

No. 23-15285

In the United States Court of Appeals for the Ninth Circuit

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION

MARY CARR, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY
SITUATED; ET AL.,

Plaintiffs-Appellees,

v.

GOOGLE LLC; ET AL.,

Defendants-Appellants.

On Interlocutory Appeal from the United States District Court
for the Northern District of California,
Nos. 21-md-2981; 20-cv-5761

**BRIEF FOR NETCHOICE & CHAMBER OF PROGRESS
AS AMICI CURIAE SUPPORTING APPELLANTS**

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/s/ Steven P. Lehotsky

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INTEREST OF AMICI CURIAE¹

NetChoice is a national trade association of online businesses that works to protect free expression and promote free enterprise online. Toward those ends, NetChoice is engaged in litigation, amicus curiae work, and legal advocacy. NetChoice currently has four active federal lawsuits over state laws that chill free speech or stifle commerce on the Internet. At both the federal and state level, NetChoice fights to ensure the Internet stays innovative and free.

Chamber of Progress is a tech industry policy coalition devoted to a progressive society, economy, workforce, and consumer climate. It backs public policies that will build a fairer, more inclusive country in which all people benefit from technological advances. Its advocacy work is supported by corporate partners.

Of particular importance to amici and their member companies and partners is ensuring that the “app economy” — the way Americans and consumers worldwide access applications (“apps”) — is protected from unlawful interference by private litigants and federal and state governments. On top of its direct consumer benefits, the app economy supports millions of jobs and

¹ No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for Appellants and Appellees do not oppose the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2).

billions of dollars in annual revenue. To help curb interference against such an important and growing industry, amici have advocated against legislative efforts on both the state and federal levels that threaten customer options in the app economy. *E.g.*, Carl Szabo, *NetChoice Opposition to Rhode Island HB 7564—App Stores*, NetChoice (Mar. 3, 2022), bit.ly/3IortYf; *The Open Apps Market Act Endangers Consumers and Protects Misinformation*, Chamber of Progress (Feb. 2, 2022), bit.ly/3ouSYbV; Carl Szabo, Christopher Marchese, & Trace Mitchell, *Comment of NetChoice on Antitrust Applied: Examining Competition in App Stores Before the Senate Judiciary Committee*, NetChoice (Apr. 21, 2021), bit.ly/42NAi6c [hereinafter, “Szabo, *Antitrust Applied*”].

At issue here is the Google Play Store, which is an online marketplace where consumers can download apps provided by third-party app developers. App stores, like Google Play, serve important roles in at least two markets: They (1) *compete* for both app developers and consumers to use the Google Play marketplace; and (2) *facilitate competition* among app developers for app consumers. In these dual roles, Google Play connects consumers with over three million apps—helping people stay connected with family and friends, keeping them informed, and offering countless sources of entertainment.

The Plaintiffs in this class-action litigation are consumers who bought apps from developers in the Google Play marketplace. Plaintiffs object to the design choices Google Play uses to structure the vibrant marketplace that

Google Play facilitates. That represents a threat to the entire app ecosystem and a misunderstanding of how the app ecosystem works.

SUMMARY OF ARGUMENT

The district court certified a class based on the theory that some of the features making Google Play's app store a vibrant and secure marketplace are actually anticompetitive actions. Here, those allegedly anticompetitive actions purportedly justify a class of more than 21 million people seeking more than one billion dollars in damages. Consequently, the invaluable benefits to both app developers and consumers in the marketplace enabled by Google Play will be severely undermined by Plaintiffs' antitrust theory.

The design choices Google Play has made to structure its app store both (1) reflect Google Play's operation in a broader competitive market among app stores; and (2) provide benefits to app developers and consumers alike.

First, Google Play must compete with more and more app stores to attract both app developers and consumers. In doing so, it has continually tailored its app-store design, pricing model, and the benefits it offers to developers and consumers to win business. In other words, many features that define Google Play's marketplace are attempts to stand out in an increasingly crowded market.

Second, Google Play provides important benefits for both app developers and consumers that use the app marketplace.

For app developers, Google Play provides tools and training to create better and more innovative apps. More generally, Google Play provides app developers access to millions of potential customers in its app store with comparatively low barriers to entry. By placing applications in its app store, Google Play helps lend credibility to app developers. This makes consumers feel more confident in downloading and purchasing apps. And that ultimately redounds to app developers' benefit, as they enjoy broader markets for their services.

Benefits to app developers ultimately result in consumer benefits. Among other things, Google Play provides consumers the ability to: (1) compare a vast number of products and see a robust set of user reviews; (2) better ensure the apps they download are trustworthy; (3) monitor and control their children's activities; (4) safeguard their personal data; (5) keep their sensitive financial information safe while paying for apps in a centralized system; (6) buy apps, and the services those apps provide, at attractive prices; and (7) access an increasing number of innovative apps for download and purchase.

Under Plaintiffs' theory, therefore, both developers and consumers will lose out. Google Play would be a less vibrant marketplace, with higher barriers to entry and less competition among app developers. Consumers will have access to fewer and less-innovative apps—which they will be able to find and download less easily and with less confidence.

ARGUMENT

I. Google Play’s design choices are the result of competing with other app stores in the vibrant app ecosystem.

As in other industries, Google Play’s design is the result of the competitive environment in the broader app ecosystem.

Google Play is a marketplace that provides a safe, centralized location for app developers to sell their apps to consumers. *See* Google Br. at 6-7 (detailing the array of available apps). App developers (*not* Google) set the price for the apps they offer on Google Play. Google Play, in turn, charges *some* app developers a service fee for offering their apps in the Google Play app store and providing services that make transactions between app developers and consumers frictionless. *See id.* at 8.² But most developers are not subject to a service fee at all.³ That is because Google Play only charges a service fee to app developers that charge consumers to download their apps or for in-app purchases. But most developers offer their apps for free. *See id.* at 7. And among the apps that are free to download but charge a subscription fee for use, many app developers still avoid paying Google Play’s service fees by

² *See also How Google Play Works*, Google Play, bit.ly/3pVU3Kh (last visited June 15, 2023) [hereinafter, “*How Google Play Works*”]. The service fee is a varying percentage of revenue made from selling the app or in-app digital goods, which varies depending on the revenue of the seller. *Id.*

³ *How Google Play Works* (explaining 97% of developers are not subject to a service fee).

preventing consumers from subscribing to the app's services through an in-app purchase.⁴

Google Play is just one of many app stores that app developers and consumers may use, and those app stores represent just a part of the broader app economy. See Michael Mandel & Jordan Shapiro, *U.S. App Economy Update, 2022*, Progressive Pol'y Inst. (May 2022), bit.ly/3pYc6PJ (explaining the growth in American jobs needed in the app economy and how it, though "already important, became an increasingly indispensable part of the real economy" through the COVID-19 pandemic); L. Ceci, *Size of the App Economy Worldwide from 2016 to 2021*, Statista (July 6, 2021), bit.ly/43cC0hh (noting the global app economy surpassed an estimated \$6.3 trillion in value in 2021).

Google's biggest competitor now is the Apple App Store, which facilitates about 26% of smartphone users' access to apps. Oviya V., *App Store Vs. Play Store – What Techies Need to Know?*, Squash Apps (Sept. 8, 2021), bit.ly/42VGDN2. Similar to Google Play, the Apple App Store carries millions of apps. Artem Dogtiev, *App Stores List*, Business of Apps (June 9, 2023), bit.ly/3Obb5hx (noting that Google Play carries 3.3 million apps and the Apple App Store carries 2.2 million apps) [hereinafter, "*Dogtiev, App Stores List*"].

⁴ E.g., *How to Pay for Netflix*, Netflix Help Center, bit.ly/3P9kMO2 (last visited June 15, 2023).

Although both Google Play and the Apple App Store have similar revenue-sharing arrangements (charging app developers a percentage of revenue for apps sold in their stores), the companies have otherwise implemented unique design choices to stand out in the competitive market. See Sanja Zdraveska, *Apple App Store vs. Google Play Store (2023 Comparison)*, Cybercrew (Mar. 30, 2023), bit.ly/42EgmlX (noting the different choices in app review process, number of apps offered, and ratio of free to pay apps) [hereinafter, “Zdraveska, *Apple vs. Google*”]; Szabo, *Antitrust Applied* (detailing how different company philosophies led to Apple and Google’s different business models and app-store design choices).⁵

Google Play does not compete with Apple alone: Many app developers and consumers have flocked to a host of new alternative app stores. See Elad Natanson, *The “Other” Android App Stores – A New Frontier for App Discovery*, Forbes (Sept. 3, 2019), bit.ly/3OfrcKV (noting there are over 400 app stores worldwide today) [hereinafter, “Natanson, *The ‘Other’ Android Stores*”].

The Android app marketplace is especially dynamic. Many Android devices have more than one app store preinstalled. E.g., *Frequently Asked Questions About Galaxy Store, Samsung*, bit.ly/3NpOpt2 (last visited June 15,

⁵ For a discussion of the comparative benefits of the Apple App Store versus Google Play, see Br. of Amicus Chamber of Progress, *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. Nos. 21-16506, -16695) (Mar. 31, 2022).

2023).⁶ Among others, Google Play competes with the Amazon App Store, GetJar, Aptoide, and Opera Mobile Source. *See Dogtiev, App Stores List*. And Microsoft plans to enter the market with a new mobile games app store next year. Tim Bradshaw, *Microsoft Plans Mobile Games App Store to Rival Apple and Google*, *Financial Times* (Mar. 20, 2023), bit.ly/45Y35GW.

All these app stores compete among themselves by offering app developers and consumers a variety of pricing models, promotion tools, and other innovative and unique design choices. For instance, some app stores provide developers with the ability to reach niche audiences by curating apps within a specific app genre, such as “games, utilities, business or one type of user segment.” *Dogtiev, App Stores List*. Other app stores offer developers increased visibility on their app stores by using promotional tools. *See id.* (noting that “[s]ome app stores may not be as generous with their revenue share model [as Google Play and the Apple App Store] but do offer the ability to pay for a certain amount of downloads to increase an app’s popularity, or even to buy ‘featured’ placement”); Natanson, *The ‘Other’ Android Stores* (noting app stores run by smartphone manufacturers “will likely give more incentives, promotion, co-branding, and potentially more favorable revenue splits in an effort to win business from app developers”).

⁶ That is not to say that *all* devices with Android operating systems have Google Play preinstalled. Some Amazon devices, for instance, do not have Google Play preinstalled. Will Sattelberg, *How to Install the Google Play Store on Every Amazon Fire Tablet*, *Android Police* (May 22, 2023), bit.ly/3oRuXfr.

In sum, Google Play is just one app store among many. Thus, it must constantly innovate to compete with other app stores. As explained next, this competition benefits app developers and consumers.

II. Google Play’s design choices provide important benefits to both app developers and consumers.

Google Play responds to the competitive app-store ecosystem by creating its own vibrant marketplace full of app developers and app consumers. Google Play’s app store therefore entails design decisions that make its market productive and provide its participants with benefits. *See* David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, 1 *Issues in Competition L. & Pol’y* 667, 667 (2008) (“These businesses serve distinct groups of customers who need each other in some way, and the core business of the two-sided platform is to provide a common (real or virtual) meeting place and to facilitate interactions between members of the two distinct customer groups.”).

In providing this marketplace, Google Play (like other app stores) occupies an “important role” in the economy by “minimizing transactions costs between entities that can benefit from getting together.” *Id.* The result is benefits for both app developers and consumers.

A. Google Play’s design choices benefit app developers.

Google Play provides two general sets of benefits to app developers.

Google first fosters the development of new and diverse apps, by offering app developers free training, tools, services, and insights “to help

developers manage their app releases and performance.” *How Google Play Works*. For most developers, these benefits are costless because Google Play only charges a service fee to the 3% of developers who offer a paid app or sell access to in-app digital goods or services. *Id.* Consequently, this model particularly benefits smaller app developers that would otherwise lack sufficient capital to enter the market.

Along with providing tools to create safe and high-quality apps, Google Play provides app developers with a marketplace full of consumers that may not otherwise feel comfortable purchasing applications from other app stores. This is especially true for smaller developers without marketing budgets or established reputations among customers. As explained further below, without a known entity like Google Play facilitating the transaction, many customers would not have the confidence to buy, download, or use a lesser-known developer’s app.

Even given these benefits, the barriers to enter the Google Play Store are lower than, for example, the Apple App Store. While “Google Play charges developers a one-time registration fee of \$25 . . . to submit an app,” “Apple has a \$99 roughly [] yearly developer fee.” Zdraveska, *Apple vs. Google*.

The result is that Google Play app developers have earned over \$120 billion, creating jobs and boosting the overall economy. *See How Google Play Works*.

B. Google Play's design choices benefit consumers.

Google Play's design choices benefit consumers by providing an easily accessible and trustworthy way to shop for, purchase, download, and use a large number of well-priced, innovative apps.

1. Variety of Apps and User Reviews. Google Play's app offerings provide consumers with a valuable shopping experience through the breadth and structure of Google Play's app offerings. Users may compare apps and access a large set of user reviews and ratings in making purchase decisions. Google Play thus lowers search costs and allows consumers to make purchase and download decisions more confidentially and easily. Tao Chen, et al., *The Impact of Online Reviews on Consumers' Purchasing Decisions: Evidence from an Eye-Tracking Study 2*, *Frontiers in Psych.* (June 8, 2022) (concluding 93% of online consumers believe reviews help them improve the accuracy of purchase decisions and reduce the risk of loss).

Furthermore, Google Play continues to improve its review feature to provide customers with accurate and useful information about the apps available in the store. For example, rather than display *lifetime* average ratings, Google Play's ratings "are calculated based on the app's current quality ratings from user reviews." *How Ratings Are Calculated*, Google Play, bit.ly/3MdsRhl (last visited June 15, 2023). Thus, consumers can easily see the current state of the app, including any recent improvements or declines in quality. Sarah Perez, *Google Play is Changing How App Ratings Work*, *Tech Crunch* (May 8, 2019), tcrn.ch/3oekSZB ("any fixes and changes that made

[an app] a better experience over the years will now be taken into account when determining the rating”; “once high-quality apps that have since failed to release new updates and bug fixes will now have a rating that reflects their current state of decline”).

2. Trustworthy Apps. Google Play also gives consumers confidence that the apps they are downloading and purchasing are trustworthy.

In today’s landscape of widespread scams, hackers, computer viruses, and bad actors online, buying and downloading digital products can be a nerve-racking, risky endeavor. Apps, like other technological tools, could be used by bad actors to target unwitting consumers. S. Ravi, *How to Protect Yourself from Fraudulent App Scams*, Outlook (June 16, 2022), bit.ly/3OguLAF (noting that apps “can access phone locations, carry out phishing activities, use phone data [for various illegal purposes], misuse . . . payment gateway[s], and cause financial loss”).

Google Play decreases these dangers for consumers with “inbuilt mechanism[s] to *minimize* fraud.” *Id.* (emphasis added).⁷ Google Play has multiple policies that prevent app developers from selling apps in its store that use malware, fraud, or cause user or device harm. *Play Console Help: Enforcement Process*, Google, bit.ly/436h8YQ (last visited June 15, 2023). And to enforce those policies, Google Play imposes an up-front review process before all apps are sold. *Id.* Afterward, it continues to monitor its store and respond to

⁷ Completely *eliminating* risk would be a near-impossibility.

apps that violate its policies. *Id.* This gives customers confidence every time they download an app.

3. Parental Controls. Google Play oversees the apps available in its app store and provides parents with important tools to oversee their children.⁸

For instance, Google Play allows parents to set up parental controls that limit the kinds of apps that their children can download and the ability of their children to engage in transactions. *How to Set Up Parental Controls on Google Play*, Google Play Help Center, bit.ly/3J98npA (last visited June 15, 2023). These limitations are based on content ratings that Google Play assigns to apps. *Id.*

Similarly, Google Play curates a collection of apps under its “Kids Tab.” Dustin Wright, *How Google’s New Play Store Policies Make It Easier to Find Safe Kids’ Apps, Make Use Of* (Nov. 29, 2022), bit.ly/3Pbj2DN. Under this tab, parents will find both educational and non-educational apps that either meet Google Play’s “Families Policies” or are “Teacher Approved” under a program that Google Play has established. *Id.*; see *Google Play Families Policies*, Play Console Help, bit.ly/43WQnq3 (last visited June 15, 2023); *Build Teacher Approved Apps*, Google Play, bit.ly/3oXwP6b (last visited June 15, 2023).

⁸ In California, Google may use these capabilities to comply with California’s Age Appropriate Design Code, which takes effect July 1, 2024. See Cal. Civ. Code §§ 1798.99.28-40.

4. Safeguarding Consumer Data. Google also helps safeguard consumers' personal data when they download apps from Google Play. Consumers often must share data with app developers that are necessary for an app to function. For instance, GPS map services need to access a phone's location to give real time directions to a consumer. At the same time, "consumers are averse to data collection by apps, especially when their data is collected for privacy-invasive uses." Bo Bian, et al., *The Supply and Demand for Data Privacy: Evidence from Mobile Apps* 37 (Apr. 4, 2023), bit.ly/3MkwUsu.

To begin, Google Play requires app developers to provide transparency about data collection, which gives consumers understanding and control of the collection of their private information. *How Google Play Works* (detailing data safety policies and procedures, which are meant to "help[] people understand and make informed decisions about the data that apps and games seek to access on their devices"). Furthermore, Google Play prevents app developers from obtaining information that is unnecessary to facilitate a primary use of the app. *Play Console Help: User Data*, Google, <https://bit.ly/3pVw3Ha> (last visited June 15, 2023). For example, many mobile games likely do not need access to a consumer's location to function properly.

For the data Google Play allows app developers to collect, Google Play prevents developers from selling personal or sensitive data and requires app developers to ask consumers permission to use their data. Consumers must provide "affirmative" consent for apps to use their data. *Id.*

5. Protect Sensitive Payment Information. In addition to its general protections for user data, Google Play specifically enables consumers to better protect, and more easily use, their sensitive payment information.

Google Play provides consumers with a single payment facilitator, allowing consumers to conveniently and safely pay for many apps in one place. Thus, consumers need not share payment information with each individual app developer from which consumers purchase. This reduces the sheer number of entities with which consumers share their information and reduces the risk of information compromise. Consumers can also securely store payment credentials with Google Play, which enables easier and faster transactions.

Furthermore, well after a sale is completed, Google Play provides consumers with a help center that gives consumers the ability to request refunds for fraudulent or unauthorized purchases. *Google Play Help: Learn About Refunds on Google Play*, Google Play, bit.ly/3ohw5sm (last visited June 15, 2023).

6. Attractive Prices for Consumers. Google Play's design also makes innovative apps—and the services they provide—available to consumers at attractive prices.

Google Play encourages app developers to adopt different pricing strategies based on the markets they wish to serve. Within those individual markets, Google Play's app marketplace spurs price competition among app developers by placing products and services side by side. It is a basic economics principle that “cutting prices in order to increase business often is the

very essence of competition.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

As a result, Google Play’s low barriers to entry have provided consumers with a wide variety of free and inexpensive apps across markets. *See* L. Ceci, *Free and Paid App Distribution for Android and iOS 2023*, Statista (Mar. 22, 2023), bit.ly/3pVeZ44 (noting that 97% of apps in the Google Play app store are free); L. Ceci, *Average Price of Paid Android Apps 2023*, Statista (Mar. 7, 2023), bit.ly/2KE6bq7 (noting that Google Play has 38,500 apps priced less than a dollar and over 26,600 apps that cost between one and two dollars).

7. Fostering Technological Competition Among App Developers. Consumers also reap the benefits of Google Play lowering the barriers to entry, *see supra* p.10, and fostering technological competition among app developers. Simply put, competition leads to innovation. *See Hirsh v. Martindale-Hubbel, Inc.*, 674 F.2d 1343, 1348 (9th Cir. 1982) (“[C]ompetition promotes consumer welfare.”). In turn, app innovation facilitates the development of new products and services (and the entry of new competitors) in sectors that affect many people’s daily lives.

For instance, the rise of the app economy has “revolutionarily transformed the restaurant and food delivery industry.” Nirav Shastri, *How Mobile Apps Have Transformed the Restaurant and Food Delivery Industry*, BBVA OpenMind (June 14, 2019), bit.ly/3WeCYap. Now, consumers seeking to order a meal—who used to be largely limited to ordering directly from restaurants—have a wide variety of meal-ordering options through various apps.

Without trustworthy app stores, consumers may lack those many options. Of course, the development of food delivery apps is just one of many examples of the consumer benefits of app innovation.

* * *

At core, the legitimate Google Play design choices implicated by this lawsuit are precisely the features that provide app developers and consumers with a useful marketplace for apps.

CONCLUSION

The Court should reverse the district court's class certification order.

Dated: June 15, 2023

Respectfully submitted,

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On June 15, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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**UNITED STATES COURT OF APPEALS
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