missions).

144. Tom Wheeler, *A Focused Federal Agency is Necessary to Oversee Big Tech*, BROOKINGS (Feb. 10, 2021), https://www.brookings.edu/research/a-focused-federal-agency-is-necessary-to-oversee-big-tech/ [hereinafter Wheeler].

145. *Id.*

should be focused on common-law derived duty of care and other corporate fiduciary duty principles.[146] In the risk management arena, the new agency should focus its energy on regulating and mitigating tech issues as they arise, instead of imposing a rigid set of rules that do not work in such a dynamic, growing market.[147] The creation of this new federal agency is supported by the rise in lawsuits[148] against these anti-competitive practices and the need for change at the federal level to institute a regulatory regime solely dedicated to combatting these distinct issues.

To supplement the already proposed federal legislation from this past year and the precedential antitrust legislation that still governs, the new federal legislation should include a strict ban on anti-steering practices by big technology companies.[149] This is because anti-steering practices in the app store realm sidesteps the purpose of antitrust law, which is to ensure a fair and equitable marketplace.[150] Antitrust law aims to "protect the process of competition for the benefit of consumers . . ."[151] Anti-steering practices do not work to benefit consumers because they explicitly limit consumers' payment processing options without the consumers' opinions being accounted for.[152] This includes the current practice of Apple preventing app developers from telling app consumers that they can pay for the app outside the app store.[153] This practice challenges the competitve nature of the market for apps by requiring a specific payment

146. *Id.*; *See* Cornell Law School, *fiduciary duty*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fiduciary_duty (including the different corporate duties of fiduciaries, like the duty of care, duty of loyalty, and duty of good faith).

147. *See* Wheeler, *supra* note 144.

148. *See supra* Section II(b) for a layout of the recent lawsuits filed alleging these antitrust violations and their implications on the need for regulation in technological spaces.

149. Anti-steering practices in app stores prohibit consumers from access to multiple different payment platforms, which directly contravenes the purposes of antitrust legislation. *See* Epic Games, Inc. v. Apple, Inc., 20-cv-05640-YGR, at 1 (N.D. Cal. Sept. 10, 2021) (Permanent Injunction) (ruling for a permanent injunction against Apple's anti-steering practices that were challenged in the United States District Court for the Northern District of California).

150. *See* discussion *supra* Section II(A).

151. FTC, *supra* note 22.

152. *See* Epic Games, Inc. v. Apple, Inc., No. 20-cv-05640, at 1 (N.D. Cal. Sept. 10, 2021) (Permanent Injunction) (ruling against Apple's anti-steering practices).

153. *See* Epic Games, Inc. v. Apple, Inc., No. 20-cv-05640, at 1 (N.D. Cal. Sept. 10, 2021) (demonstrating an example of a company successfully challenging Apple's anti-steering practices in the app store at the federal district court level).

mechanism and takes the option of paying elsewhere away from the consumer.

CONCLUSION

To gain control over anti-competitive practices of technology giants, the federal legislature needs to step in and implement a new federal regulatory agency tasked with oversight of these matters.[154] In addition, Congress should include anti-steering bans in their legislative bills aimed at regulating these potentially monopolistic practices, supplementing the recently proposed legislation, the pre-existing legacy of antitrust laws, and the recent successful challenge of these practices in federal district court.[155] To prevail against technology giants who have recently overtaken the app store market and beyond, the federal government must extend beyond the traditional reaches of the governing antitrust laws to account for the digital market's overwhelming and undeniable presence in today's society.[156]

154. *See supra* Section IV.
155. *See supra* Section IV.
156. *See supra* Section IV.