

Case Nos. 21-16506 & 21-16695

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Epic Games, Inc.,
Plaintiff, Counter-defendant – Appellant, Cross-Appellee,

v.

Apple Inc.,
Defendant, Counterclaimant – Appellee, Cross-Appellant.

Appeal from the United States District Court
Northern District of California
The Honorable Yvonne Gonzalez Rogers, Presiding
Case No. 4:20-cv-05640-YGR-TSH

**BRIEF OF AMICUS CHAMBER OF PROGRESS IN
SUPPORT OF DEFENDANT, COUNTERCLAIMANT
– APPELLEE, AND CROSS-APPELLANT APPLE
INC. AND PARTIAL AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record states that, as a nonprofit 501(c)(6) corporation, amicus curiae Chamber of Progress has issued no stock. Consequently, no parent corporation nor any publicly held corporation could or does own 10% or more of its stock.

s/Steven A. Hirsch
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STATEMENT PURSUANT TO FED. R. APP. P. 29(A)(4)(E)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

I. AMICUS'S IDENTITY, INTERESTS, AND AUTHORITY TO FILE THIS BRIEF

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate.

Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all people benefit from technological leaps.

Chamber of Progress seeks to protect Internet freedom and free speech, to promote innovation and economic growth, and to empower technology customers and users. In keeping with that mission, Chamber of Progress believes that allowing a diverse range of app-store models and philosophies to flourish will benefit everyone—the consumer, the store owner, and application developers.

Chamber of Progress's work is supported by its corporate partners; but its partners do not sit on its board of directors and do not have a vote on, or veto over, its positions. Chamber of Progress does not speak for individual partner companies, and it remains true to its stated principles even when its partners disagree. ¹

¹ Our partners include Amazon, Apple, Automattic, Chime, Circle, Cruise, DoorDash, Earnin, Filecoin Foundation, Getaround, Google,

All parties have granted Chamber of Progress permission to file this amicus brief. *See* FED. R. APP. P. 29(A); CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 29-3.

II. INTRODUCTION

The district court in this case concluded that Apple’s security rationale for its “walled garden” approach to mobile-application distribution represented a “valid and nonpretextual business reason for restricting app distribution” and thus “a legitimate procompetitive justification.”² Apple’s comparatively restrictive approach, the court wrote, “differentiates Apple from Google” and thus ultimately “increases consumer choice by allowing users who value open distribution to purchase Android devices, while those who value security and the protection of a ‘walled garden’ [may] purchase iOS devices.”³ And the court found that a majority of iPhone and iPad customers do in fact take security into account when purchasing their devices.

Grubhub, Instacart, Lime, Lyft, Meta, Nuro, Pindrop, Rhino, Ripple, SmileDirectClub, SoftBank Group, Swimply, Turo, Twitter, Uber, Waymo, Zillow, and Zoox.

² 1-ER-149.

³ *Id.*

The district court was right, and its judgment for Apple should be affirmed. As discussed below, the differences between Apple’s “walled garden” and Google’s openness reflect tradeoffs between safety, cost, convenience, and variety that consumers and developers are, and should remain, free to make. And those tradeoffs are not limited to the choice between the Apple App Store and the Google Play Store—many other app stores have sprung up, catering to a variety of tastes and philosophies concerning the best way to distribute and purchase mobile apps. Each offers advantages and disadvantages.

Antitrust law protects consumers’ ability to “mak[e] free choices between market alternatives.”⁴ Courts should allow the market to continue to furnish a plethora of app-store models and should avoid “limiting consumer choice by impeding the ‘ordinary give and take of the marketplace.’”⁵

⁴ *CollegeNET, Inc. v. Common Application, Inc.*, 711 F. App’x 405, 406 (9th Cir. 2017) (citing *Glen Holly Entm’t, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 374 (9th Cir. 2003)).

⁵ *F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (citation omitted).

III. ARGUMENT

A. **The district court’s ruling acknowledges the advantages of a mobile-application market featuring a diversity of distribution approaches and philosophies.**

The district court’s factual and legal findings furnish a starting point for understanding how mobile-phone platforms, app users, and app developers all can benefit from competition between different models of app distribution, resulting in an environment where—to quote Chamber of Progress’s guiding principles—“all people benefit from technological leaps.”⁶ Although the court was of course focused on Apple’s “walled garden” approach, its analysis also supports broader conclusions about the diverse and highly competitive app-distribution system.

One of Apple’s key procompetitive business justifications for its relatively restrictive approach to app distribution is “security”; but as the district court noted, that word does not have a single, universally shared meaning. The “narrow” sense (urged by Epic) views security as preventing an app from performing unauthorized actions or stealing user data. By contrast, the “broad” sense (favored by Apple) additionally

⁶ *Chamber of Progress: What We Believe*, <https://progresschamber.org/>.

encompasses user privacy, quality, and “trustworthiness”—a shorthand term for measures such as curbing unnecessary requests for access to phone functionality and data, preventing false representations about what an app is and does, and banning objectionable content such as pornography and pirated apps.⁷

As a factual matter, the court found that centralized distribution through Apple’s App Store does increase security in the “narrow” sense, primarily by thwarting “social-engineering attacks” that evade a mobile device’s operating-system defenses by tricking users into granting access.⁸ The court likewise found that centralized distribution through the App Store also helps to ensure “broad” security, mainly as the result of “human app review.”⁹ Apple’s restrictions bolster

- privacy (for example, by requiring developers to publish “privacy labels” that disclose data collection, and by enforcing the European Union’s stricter privacy policies, including user opt-out),

⁷ 1-ER-108.

⁸ 1-ER-109, 111.

⁹ 1-ER-111.

- quality (by eliminating safe but objectionable content such as pornography, gambling, and inappropriate marketing to children), and
- trustworthiness (by protecting against scams and other fraud, such as pirated or copycat apps).¹⁰

Most significantly, for present purposes, the district court found that security and privacy concerns are “an important aspect of an iPhone purchasing decision for 50% to 62% of users in most countries . . . and an important part of an iPad purchasing decision for 76% to 89% of users.”¹¹ For those consumers, security and privacy are worth the additional cost and restricted choices associated with the walled-garden approach. By contrast, the court found that Apple’s policies may be a mixed bag for developers, who “experience delays and mistaken rejections that would not occur with sideloading or distribution through stores without app review,” but who also “benefit from the safe environment created by the App Store.”¹² The “small burden on

¹⁰ 1-ER-112–113.

¹¹ 1-ER-113.

¹² 1-ER-114.

developers,” the court noted, “maintains a healthy ecosystem that ultimately benefits both sides.”¹³

As for its legal conclusions, the court found Apple’s security justification to be a “valid and nonpretextual business reason for restricting app distribution.”¹⁴ Apple’s “‘walled garden’ approach,” the court reasoned, “differentiates Apple from Google” and thus ultimately “increases consumer choice by allowing users who value open distribution to purchase Android devices, while those who value security and the protection of a ‘walled garden’ [may] purchase iOS devices. This, too, is a legitimate procompetitive justification.”¹⁵

Below, we amplify that theme by showing that consumers do (and should) have a range of choices for how to shop for, acquire, and install mobile applications. The point is not that Apple’s “walled garden” approach or Google’s more open approach is “better” for some hypothetical average consumer or developer. Rather, the point is that consumers are, and should remain, free to choose between them and

¹³ *Id.*

¹⁴ 1-ER-148.

¹⁵ 1-ER-149.

among numerous other existing and future app-distribution models as well. Developers likewise benefit from a diversity of app-distribution philosophies and approaches.

B. Consumers do (and should) enjoy a wide range of choices for how to shop for and install mobile applications.

A cellphone or tablet purchaser deciding which mobile-app system to opt into confronts an initial choice between Apple’s generally more costly and well-tended “walled garden” and Google’s generally less expensive, more open, and more extensive Play Store. Each has its advantages and disadvantages. Think of it as the difference between visiting Disney World and visiting Yosemite National Park. Visitors appreciate both, but each involves tradeoffs of control and openness. The district court correctly found that it is not the law’s role to mandate that Disneyland operate more like Yosemite or vice versa. Consumers should be free to choose between those experiences and to make those tradeoffs for themselves.

Apple couldn’t be clearer about its overall approach. As stated in its App Store Review Guidelines,

The guiding principle of the App Store is simple—we want to provide a safe experience for users to get apps and a great opportunity for all

developers to be successful. We do this by offering a highly curated App Store where every app is reviewed by experts and an editorial team helps users discover new apps every day. For everything else there is always the open Internet. If the App Store model and guidelines are not best for your app or business idea that's okay, we provide Safari for a great web experience too.¹⁶

As the district court noted, Apple's highly curated approach appeals to users who prioritize "security and . . . protection."¹⁷ More specifically, the court found that the App Store offers benefits in the form of both "narrow" and "broad" security, not only thwarting "social-engineering attacks" that trick users into granting access, but also bolstering privacy, quality, and trustworthiness through such measures as privacy labels, user opt-outs, objectionable-content bans, and antifraud protections.

But there are tradeoffs for consumers. App Store users lack access to nearly 1.3 million apps available in the Play Store—most of which are free.¹⁸ And the Play Store features third-party "launchers" that can

¹⁶ <https://developer.apple.com/app-store/review/guidelines/>.

¹⁷ 1-ER-149.

¹⁸ The App Store offers around 2.22 million apps, while the Google Play Store offers around 3.48 million. See *Number of Apps Available in Leading App Stores as of 1st Quarter 2021*,

“completely change your phone into something else entirely,” whereas the ability to modify the iOS home screen is more limited.¹⁹

The Play Store is a non-exclusive source of apps for Android users, who may also use the web browser of their Android device to shop for and install apps; by contrast, an App Store user can install apps only via the App Store.²⁰

The vast majority of Android apps are designed for use on both smartphones and tablets, whereas the ability for an iPad to run an app

<https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/> (Jan. 27, 2022); Sanja Zdraveska, *Apple App Store vs Google Play Store (2022 Comparison)*, <https://cybercrew.uk/software/app-store-vs-play-store/> (Jan. 27, 2022) (“Unlike Apple, Android offers its customers access to many more free apps.”); Priya Viswanathan, *iOS App Store vs. Google Play Store: Which Is Better for App Developers?* <https://www.lifewire.com/ios-app-store-vs-google-play-store-for-app-developers-2373130> (Mar. 9, 2020) (“Android users tend to prefer free apps.”) [hereinafter *Which Is Better?*].

¹⁹ Simon Hill & Mark Jansen, *Android vs. iOS: Which Smartphone Platform is the Best?*, <https://www.digitaltrends.com/mobile/android-vs-ios/> (Apr. 14, 2021).

²⁰ See Dane O’Leary, *7 Things the Google Play Store Does Better Than the Apple App Store*, <https://www.androidauthority.com/google-play-store-vs-apple-app-store-744204/> (Jan. 27, 2017) [hereinafter *Seven Things*].

is contingent on that app's having been adapted for use on the iPad's larger display.²¹

Apps sometimes appear first in the App Store because developers targeting that store only have to ensure compatibility with two principal devices (the iPhone and the iPad), while developers targeting the Play Store must ensure compatibility with many devices.²² But apps on the Play Store may be more up-to-date because Play Store developers are permitted to update their apps whenever necessary, while new builds may not be placed on the App Store immediately because updates also have to go through the App Store's review process.²³

²¹ *Id.*

²² See *iOS vs Android: Which Should You Build Your Mobile App on First*, <https://buildfire.com/ios-android-which-to-develop-on-first/> [hereinafter *Build First*]. There are about 1,300 tech brands that have created more than 20,000 types of devices that work with Android. See *Are Android vs iOS Users Really Different?*, <https://nix-united.com/blog/are-android-vs-ios-users-really-different-or-forced-to-be-enemies/#:~:text=The%20average%20salary%20of%20iPhone,users'%20average%20salary%20is%20%2437%2C040> (Sept. 29, 2021) [hereinafter *Really Different?*].

²³ See *What to Know: The Difference Between Google Play and the Apple Store*, <https://245.tech/2021/01/12/what-to-know-the-difference-between-google-play-and-the-apple-store/> (Jan. 12, 2021) [hereinafter *What to Know*].

The shopping experience offered by the two stores also differs. The Play Store draws on Google’s search expertise to help users find apps²⁴ and gives more prominence to “social” features, such as telling consumers whether any of their friends use and recommend the app. The App Store, by contrast, also features app reviews, but “they’re not front-and-center like on the Google Play Store. Perhaps this is due to the assumption that iOS apps are of a higher quality or because it encourages users to choose apps based on those apps’ merits rather than the opinions of others.”²⁵

Developers face tradeoffs, too. Research shows that the App Store is more lucrative for them (especially for non-gaming developers).²⁶ App

²⁴ See *What to Know* (“The search queries on the Google Play store are much more effective because Google will run the queries through all information available on a page including the descriptions. The App Store, on the other hand, compares queries against the keywords developers manually enter for search. However, the App Store is notorious for its extensive promotion via channels on the store including their trending categories.”).

²⁵ *Seven Things*.

²⁶ See Felix Richter, *Apple’s App Store More Lucrative for App Makers*, <https://www.statista.com/chart/18472/app-publisher-earnings/> (June 21, 2019) (citing report that 100 highest-earning app publishers on the App Store made 65 percent more on average than the top 100 publishers on Google Play, while the highest-grossing non-gaming app publishers for iOS outperformed the top 100 on Google’s Play Store by 232 percent).

Store customers spend more money on apps than Android users do,²⁷ perhaps because, on average, they earn higher salaries.²⁸ In addition, differences in the way that the two stores present information about apps require developers to adopt different strategies and techniques for promoting their apps and making them stand out from the crowd.²⁹ And the decision whether to develop an app initially for the App Store or for the Play Store involves a multitude of economic and technical considerations, including the developer's resources, the app's target

²⁷ iOS users as a whole spend almost twice as much on apps as Android users do (\$21 billion versus \$11 billion in the first quarter of 2021). See Liam Tung, *We Are Spending More on Smartphone Apps Than Ever Before. Apple Is Still the Big Winner*, <https://www.zdnet.com/article/we-are-spending-more-on-smartphone-apps-than-ever-before-apple-is-still-the-big-winner/> (Apr. 1, 2021).

²⁸ The average salary of iPhone users in the U.S. is \$53,251, in contrast with \$37,040 for Android users. See *Really Different?* The least expensive Apple phone costs around \$399, while Android phones range from \$50 to luxury models. *Id.*

²⁹ See generally *Difference Between App Store vs Google Play Store*, <https://citrusbits.com/difference-app-store-vs-google-play-store-2/> (advising developers on store differences so they can better promote their apps); *Ultimate Mobile App Stores List (2022)*, <https://buildfire.com/mobile-app-stores-list/> [hereinafter *Ultimate List*]. Developers also must target their “build processes” to the specific store on which they hope to list their apps, as the stores use different programming languages and tools. See *What to Know*.

audience, and the app’s monetization model.³⁰ The more open character of the Play Store and other Android-focused app stores allows developers to build a following before attempting to get their apps admitted to the App Store.

Consumers who forgo the “walled garden” and opt instead for Google’s more “open” distribution system are then able to obtain apps from a variety of stores besides the Play Store.³¹ Some of them come preloaded on a specific brand of Android device.³² Others are distinguished by a focus such as gaming or entertainment,³³ an especially friendly user interface,³⁴ apps that are compatible with

³⁰ See *Build First*.

³¹ Chamber of Progress does not endorse the use of any alternative app stores, some of which offer apps of dubious security or reliability that could never survive the vetting processes of the App Store or the Play Store. The following characterizations of the various stores were obtained from the above-cited *Ultimate List* article and from Joe Hindy, *10 Best Third Party App Stores for Android and Other Options Too*, <https://www.androidauthority.com/best-app-stores-936652/> (Jan. 4, 2022) [hereinafter *Ten Best*].

³² E.g., the Samsung, LG, Sony, and Amazon app stores (although the Amazon Appstore also is available to users of non-Amazon Android devices).

³³ E.g., 1Mobile, Itch.io, Kongregate, QooApp, and Taptap.

³⁴ E.g., APKPure and Aptoide.

multiple operating systems,³⁵ heightened security,³⁶ compatibility with a specific web browser,³⁷ a focus on open-source apps,³⁸ or use of crowdsourcing.³⁹ Some are just general app stores that compete with the Play Store.⁴⁰ And Chinese users can access a plethora of app stores aimed at that market.⁴¹

Thus, the market now caters to an astonishing variety of consumer and developer tastes and philosophies concerning the best way to shop for, distribute, promote, and sell mobile apps. And the features that distinguish app stores really do matter to consumers. Indeed, the aspects of Apple's approach that Epic attacks in this lawsuit are integral to the security and privacy concerns that influence some consumers to choose Apple. Thus, the district court got it exactly right when it observed that permitting differing levels and types of curation

³⁵ E.g., Appland, GetJar, and Uptodown Market.

³⁶ E.g., Applicious and Uptodown Market.

³⁷ E.g., Bemobi Mobile Store.

³⁸ E.g., F-Droid.

³⁹ E.g., Mobilism.

⁴⁰ E.g., SlideME.

⁴¹ E.g., Tencent, Myapp, 360, Baidu, Oppo, AppChina, VIVO, PP Assistant, Wandoujia, HiAPK, Flyme, HiMarket, 2345, Coolmart, Anzhi Market, and MaoPao.

to flourish “increases consumer choice” and represents “a legitimate procompetitive justification” for the App Store’s walled-garden approach—and the same is true of competing approaches like Google’s.⁴²

Inevitably, running an app store sometimes will displease developers who perceive their interests as being in conflict with the store owner’s rules. But developers’ business interests don’t entitle them to dictate the terms on which they participate in a store; nor can their interests be allowed to trump those of consumers. If the market is to continue offering meaningful choices, store owners must remain free to create and pursue different means for satisfying diverse consumer preferences.

When it comes to app stores, there is room for both the hothouse flower and the wildflower—and courts should let them all bloom.

IV. CONCLUSION

For the reasons stated above, the Court should affirm all aspects

⁴² 1-ER-149.

of the judgment favorable to Apple.

Respectfully submitted,

DATED: March 31, 2022

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DATED: March 31, 2022

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