No. 25-7917

In the United States Court of Appeals for the Ninth Circuit

IN RE: APPLE INC.APP STORE SIMULATED CASINO-STYLE GAMES LITIGATION,

FRANK CUSTODERO, ET AL.,
Plaintiffs-Appellees,
v.
APPLE INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California,
No. 5:21-med-02985-EJD (Hon. Edward J. Davila)

BRIEF OF AMICUS CURIAE ASSOCIATION FOR COMPETITIVE TECHNOLOGY SUPPORTING DEFENDANT-APPELLANT

Chapin Gregor*
ASSOCIATION FOR COMPETITIVE TECHNOLOGY
1401 K St NW (Ste 501)
Washington, DC 20005
(917) 621-5465
cgregor@actonline.org
Counsel for Amicus Curiae Association for Competitive Technology

Brian Scarpelli
ASSOCIATION FOR COMPETITIVE TECHNOLOGY
1401 K St NW (Ste 501)
Washington, DC 20005
(517) 507-1446
bscarpelli@actonline.org
Counsel for Amicus Curiae Association for Competitive Technology

* Ninth Circuit admission pending

CORPORATE DISCLOSURE STATEMENT

No. 25-7917

FRANK CUSTODERO, ET AL.,
Plaintiffs-Appellees,
v.
APPLE INC.,
Defendant-Appellant.

Under Federal Rule of Appellate Procedure 26.1, the Association for Competitive Technology certifies that it has no parent corporation, and that no publicly held company owns 10% or more of its stock.

/s/ Brian Scarpelli
Brian Scarpelli
Counsel for the Association for Competitive Technology

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INTEREST OF AMICUS CURIAE[1]

Founded in 1998, the Association for Competitive Technology (ACT) is an international not-for-profit grassroots advocacy and education organization representing the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. Today, the ecosystem ACT represents is valued at approximately $1.8 trillion and is responsible for 6.1 million American jobs.[2]

As ACT has explained in comments filed with the FTC and in testimony before Congress, mobile platforms solve many of the problems that developers faced in the early internet economy.[3] Before mobile platforms,

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[1] No party's counsel authored any part of this brief. No one, apart from ACT and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

[2] *State of the U.S. App Economy: 2022*, ACT| The App Association (8th ed. 2022), (hereinafter *"App Economy Report"*), https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL-1.pdf.

[3] *See Comments of ACT | The App Association to the Federal Trade Commission on Competition and Consumer Protection in the 21st Century (Question 3)* (Aug. 20, 2018) at 3–4, (hereinafter "*App Association FTC Comments*"), https://tinyurl.com/bdncf8bh. *See also* Testimony of Morgan Reed, President ACT |

app developers were effectively required to pay publishers and other intermediaries and engage in time-consuming marketing campaigns to make it onto store shelves in order to reach users.[4] These costs imposed formidable barriers to entry, resulting in higher prices and fewer choices for consumers.[5] Software platforms, which provide one-stop shops where developers and consumers transact directly, lower these barriers to entry and thus free up substantial amounts of capital that startups can use to grow their businesses.[6] There are now several hundred thousand companies active in the mobile app market in the United States and nearly three million apps available on major app platforms.[7]

Today, developers overwhelmingly use software platforms—such as Apple's App Store—to distribute their applications. A mutually beneficial relationship has flourished between developers and platform companies.[8]

The App Association, Before the U.S. House of Representatives Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law (2019), at 3-6 (hereinafter "Reed Testimony"), https://tinyurl.com/2ynpvx4s.

[4] *See id.*, at 3–4.

[5] *Id.*

[6] *Id.*

[7] *Mobile App Download and Usage Statistics*, buildfire (2024), (hereinafter *"Mobile App Statistics"*), https://tinyurl.com/4a952te7.

[8] *See App Association FTC Comments*, *supra* n.2, at 2, https://tinyurl.com/bdncf8bh.

Small developers provide useful and enjoyable digital content and services, which draw consumers to the platform, while the platform provides developers with low overhead costs, simplified market entry, consumer trust, dispute resolution, data analytics, flexible marketing and pricing models, and strengthened IP protections.[9]

ACT has a keen interest in the legal rules governing software platforms where apps are downloaded by users and monetized by developers. In fact, one of the first *amicus* briefs the ACT ever filed was in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam), which involved an effort to break up a company that provided a "platform[] for software applications." *Id.* at 53. ACT provides this brief to highlight how small and midsized developers in particular benefit from their symbiotic relationship with companies like Apple and to explain how the district court's decision would upend the app ecosystem writ large to the detriment of these developers, and should therefore be reversed.

INTRODUCTION

ACT respectfully urges this Court to reverse the district court's order denying in part Apple's motion to dismiss. ACT concurs in Apple's arguments that the liability protection provided by Section 230 of the Communications Decency Act, 47 U.S.C. 230(c)(1), applies to payment processing. The purpose of this brief is to impress upon the Court that if Section 230

[9] *Id.*

protection were found not to apply to payment processing significant negative impacts on small business app developers like ACT's members would ensue. Indeed, the entire app store model on which developers like our members rely could be upended.

Platforms like the App Store and Google Play store provide important services, including payment processing but also analytics, cybersecurity and user privacy protections, intellectual property safeguards, and others. These services and the neutral and accessible way they are provided has been instrumental in allowing the entire app economy to develop as it has. For small developers in particular, the ability to use platform-provided features can mean the difference between success or failure, as the provided services limit the significant overhead that would be required for an individual app to reproduce those services on its own. These benefits are underpinned by the payment processing model, which provides value to developers (i.e., they don't have to build and run their own payment processing functionality or pay for a third-party service), allows for a progressive payment model that charges small developers far less for distribution than larger companies, and has enabled the app ecosystem to thrive.

Removing Section 230 protection from neutral payment processing will open Apple and other platform providers to significantly increased liability. This increase in liability will likely be great enough to incentivize platform providers to cease offering payment processing on a neutral basis and instead introduce additional layers of review or even discontinuing

payment processing entirely. This would at minimum introduce significant friction to how payments are handled in the app store ecosystem. But the removal of Section 230 protection from payment processing could have negative effects on the other neutrally provided services Apple and other platform providers make available to developers on their stores. Indeed, Apple could decide to cease offering any or all of its important services, either out of concern that payment processing is not the only neutrally provided service that could fall out of Section 230 protection.

Similarly, if exposed to new liability for processing payments for games, the app stores will likely be compelled to alter their fee structures. The loss of beneficial services and a concomitant regression of the fee structure would fall on small developers the hardest and would set the digital economy back more than a decade.

Therefore, we urge the Court to reverse the district court's order.

ARGUMENT

I. Platforms provide important services that developers rely on, supporting the modern app economy.

Experiencing rapid growth alongside the rise of smartphones and other connected devices, ACT members and developers like them drive a global app economy valued at more than $1.8 trillion and supporting 6.1 million American jobs, including developers, engineers, marketing and sales

experts.[10] Software apps are now central players in how Americans work and play, with the average smartphone owner using 10 apps per day and 30 apps per month, and one in two Americans opening an app over 11 times each day.[11]

But before the development of today's ecosystem, consumers were tasked with the challenge of locating and then travelling to a brick-and-mortar store that happened to sell software. Once internet connectivity became commonplace, consumers began to download software without having to step foot in a physical store. Building on this development, the size and scale of the mobile app revolution has far surpassed the personal computer (PC) software era, as software developers transitioned into app developers.

In the PC software era software companies had to cobble together a distribution plan, including creating consumer trust, from the ground up. This forced small software companies' staff to wear many hats to develop, market, and benefit from the sale of their products. Software companies were not only required to write code for their products, but they were also responsible for:

1. Managing their public websites;
2. Hiring third parties to handle financial transactions;
3. Employing legal teams to protect their intellectual property; and

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[10] *App Economy Report*, *supra* n.1.

[11] *Mobile App Statistics*, *supra* n.6.

4. Contracting with distributors to promote and secure consumer trust in their product.

The skillsets required to manage the overhead of software distribution were often not core competencies of small development companies, and each additional step cost software developers valuable time and money, with little tangible benefit. Costs could easily exceed $100,000 before a single box of software was sold. Further, software developers had to hand over their products to companies with a significant reputation to break through the trust barrier and ensure consumers felt confident installing software and sharing personal information.

Now, with the emergence of curated platforms or app stores, such as Apple's App Store, the experience of these innovative small businesses has shifted positively due to a symbiotic relationship between software platforms and developers. Trusted app stores serve as a vital foundation for the growing uses of apps across industries and enterprises. Three key attributes have emerged that have led to the revolution in software distribution:

1. The provision of a bundle of services—payment processing, analytics, cybersecurity and user privacy protections, intellectual property safeguards, and others—that reduces overhead costs;
2. Instantaneous and robust consumer trust mechanisms; and
3. Cost-effective access to a global market.

The neutral provision of these services to all developers hosting their apps on the App Store is similar to how Google makes these services available to Android developers. The Google Play store features around 2.4 million apps and is part of a broader ecosystem of platforms that compete for consumer and developers. *See Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 987, 1024-25 (N.D. Cal. 2021), *aff'd on this ground, rev'd in part and remanded on other grounds*, 67 F.4th 946 (9th Cir. 2023) (finding that Apple's App Store competes with other platforms for consumers and developers). Today, every successful platform for mobile, desktop, gaming, and even cloud computing must provide these features or risk failing in the marketplace. Platforms need to continuously improve because they know that, while platforms provide infrastructure and support, developers bring smart devices to life. Apple's App Store is an important means for opportunity and empowerment for the small business software developer community.

II. Removing Section 230 protection from neutrally provided services would upend the app economy and significantly harm small developers.

Removing Section 230 protection from neutral payment processing will open Apple and other platform providers to significantly increased liability. This increase in liability will likely be great enough to incentivize platform providers to change their service offerings in ways that will almost certainly be worse than the market-driven status quo for small developers.

After making changes necessitated by the loss of Section 230 protection, Apple could determine that the progressive fee structure that currently adequately compensates it for the provision of these services would no longer do so. As it stands, iOS and Android developers pay for the stores' distribution services in two ways: all developers pay the annual registration fee, which is $25 for Android developers and $99 for iOS developers. The other way is via commissions on "digital-only" goods and services—of which gaming transactions like those at issue in this case are a significant proportion—which the stores collect simultaneously with processing the payments made by the games' users. Around 85 percent of all apps do not charge for download or for in-app purchases, so the digital-only service commission imposed on the largest gaming and digital-only companies help subsidize the services provided neutrally for apps offering real-world goods and services in addition to those with a digital-only revenue model. Since the commission is a percentage, the larger the digital-only revenue, the more a company pays to the store. Thus, new liability for processing payments for digital-only goods and services would mean the stores must look elsewhere for revenue to cover distribution costs and their sights would turn to charging apps offering real-world goods and services, including those made by the smallest businesses with apps on the stores. Since transactions for real-world goods and services take place outside the app stores and away from consumers' smart devices, Apple would have no practical way of charging a percentage of revenue. ACT is already seeing

changes in platforms' policies due to new regulation in foreign jurisdictions: in order to comply with the European Digital Markets Act's (DMA's) prohibition on charging a commission for digital-only goods and services, Apple is proposing to charge developers based on downloads instead. Likewise, in this case, the increased Section 230 liability would likely result in a new fee structure targeting a revenue-neutral metric, which would hit smaller businesses with less revenue harder. Whether payment processing becomes degraded because platform providers institute new restrictions or simply more expensive because they pass the costs on to them, the result for small developers would likely be significantly increased costs. And small developers would find it difficult to replace this functionality by contracting with third parties if those third-party services are also becoming more expensive to absorb increased liability from the loss of Section 230 protection from payment processing beyond the app stores.

But the removal of Section 230 protection from payment processing would have broader negative effects. As discussed above, the App Store, like other platforms, provides a number of important services, including user and marketing analytics, intellectual property safeguards, user privacy controls, and security features. Today, these features are provided to all developers on a neutral basis just like payment processing. However, these other similarly situated services could be implicated in an adverse result to this case along with payment processing. Apple, for example, could cease offering any or all of these important services out of concern that

payment processing is not the only neutrally provided service that could fall out of Section 230 protection, resulting in further liability for these services.

In other contexts, in U.S. courts and in policy debates in jurisdictions around the world, we have seen policymakers seek to increase digital competition by incentivizing platforms to be less restrictive. The very neutrality Section 230 provides as a baseline in the United States is essential to achieving the vibrant, highly competitive ecosystem that courts and lawmakers have demanded. If Section 230 protection is removed, not just Apple but any platform would be heavily incentivized to limit their offerings to companies large enough to take on the liability burden through indemnification or otherwise. In this new world, small developers would lose out, and the vibrant ecosystem of today would be replaced by a handful of large firms, to the detriment of platform providers, developers, and users.

CONCLUSION

This Court should reverse the lower court's decision.

Dated: April 17, 2026

Respectfully submitted.

/s/ Brian Scarpelli
Brian Scarpelli
ASSOCIATION FOR COMPETITIVE TECHNOLOGY
1401 K St NW (Ste 501)
Washington, DC 20005
(517) 507-1446
bscarpelli@actonline.org

Counsel for Amici Curiae Association for Competitive Technology

CERTIFICATE OF SERVICE

On April 17, 2026, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ Brian Scarpelli
Brian Scarpelli

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
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9th Cir. Case Number 25-7917

I am the attorney or self-represented party.

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