

# Does the Anti-Google Law Actually Help Google and Hurt Startups?

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*On August 31, 2021, South Korea passed a law prohibiting smartphone application (app) store operators from imposing particular payment systems on the apps hosted in their app stores, intended to prevent dominant firms such as Google and Apple from charging exorbitant commissions on in-app purchase revenues. This so-called Anti-Google Law, a similar version of which is being considered by the U.S. Congress, was widely praised by prominent developers and politicians as improving apps' bargaining position with respect to monopolistic app store operators.*

*This Article argues that the Anti-Google Law (AGL) risks achieving the opposite effect by making small app developers even more beholden than they are now to dominant platforms. Much of the discourse over the AGL and similar proposals overlooks a basic fact: while developers might oppose Google's or Apple's payment system, many consumers like it because it allows them to avoid having to arrange payment separately for every single app on their phones. Whereas apps with large and devoted user bases could sustain the user attrition resulting from switching to their own payment systems, typical apps without such devoted followings may not. I argue that the AGL merely permits apps to use their preferred payment systems in theory without creating an environment in which apps could afford to use their preferred payment systems in practice, and that the AGL provides governments looking to adopt similar legislation an object lesson in pitfalls to avoid.*

## INTRODUCTION

Reining in Big Tech, represented by the likes of Google, Apple, and Facebook, is the talk of the town, with Democrats, Republicans, businesses, governments, academics, and lawyers all contributing to the debate.<sup>1</sup> Big tech's presence in everyday life became especially pronounced following the global COVID-19 outbreak, which drove typical consumers to spend

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<sup>1</sup> See, e.g., Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1956–57 (2020) (discussing a “bipartisan momentum to prosecute big tech companies” and academic demands for “stronger remedies for anticompetitive behavior”); Petition for Writ of Certiorari, *Berisha v. Lawson*, 594 U.S. \_\_\_ (2021) (No. 20-1063) (Gorsuch, J., dissenting) (observing that certain speech protections “ha[ve] evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable”).

more time online than ever before—working on Zoom, shopping on Amazon, or binging on Netflix.<sup>2</sup> As the amount of time spent staring at screens is scaling to new heights, so too has the amount of money spent online, particularly through smartphone applications. According to one estimate, consumer spending on apps grew by \$2 billion between the first and second quarters of 2021 alone, with TikTok claiming the largest share of the \$34 billion in total spending on apps in the second quarter of 2021.<sup>3</sup>

Increased in-app spending has bred controversy over how that revenue should be divided up between app developers and companies like Google and Apple, which own the platforms that distribute apps to consumers. Google collects up to 30% of in-app purchase revenues by requiring apps to use only Google’s payment system<sup>4</sup> and plans to apply that policy to all apps hosted on its app store beginning in 2022;<sup>5</sup> Apple already collects up to 30% of in-app purchase revenues from many apps registered on its app store.<sup>6</sup> On August 31, 2021, the South Korean legislature passed a bill, colloquially called the Anti-Google Law, that would ban app store operators from imposing particular payment systems on apps.<sup>7</sup> Although a similar bill has been introduced in the U.S. Congress,<sup>8</sup> the AGL is the first of its kind to pass in any legislature.<sup>9</sup> In the United States, Members of Congress, as well as app developers, praised the South Korean law as “rein[ing] in

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<sup>2</sup> See Cassidy C. Duckett, Comment, *Intangible Inaccessibility: How Wayfair Paves the Way for an Expanded ADA*, 93 TEMP. L. REV. ONLINE 1, 24 (2021) (mentioning an “increase in use of online services and time spent on screens during the COVID-19 pandemic”).

<sup>3</sup> See Robert Hart, *Mobile App Spending Soars to Record-Breaking \$34 Billion as Demand for Travel Apps Signal Wider Pandemic Recovery*, FORBES (June 29, 2021, 3:00 AM), <https://www.forbes.com/sites/roberthart/2021/06/29/mobile-app-spending-soars-to-record-breaking-34-billion-as-demand-for-travel-apps-signal-wider-pandemic-recovery>.

<sup>4</sup> GOOGLE PLAY CONSOLE HELP, *Payments*, <https://support.google.com/googleplay/android-developer/answer/9858738?hl=en> [<https://perma.cc/288L-EKSL>] (last visited Sept. 27, 2021); GOOGLE PLAY CONSOLE HELP, *Changes to Google Play’s Service Fee in 2021*, <https://support.google.com/googleplay/android-developer/answer/10632485?hl=en> [<https://perma.cc/798B-5Y5J>] (last visited Sept. 27, 2021).

<sup>5</sup> Purnima Kochikar, *Allowing Developers to Apply for More Time to Comply with Play Payments Policy*, ANDROID DEVS. BLOG (July 16, 2021), <https://android-developers.googleblog.com/2021/07/apply-more-time-play-payments-policy.html> [<https://perma.cc/Q6NA-DXLD>].

<sup>6</sup> See Jack Nicas, *How Apple’s 30% App Store Cut Became a Boon and a Headache*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/08/14/technology/apple-app-store-epic-games-fortnite.html>.

<sup>7</sup> See generally Jeongitongsinsa-eobbeob [Telecommunications Business Act], amended by Act. No. 18451, Sept. 14, 2021, <https://www.law.go.kr/%EB%B2%95%EB%A0%B9/%EC%A0%84%EA%B8%B0%ED%86%B5%EC%8B%A0%EC%82%AC%EC%97%85%EB%B2%95>; see *id.* at art. 22, § 50(1).

<sup>8</sup> See Open App Markets Act, S. 2710, 117th Cong. § 3(a)(1) (2021).

<sup>9</sup> See Saheli Roy Choudhury & Sam Shead, *South Korea Passes Bill Limiting Apple and Google Control over App Store Payments*, CNBC (Sept. 1, 2021, 4:01 AM), <https://www.cnbc.com/2021/08/31/south-korea-first-country-to-curb-google-apples-in-app-billing-policies.html> [<https://perma.cc/9WF2-P6ZT>].

abusive and anticompetitive practices by dominant online platforms” and “a monumental step in the fight for a fair app ecosystem.”<sup>10</sup>

This Article argues that the AGL risks achieving the opposite effect by making small app developers even more beholden than they are now to dominant app store operators. Much of the discourse over the AGL and similar proposals overlooks a basic fact: while developers might oppose Google’s or Apple’s payment system, many consumers like it because it lets them avoid having to arrange payment separately for every single app on their phones. Because consumers value that convenience, the AGL would likely benefit only that small share of developers who, after switching to their preferred payment systems, retain enough customers to stay profitable. Apps without such a loyal customer base that nonetheless use their preferred payment systems would go out of business. I argue that, once apps do fail for that reason, that precedent would serve as additional leverage against small developers, resulting in the AGL having weakened their bargaining position. Moreover, the AGL serves as a convenient excuse for Google and Apple to rescind concessions that would have helped small developers, which the platforms had offered in response to public criticism and pressure.

Part III discusses a solution to the AGL’s adverse consequences. The AGL’s problems could be mitigated if it enabled apps to use alternative, widely used payment systems that are not as exploitative as Google’s and Apple’s systems allegedly are, or if it enabled app stores that are not owned by Google or Apple to compete on Android or iOS smartphones. These alternatives already exist in other forms on other platforms, such as credit cards widely used by brick-and-mortar merchants and app store-equivalents owned by third parties that sell computer games on PC and macOS. However, the AGL merely permits apps to use their preferred payment systems in theory without addressing the large disparity in bargaining power that prevents many apps from actually using their preferred payment systems in practice. I conclude that the AGL provides governments looking to adopt similar legislation an object lesson in pitfalls to avoid.

## I. BACKGROUND

Although Apple had been collecting up to 30% of in-app purchase revenues since 2009,<sup>11</sup> that policy gained widespread exposure only in

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<sup>10</sup> Hamza Shaban & Cristiano Lima, *U.S. Legislators Hail South Korea’s Move to Curb Apple and Google’s App-Store Dominance*, WASH. POST (Aug. 31, 2021, 3:18 PM), <https://www.washingtonpost.com/business/2021/08/31/apple-google-app-store-south-korea/>.

<sup>11</sup> Nicas, *supra* note 6. Apple had granted exemptions from its commission policy on a case-by-case basis, one notable example being an exemption for the Chinese messenger service WeChat. See Leo Sun, *Tencent Quietly Offers a Cut of WeChat’s Revenues to Apple*, THE MOTLEY FOOL (Jan. 29, 2020, 12:00 PM), <https://www.fool.com/investing/2020/01/29/tencent-quietly-offers-a-cut-of-wechats-revenues-t.aspx> [<https://perma.cc/>

2020, when online game developer Epic Games mounted a public campaign to defy it. Epic Games developed a mobile version of its game Fortnite for both Android and iOS phones.<sup>12</sup> On August 13, 2020, Epic Games implemented its own in-app payment system in violation of Apple policy and announced discounts of up to 20% on in-game purchases, stating that this discount would not apply “when using Apple and Google payment options [because] Apple and Google collect a 30% fee” on all in-app purchases.<sup>13</sup> Epic Games also sued Google and Apple claiming antitrust violations and began the Twitter hashtag campaign “#FreeFortnite.”<sup>14</sup> Google and Apple both removed Fortnite from their respective app stores, where the game continues to be unavailable as of September 2021.<sup>15</sup>

Despite a lack of immediate success against Google or Apple, Epic’s campaign directed a previously unseen level of public criticism toward Google’s and Apple’s commission policies. Even before the Fortnite incident, calls to restrain Big Tech had been growing on both sides of the aisle, putting politicians as different as Democratic Senator Amy Klobuchar and Republican Senator Josh Hawley on the same side of this issue.<sup>16</sup> However, the Fortnite incident added to a growing public perception that Google and Apple are exploiting their market power to extract exorbitant profits from app developers.<sup>17</sup> Legal scholars have also voiced support for greater regulation of dominant platform providers, arguing that “regulators and courts must bar discrimination and self-preferencing by platforms” and

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3TXM-82H8] (“Tencent added a ‘tipping’ feature . . . which enabled readers to pay their favorite writers, in 2017. Tencent retained a cut of those tips as revenue, which prompted Apple . . . to declare that it was also entitled to a 30% cut on iOS devices — since the tips counted as in-app purchases. Tencent and Apple settled their differences . . . . [N]either would charge a transaction fee. The agreement was considered a concession for Apple . . . .”).

<sup>12</sup> See Chris Jay Hoofnagle, Aniket Kesari & Aaron Perzanowski, *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 842 (2019) (“Fortnite is available on . . . Apple, Android devices . . .”).

<sup>13</sup> The Fortnite Team, *The Fortnite Mega Drop - Permanent Discounts up to 20%*, EPIC GAMES (Sept. 10, 2020), <https://www.epicgames.com/fortnite/en-US/news/the-fortnite-mega-drop-permanent-discounts-up-to-20-percent> [<https://perma.cc/CWV4-RE2R>].

<sup>14</sup> See @FortniteGame, TWITTER (Aug. 13, 2020, 4:22 PM), <https://twitter.com/FortniteGame/status/1294006412931223552> [<https://perma.cc/AGJ4-X3E3>]; Epic Games, Inc. v. Apple Inc., No. 20-cv-05640, 2021 WL 4128925, at \*1 (N.D. Cal. Sept. 10, 2021).

<sup>15</sup> See Nicas, *supra* note 6; Epic Games, Inc. v. Apple Inc., 493 F. Supp. 3d 817, 831 (N.D. Cal. 2020).

<sup>16</sup> See Shira Ovide, *How Klobuchar and Hawley See Things When It Comes to Technology*, N.Y. TIMES (May 13, 2021), <https://www.nytimes.com/2021/05/13/books/amy-klobuchar-antitrust-josh-hawley-tyranny-big-tech.html>.

<sup>17</sup> See Rachel Lerman, Cat Zakrzewski & Heather Kelly, *Apple Loosens Rules for Developers in Major Concession Amid Antitrust Pressure*, WASH. POST (Aug. 26, 2021, 11:47 PM), <https://www.washingtonpost.com/technology/2021/08/26/apple-app-store-payment-settlement/> [<https://perma.cc/P8QN-9B22>] (“Epic ha[s] alleged [that] Apple wields too much control over how people can purchase apps for iOS devices . . . Apple’s previous attempts to extend the olive branch to developers have failed to assuage a growing firestorm of criticism.”).

must eventually “upend platform-monopolies entirely.”<sup>18</sup>

Mounting criticism and regulatory threats did lead to some concessions. On March 16, 2021, Google offered to reduce its commission to “15% for the first \$1M (USD) of revenue every developer earns each year[,]” claiming that “99% of developers . . . sell[ing] digital goods and services [through Google’s app store] will see a 50% reduction in fees.”<sup>19</sup> As part of a class action settlement against some developers in the United States, Apple also offered to reduce its fees for qualifying apps for at least the next three years.<sup>20</sup> Apple would also allow developers to e-mail their customers “about payment methods outside of their iOS app.”<sup>21</sup>

Nevertheless, on August 31, 2021, the South Korean legislature passed the so-called Anti-Google Law,<sup>22</sup> whose stated legislative intent is to foster fair competition in the app-market industry by prohibiting dominant platforms from imposing particular payment methods.<sup>23</sup> The passage was praised by politicians and developers as “rein[ing] in abusive and anticompetitive practices by dominant online platforms” and “a monumental step in the fight for a fair app ecosystem.”<sup>24</sup> Tim Sweeney, founder and CEO of Epic Games, went so far as to say that “today all

<sup>18</sup> See, e.g., Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237, 250 (2021); see also Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer-Welfare Standard*, 26 GEO. MASON L. REV. 395, 396 (2018) (“[I]nnovation harms are beyond the scope of the [consumer-welfare] standard and the capability of antitrust courts; to protect innovation, we need a new regulatory tool.”).

<sup>19</sup> Sameer Samat, *Boosting Developer Success on Google Play*, ANDROID DEVS. BLOG (Mar. 16, 2021), <https://android-developers.googleblog.com/2021/03/boosting-dev-success.html> [<https://perma.cc/Z224-SGF2>].

<sup>20</sup> Press Release, Apple, Apple, US Developers Agree to App Store Updates That Will Support Businesses and Maintain a Great Experience for Users (Aug. 26, 2021), <https://www.apple.com/newsroom/2021/08/apple-us-developers-agree-to-app-store-updates/> [<https://perma.cc/N2YY-AH94>].

<sup>21</sup> *Id.*

<sup>22</sup> See Choudhury & Shead, *supra* note 9 (stating that this law is “sometimes referred to as the Anti-Google Law”).

<sup>23</sup> Jeongitongsinsa-eobbeob ilbugaejeongbeoblyul-an(daeon) [Partial Amendment to the Telecommunications Business Act (alternative)], amended by Act. No. 2112203, Aug. 31, 2021 (S. Kor.) (“대안의 제안이유 . . . 앱 마켓사업자가 거래상의 지위를 부당하게 이용하여 모바일콘텐츠 등 제공사업자로 하여금 특정한 결제방식을 사용하도록 강제하는 행위, 앱 마켓사업자가 모바일콘텐츠 등의 심사를 부당하게 지연하는 행위 등을 금지함으로써 앱 마켓산업 참여자의 공정한 경쟁을 촉진하고자 함”).

<sup>24</sup> Shaban & Lima, *supra* note 10; see also Reis Thebault, *European Lawmakers Welcome South Korean Action on Apple, Google App Stores, Promise More Regulatory Efforts*, WASH. POST (Sept. 1, 2021, 3:48 PM), <https://www.washingtonpost.com/technology/2021/09/01/eu-apple-google-korea-react/> (quoting Marcel Kolaja, a Member and Vice-President of the European Parliament, who stated: “This South Korean bill goes in the right direction, and I am happy that it’s not only the European Union that is looking into this systematic problem and trying to resolve it systematically.”).

developers around the world can be proud to say: I am a Korean!”<sup>25</sup>

## II. THE ANTI-GOOGLE LAW’S INTENDED AND UNINTENDED CONSEQUENCES

The AGL, whose stated purpose is to reduce dominant platforms’ anticompetitive effects on the app-market ecosystem,<sup>26</sup> has two primary functions in service of that goal.<sup>27</sup> The first prohibits the imposition of a particular in-app payment system on apps, which is intended to prevent dominant platforms from charging excessive commissions on in-app purchases.<sup>28</sup> The second prohibits app stores from unduly delaying the process of registering apps or deleting already-registered apps, which is intended to prevent platforms from retaliating against recalcitrant developers by holding their apps hostage.<sup>29</sup> The apparent intent of these two functions is to enable app developers to use any payment system they please, so that they may be freed from exorbitant commissions without fear of retaliation from dominant platforms.

Part II shows that the AGL risks making small developers more beholden to dominant platforms such as Google and Apple due to its apparent neglect of two facts. First, typical smartphone users may like the payment systems that Google and Apple impose on apps because those payment systems allow users to make payments in multiple apps without having to arrange payment separately for every single app they use. Because app users value this convenience, they may abandon apps that attempt to implement their preferred payment systems. Due to the hypercompetitive nature of the app marketplace, few apps could afford such user attrition—meaning that typical apps may continue to use Google’s or Apple’s payment systems despite the AGL. Part II.A demonstrates that, for this reason, the AGL’s ban on platforms’ imposition of particular payment systems would be unlikely to strengthen small developers’ bargaining position against the likes of Google and Apple and may, in fact, end up weakening it.

Second, Part II.B shows that the AGL may have foreclosed an

<sup>25</sup> Tim Sweeney (@TimSweeneyEpic), TWITTER (Aug. 31, 2021, 6:14 AM), <https://twitter.com/TimSweeneyEpic/status/1432648097075707904> [<https://perma.cc/898T-29QE>].

<sup>26</sup> See Jeongitongsinsa-eobbeob ilbugaejeongbeoblyul-an(daeon) [Partial Amendment to the Telecommunications Business Act (alternative)], amended by Act. No. 2112203, Aug. 31, 2021 (S. Kor.).

<sup>27</sup> Other functions of the amended law would include, for example, requiring app store operators to stipulate the terms of in-app purchase payments and refunds in the user agreement. See Jeongitongsinsa-eobbeob [Telecommunications Business Act] art. 22, § 9(1), amended by Act. No. 18451, Sept. 14, 2021, <https://www.law.go.kr/%EB%B2%95%EB%A0%B9%EC%A0%84%EA%B8%B0%ED%86%B5%EC%8B%A0%EC%82%AC%EC%97%85%EB%B2%95>.

<sup>28</sup> *Id.* at art. 50, § 1(9).

<sup>29</sup> *Id.* at art. 50, § 1(10).

opportunity to gain concessions from dominant platforms that would have been beneficial to small developers. The AGL was precipitated by the prevailing perception that Google and Apple were abusing their market power to extract exorbitant commissions from small app developers. In an apparent effort to assuage mounting public criticism, both Google and Apple offered to reduce their commissions for apps with sufficiently low revenues. Had the AGL not passed, Google and Apple would probably have had to make those concessions permanent or offer something equivalent. If Google and Apple rescinded those concessions the moment the AGL was withdrawn, they would face even greater criticism than what they had tried to avoid in the first place. However, now that the AGL has passed, Google and Apple no longer need to offer to self-regulate. Although those concessions may not be so missed if the AGL achieved its intended objectives, this Article argues that the AGL would not achieve those objectives.

*A. The Convenience of Dominant Platforms' Payment Systems May Render the AGL Toothless*

The AGL prohibits dominant platforms from imposing particular payment systems on apps. Yet, even if the AGL is enforced to the letter, developers still may not be able to switch payment systems as they please. This is due to some basic facts that the discourse over the AGL seems to be overlooking. First, many app users may prefer to use Google's and Apple's payment systems because they allow consumers to arrange payment only once to make payments in dozens of apps<sup>30</sup> (just as consumers can buy many different products from many different sellers at once by registering just one credit card with Amazon).<sup>31</sup> Second, apps might continue to use Google's and Apple's payment systems despite the AGL's protections because the alternative may be to suffer unaffordable user attrition in a hypercompetitive market.

For illustration, consider how one would arrange payment with an app that does not use the payment systems imposed by Google and Apple. Google has allowed WeChat to use its own payment system, WeChat Pay,

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<sup>30</sup> See Choudhury & Shead, *supra* note 9 (“South Korea’s parliament has approved a bill that will make it the first country to impose curbs on Google’s and Apple’s payment policies that force developers to only use the tech giants’ proprietary billing systems.”).

<sup>31</sup> See Jay Greene, *Amazon Sellers Say Online Retail Giant Is Trying to Help Itself, Not Consumers*, WASH. POST (Oct. 1, 2019), <https://www.washingtonpost.com/technology/2019/10/01/amazon-sellers-say-online-retail-giant-is-trying-help-itself-not-consumers/> (stating that Amazon hosts “more than 2.5 million third-party sellers who have become global businesses on its platform”). Cf. *Accepted Payment Methods*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GFBWMNXEPYVJAY9A> [<https://perma.cc/5SR9-FPLP>] (last visited Sept. 1, 2021) (stating that users “can’t split payment among multiple [credit or debit] cards”).

for in-app purchases even though WeChat is available on its app store.<sup>32</sup> Using WeChat Pay requires registering a bank card with that app, separately from any bank card registered with the Google or Apple payment systems.<sup>33</sup> If apps implemented their own preferred payment systems, users would likely have to repeat this process for each of those apps.<sup>34</sup> Therefore, if consumers do not want to arrange payment separately with every single app on their phones, platforms may not have to bother imposing their payment systems on apps. Apps without a large and loyal enough user base might not risk using their preferred payment systems out of fear that the inconvenience would drive users away and put them out of business.

Whether users actually abandon an app for that reason would depend on how much they value this convenience. Recall that Fortnite offered 20% discounts on in-app purchases after announcing that it would no longer pay 30% fees to Google or Apple.<sup>35</sup> Apps can offer similar discounts as compensation to users in exchange for the inconvenience of arranging payment separately for each app. However, the rosy predictions about the AGL's consequences—including the one from Epic CEO Tim Sweeney—would materialize for a particular app only if this strategy persuades enough users to continue making in-app purchases. Clearly, this strategy would be both less risky and more profitable for apps with larger and more devoted user bases. Larger user bases would enable apps to sustain more user attrition without going out of business, and loyal user bases would reduce the amount of user attrition.

This compensation strategy is likely to be highly effective for apps like Fortnite. First, Fortnite has a large number of users. About four months before its public spat with Google and Apple, Fortnite claimed to have 350 million total registered users<sup>36</sup> and 12.3 million concurrent users for a particular in-game event.<sup>37</sup> Second, Fortnite is playable not only on

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<sup>32</sup> See Sun, *supra* note 11 (“Android users in China can directly use Tencent’s WeChat Pay to pay for Mini Program services like ride hailing, bills, deliveries, and games without ever leaving the app.”).

<sup>33</sup> See *How Do I Unlink Bank Card(s) from WeChat Pay?*, WECHAT, <https://help.wechat.com/cgi-bin/micromsg-bin/oshelpcenter?opcode=2&id=1612026rbza2161202ir7rn6&lang=en&plat=2&Channel=helpcenter> [https://perma.cc/8A9M-2RSP] (last visited Sept. 1, 2021). Although the page refers to Android, the same help appears for iOS. See *id.*

<sup>34</sup> There is a scenario in which apps can use whichever preferred payment system without suffering unaffordable user attrition: if there exists some payment system other than Google’s or Apple’s that is used by a sufficiently large number of apps and convenient to users—akin to a Visa credit card. See *infra* Part III.

<sup>35</sup> See The Fortnite Team, *supra* note 13 and accompanying text.

<sup>36</sup> Fortnite (@FortniteGame), TWITTER (May 6, 2020, 1:01 PM), <https://twitter.com/fortnitegame/status/1258079550321446912?lang=en> [https://perma.cc/K7LP-VSAV].

<sup>37</sup> Fortnite (@FortniteGame), TWITTER (Apr. 23, 2020, 11:21 PM), <https://twitter.com/fortnitegame/status/1253524351376330752?lang=en> [https://perma.cc/4V8P-PKZK].



smartphones but also on PCs and game consoles.<sup>38</sup> This means that Google's and Apple's threat to remove an app from their app stores is likely to be much less effective against Fortnite than against apps that are available only on smartphones. Even if Fortnite does suffer user attrition on smartphones, it could still make up for those losses by attracting users elsewhere. Indeed, the number of Fortnite users is estimated to have increased after Epic's public spat with Google and Apple began.<sup>39</sup> Fortnite's (and Epic Games') prospects of benefitting from the AGL should explain why Epic's CEO Tim Sweeney sings unqualified praises of it, to the point of implying that it is a bulwark against tyranny comparable to the Berlin Wall.<sup>40</sup>

However, this strategy is unlikely to work for typical apps without such numerous and loyal users. For illustration, compare small apps hosted on Google and Apple app stores to third-party sellers hosted on Amazon. Amazon collects up to 35% of third-party sales revenue—similar to Google and Apple—and also charges for optional services such as advertising.<sup>41</sup> These fees indicate that consumers could purchase the same items they buy on Amazon for lower prices by going to third-party sellers directly. Yet, the third-party sellers themselves seem skeptical that consumers would give up the convenience of one-stop shopping for discounts. Many sellers feel compelled to buy advertisements on Amazon for fear of losing sales, and marketers estimate that third-party sellers would still sell on Amazon even if it raised its commission by 5%.<sup>42</sup> These fears seem well-founded, given that sales through Amazon “account[] for 75 percent or more of . . . annual sales” for some merchants, while “[t]wo-thirds of U.S. shoppers who purchased a product on Amazon . . . started their search on [Amazon] rather than . . . another retail website[.]”<sup>43</sup>

This dynamic is likely to apply in a similar (if not worse) way to typical

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<sup>38</sup> See *FAQ*, EPIC GAMES: FORTNITE, <https://www.epicgames.com/fortnite/en-US/faq> [<https://perma.cc/KR7U-VXN2>] (last visited Sept. 1, 2021). Although Fortnite continues to be unavailable on Google and Apple app stores, it can still be played on Android and iOS smartphones. Some features of the game are not available depending on the platform. See generally *id.*

<sup>39</sup> See *Fortnite Live Player Count and Statistics*, ACTIVEPLAYER.IO, <https://activeplayer.io/fortnite/> [<https://perma.cc/JYH5-F8JL>] (last visited Sept. 1, 2021) (“There are approximately 390 million registered users on the game Fortnite [sic] in the 1st quarter [sic] of 2021.”); Fortnite (@FortniteGame), TWITTER (Dec. 1, 2020, 9:00 PM), <https://twitter.com/fortnitegame/status/1333954074371383296?lang=en> [<https://perma.cc/6GXW-Z4FF>] (claiming 15.3 million concurrent users for an in-game event).

<sup>40</sup> See Tim Sweeney (@TimSweeneyEpic), TWITTER (Aug. 31, 2021, 7:14 PM), <https://twitter.com/TimSweeneyEpic/status/1432648097075707904> [<https://perma.cc/898T-29QE>] (“As President Kennedy said at the Berlin Wall in 1963, today all developers around the world can be proud to say: I am a Korean!”).

<sup>41</sup> See Greene, *supra* note 31.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

apps because commercially available data indicate that abandoning Google's or Apple's payment system may be far riskier than the AGL's proponents appear to believe. One survey found that, while the average person has forty apps installed on their phone, eighteen apps accounted for 89% of total usage time.<sup>44</sup> Moreover, most apps are already estimated as losing between 86.6% to 97.7% of their users within the first thirty days,<sup>45</sup> indicating that apps' competition for user attention is already fierce. According to Google, smartphone users are 32% more likely to leave a webpage if the time taken to load that page increases by two seconds.<sup>46</sup> Given these facts, most apps are likely to keep Google's or Apple's payment system despite the AGL's protections. Arranging a new payment method—for example, creating an account, registering an e-mail address, and typing in one's credit card number—is likely to take longer than two seconds.

The AGL may not only be unhelpful to small app developers but also could make them even more beholden to Google or Apple. Before the AGL's passage, there was little to no evidence of what would happen to *small* apps that used their preferred payment systems instead of Google's or Apple's systems. Apps such as Fortnite and WeChat used their own payment systems before the AGL, but those examples were extreme outliers: the number of Fortnite users was already in the millions and growing,<sup>47</sup> and WeChat accounts for more than a third of China's data traffic.<sup>48</sup> Now imagine that, following the AGL's passage, some small apps do switch to their preferred payment systems and subsequently go out of business. Their failure would serve as previously nonexistent evidence of what would happen to small apps that follow the same path. This evidence would worsen small app developers' bargaining position against dominant platforms, meaning that Google or Apple may not have to bother imposing

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<sup>44</sup> See Hardik Shah, *App Usage Statistics 2021 That'll Surprise You (Updated)*, SIMFORM (Sept. 17, 2021) <https://www.simform.com/blog/the-state-of-mobile-app-usage/> [<https://perma.cc/VJ48-HWWS>] (“[T]he average person has 40 apps installed on the phone. Out of that 40 apps, 89% of the time is split between 18 apps.”).

<sup>45</sup> See generally *Retention Rate on Day 1 and Day 30 of Mobile App Installs Worldwide as of August 2020, By Category*, STATISTA, <https://www.statista.com/statistics/259329/ios-and-android-app-user-retention-rate/> [<https://perma.cc/D2HR-E7R4>] (last visited Sept. 1, 2021).

<sup>46</sup> See THINK WITH GOOGLE, <https://www.thinkwithgoogle.com/marketing-strategies/app-and-mobile/page-load-time-statistics/> [<https://perma.cc/DUJ5-SQY8>] (last visited Sept. 1, 2021) (“The probability of bounce increases 32% as page load time goes from 1 second to 3 seconds.”); see also *Analytics Help*, GOOGLE, <https://support.google.com/analytics/answer/1009409?hl=en> [<https://perma.cc/84CH-YV3B>] (last visited Sept. 1, 2021) (“A bounce is a single-page session on your site. In Analytics, a bounce is calculated specifically as a session that triggers only a single request to the Analytics server, such as when a user opens a single page on your site and then exits without triggering any other requests to the Analytics server during that session.”).

<sup>47</sup> See *supra* notes 36–39 and accompanying text.

<sup>48</sup> See Yiren Lu, *China's Internet is Flowering. And It Might Be Our Future*, N.Y. TIMES MAG. (Nov. 13, 2019), <https://www.nytimes.com/interactive/2019/11/13/magazine/internet-china-wechat.html>.

its payment systems on small apps.<sup>49</sup>

The ineffectual nature of merely permitting apps to use their preferred payment systems is not limited to the AGL. On September 10, 2021, the U.S. District Court for the Northern District of California ruled that Apple violated California law when Apple prohibited apps from directing users to payment methods other than Apple's.<sup>50</sup> Although this ruling would theoretically permit any app to direct users to its preferred payment system (for example, by e-mail or text message), it would do nothing to ensure that apps could actually afford to do so. As discussed further in Part III, permitting app stores that are not owned by Google or Apple to compete on Android and iOS *may* make it feasible for apps to reject Google's or Apple's payment systems without excessive user attrition. However, the district court found that it could not "require Apple to give competing app stores access to the same 'iOS functionality that the App Store has access to[.]'"<sup>51</sup>

*B. The AGL May Have Foreclosed Self-Regulatory Concessions  
Beneficial to Small Developers*

Google's and Apple's responses to the AGL further indicate that its passage may have left small developers worse off. Scholars have shown that firms facing regulatory threats in a variety of contexts often present self-regulation as a preferable alternative to government regulation.<sup>52</sup> Recall that Google and Apple offered concessions shortly before the AGL's passage, such as reducing their fees for small developers.<sup>53</sup> These offers were apparently intended to assuage mounting public criticism and to preempt regulatory threats, including the AGL. As noted above, had the AGL not passed, Google and Apple would likely have had to make their concessions permanent or offer something equivalent; corporate self-regulation, once created, often persists in the absence of government regulation.<sup>54</sup> If Google

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<sup>49</sup> Cf. Garry A. Gabison, *A Platform Paradox: Two Sides, Three Markets*, 17 DEPAUL BUS. & COMM. L.J. 65, 79, 81 (2019) ("[Platform suppliers] need a critical mass to even out the bargaining power that platforms yield thanks to the network externalities. Amazon was able to impose whatever model they wanted on [e-book] publishers. . . . In most situations, platform suppliers have little to no bargaining power against platforms.").

<sup>50</sup> *Epic Games, Inc. v. Apple, Inc.*, Case No. 4:20-cv-05640-YG, 2021 WL 4128925, at \*117-118 ("Apple uses anti-steering provisions prohibiting apps from . . . direct[ing] customers to purchasing mechanisms other than in-app purchase[] . . . Accordingly, the Court finds that the anti-steering provisions violate the UCL's unfair prong under the tethering test.") (citation omitted).

<sup>51</sup> *Id.* at \*104.

<sup>52</sup> See, e.g., Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591, 598 (2010) ("As the case studies below are focused on the regulation of particular industries, it should be no surprise that we see the industries each used some form of 'preemptive self-regulation' to react to concern from the public and policy-makers . . . to take the wind out of the sails of the regulators . . .").

<sup>53</sup> See *supra* notes 19-20 and accompanying text.

<sup>54</sup> See John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace*

or Apple rescinded the reduced fee policy the moment the AGL was withdrawn, both would likely suffer greater public criticism and regulatory threats than what they had originally tried to forestall.

Nevertheless, the AGL passed despite the offers of concession. The AGL's passage gives Google and Apple a convenient excuse to rescind those offers: Google and Apple might argue that self-regulation is unnecessary because the AGL would regulate them. Indeed, Apple's offer to reduce fees, announced five days before the AGL's passage, came with a three-year time limit<sup>55</sup>—indicating that such an offer can always be rescinded. Although that concession might not be so missed if the AGL succeeds, there is a nontrivial likelihood of the AGL being unhelpful to small app developers, as already explained. Hence, the AGL risks leaving small developers worse off than before by failing to deliver on its promised protections while inducing dominant platforms to rescind the concessions that they might have preserved had the AGL not passed. Indeed, Apple's claim that the AGL would “lead[] to fewer opportunities for the over 482,000 registered developers in Korea”<sup>56</sup> sounds less like concern and more like a thinly veiled threat to raise its fees back up if and when the AGL takes effect.

Because this Article was published before the AGL took effect,<sup>57</sup> the AGL's actual consequences on the app ecosystem remain to be seen. However, I argue that the glowing praise dominating the discourse about the AGL—coming mostly from politicians and large app developers—should not be taken at face value, and the warning that “the rushed process hasn't allowed for enough analysis of the negative impact of this legislation on . . . app developers”<sup>58</sup> should not be dismissed out of hand simply because it comes from conflicted interests like Google. The prevailing discourse appears to have overlooked the basic fact that many consumers

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*Utopianism*, 74 IND. L.J. 893, 948 (1999) (“Government officials may be quite explicit in urging industry to self-regulate or be subject to government regulation, and industry members may be likewise explicit in urging their competitors to adopt self-regulation as a means of avoiding presumptively worse-tasting medicine.”).

<sup>55</sup> See Apple, *supra* note 20.

<sup>56</sup> Heekyoung Yang, *South Korea Set to Curb Google, Apple Commission Dominance*, REUTERS (Aug. 24, 2021 5:00 PM), <https://www.reuters.com/technology/skorea-set-curb-google-apple-commission-dominance-2021-08-24/> [<https://perma.cc/VZ92-T75Z>].

<sup>57</sup> See generally Jeongitongsinsa-eobbeob [Telecommunications Business Act] addendum to Act. No. 18451, amended by Act. No. 18451, Sept. 14, 2021 (S. Kor.), <https://www.law.go.kr/%EB%B2%95%EB%A0%B9/%EC%A0%84%EA%B8%B0%ED%86%B5%EC%8B%A0%EC%82%AC%EC%97%85%EB%B2%95> (stating that articles 22 § 9 and 92 will take effect six months following September 14, 2021, the date of the AGL's enactment).

<sup>58</sup> Heekyoung Yang & Joyce Lee, *S.Korea Parliament Committee Votes to Curb Google, Apple Commission Dominance*, REUTERS (Aug. 25, 2021 4:38 AM), <https://www.reuters.com/technology/skorea-parliament-committee-votes-curb-google-apple-commission-dominance-2021-08-25/> [<https://perma.cc/6Q2X-38FQ>].

enjoy Google's and Apple's payment systems because of the convenience of not having to arrange payment separately with every single app. This convenience may deter small apps from switching to their preferred payment systems despite any protection that the AGL claims to offer.

The AGL may also leave small developers worse off than before. Prior to the AGL, apps publicly known to have successfully implemented their own payment systems were limited to the few outliers that could afford to do so—such as Fortnite, an app with approximately 350 million registered users,<sup>59</sup> and WeChat, an app that accounts for 34% of China's data traffic.<sup>60</sup> However, following the AGL's passage, small apps may attempt to implement their own payment systems and go out of business. Going out of business would serve as previously nonexistent evidence of what would likely happen to small apps that try to implement their own payment system, which would result in the AGL weakening their bargaining position. Moreover, the AGL can serve as a convenient excuse for dominant platforms to rescind concessions they had offered to small developers. This means that the AGL offers small developers a highly unlikely prospect of a gain in exchange for a likely loss, indicating that the AGL may not be the unqualified cause for celebration that some large app developers present it as.<sup>61</sup>

### III. A SOLUTION TO THE AGL'S ADVERSE CONSEQUENCES

The AGL is not necessarily doomed to fail. Epic Games' campaign to implement its own payment system has made it something of a poster child for apps allegedly being exploited by dominant platforms.<sup>62</sup> Perhaps because of Epic's poster-child status, much of the public discourse on the AGL seems to assume that each app will separately implement its own payment system once the AGL takes effect.<sup>63</sup> However, not every app needs

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<sup>59</sup> See ACTIVEPLAYER.IO, *supra* note 39.

<sup>60</sup> See Lu, *supra* note 48.

<sup>61</sup> See Shaban & Lima, *supra* note 10 (stating that a coalition of developers pushing Apple and Google to change their policies called the AGL “historic and [] monumental”).

<sup>62</sup> Leah Nysten, *Online Gaming Flourished During the Pandemic. So Have Apple's Antitrust Troubles*, POLITICO (Nov. 10, 2020, 5:22 PM), <https://www.politico.com/news/2020/11/10/online-gaming-flourished-during-pandemic-apple-antitrust-435818> [<https://perma.cc/ZXD3-G72D>] (calling Epic Games “the poster child” in the effort to fight Apple's dominance as a platform); see also Rebecca Haw Allensworth, *Antitrust's High-Tech Exceptionalism*, 130 YALE L.J.F. 588, 602 (2021) (“Some plaintiffs have challenged Apple's integration of its phone and the App Store on antitrust grounds. Most notably and most recently Epic [Games] . . . pulled off an orchestrated attack against Apple . . . .”) (footnote omitted).

<sup>63</sup> See, e.g., Scott Nover, *Apple Is Losing Control over Its App Store*, QUARTZ (Sept. 1, 2021), <https://qz.com/2054890/governments-are-chipping-away-at-apples-app-store/> [<https://perma.cc/K9W7-HB5K>]

(“South Korea passed a law allowing developers on Apple and Google's app marketplaces to introduce their own payment systems. . . .”); Todd Haselton, *Fortnite Maker Challenges Apple and Google's App Store Rules Through Direct-Payment Discounts*, CNBC (Aug.

its own payment system. The problem with the AGL is that it overlooks the likelihood that users will abandon small apps instead of arranging payment methods separately. To mitigate this problem, apps could coalesce around payment systems that do not include the allegedly exploitative features of Google's or Apple's systems. Think of that payment system as analogous to a Visa credit card: a large enough number of merchants accept Visa cards that they offer consumers convenience, but the presence of competing credit cards theoretically prevents Visa from charging merchants 30% in fees on every transaction.<sup>64</sup>

The AGL's adverse consequences could also be preempted by permitting other app stores to compete on Android and iOS with Google and Apple, whose app stores are currently the only game in town. A similar model has been operating for nearly twenty years on non-mobile platforms. For example, Steam, GOG, and the Epic Games Store are analogous to app stores in that they sell computer games for Microsoft Windows and macOS, but Steam, GOG, and the Epic Games Store are not designed or operated by Microsoft or Apple.<sup>65</sup> Of course, I am not saying that allowing competing app stores to operate on Android and iOS would magically solve all of the problems that the app ecosystem faces today. Like Google and Apple, Steam has been criticized for taking 30% of game developers' sales revenue.<sup>66</sup> Epic, ostensibly a crusader against the exploitations of Google and Apple, has also been accused of anticompetitive behavior in operating its Epic Games Store.<sup>67</sup> As with any solution, the devil would be in the details.

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13, 2020, 10:43 AM), <https://www.cnbc.com/2020/08/13/fortnite-discount-appears-to-break-apple-google-app-store-rules.html> (quoting Epic Games CEO Tim Sweeney as saying: "If every developer could accept their own payments . . . we could pass the savings along to all our consumers and players would get a better deal on items. And you'd have economic competition . . .").

<sup>64</sup> See Steven Semeraro, *Cooperation, Competition and Easterbrook's Forgotten Insight: A Case Note on Ohio v. American Express*, 41 T. JEFFERSON L. REV. 1, 24 (2018) (discussing "the competitive check that cardholders and merchants can refuse to take a card if a card system's terms are not attractive enough").

<sup>65</sup> See *In re Apple iPhone Antitrust Litig.*, No. 11-CV-06714-YGR(TSH), 2021 WL 718650, at \*1, 3 (N.D. Cal. Feb. 24, 2021) (comparing Steam to app stores); *Epic Games, Inc. v. Apple, Inc.*, No. 4:20-cv-05640-YGR, 2021 WL 4128925, at \*10 (N.D. Cal. Sept. 10, 2021) ("[T]he Epic Games Store's 'FAQ' describes the Epic Games Store as a 'curated digital storefront for PC and Mac' . . ."); *Stardock Sys., Inc. v. Reiche*, No. C 17-07025 SBA, 2019 WL 8333563, at \*1 (N.D. Cal. May 14, 2019) (describing GOG as a game distributor).

<sup>66</sup> *In re Apple iPhone Antitrust Litig.*, 2021 WL 718650, at \*1–2 ("[Steam's operator] Valve charges a 30% commission on all sales . . . Epic has . . . stated that it will not offer Fortnite on Steam unless Valve changes its business model.") (citation omitted).

<sup>67</sup> See Ben Gilbert, *The Creator of 'Fortnite' Is Trying to Shake Up the PC Gaming Industry—Here's Why a Lot of Folks Are Furious About It*, BUSINESS INSIDER, (Aug. 19, 2019, 3:56 PM), <https://www.businessinsider.com/epic-games-store-situation-2019-4> [<https://perma.cc/6M3W-5TS7>] (describing consumer criticism of Epic Games Store's policy of making certain games previously available on Steam subsequently available only on the Epic Games Store).

My point is that the AGL is intolerably negligent of those details, which are critical to ensuring that the AGL's ostensibly good intentions do not end up paving a road to hell. The AGL simply permits apps to use their preferred payment systems without creating an environment in which apps could afford to use their preferred payment systems. That environment could be created by, for example, updating antitrust laws to allow other app stores and payment systems to compete against Google and Apple on Android and iOS,<sup>68</sup> and ensuring that those competitors do not simply repeat Google's and Apple's allegedly exploitative practices. The AGL merely prohibits app stores from unduly delaying an app's registration or deleting a registered app in retaliation,<sup>69</sup> a provision that would be toothless if apps voluntarily continue to stay with Google and Apple for fear of losing customers.

In sum, the AGL provides governments looking to adopt similar legislation an object lesson in pitfalls to avoid. Most importantly, the AGL's practical consequences must be examined separately from the politics and publicity surrounding it. Although intuitively appealing laws with soundbite-worthy monikers may make for good press, they may not necessarily make for sound economic regulations.

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<sup>68</sup> See *Epic Games, Inc.*, 2021 WL 4128925, at \*104, \*106–07 (finding that “Apple does not have monopoly power in the relevant product market” under existing antitrust law and that the court cannot force Apple to permit competing app stores to operate on iOS). See generally Nikolas Guggenberger, *The Essential Facilities Doctrine in the Digital Economy: Dispelling Persistent Myths*, 23 YALE J.L. & TECH. 301 (2021) (discussing conflicting views on the application of antitrust law to Epic Games' claim against Apple).

<sup>69</sup> See Jeongitongsinsa-cobbeob [Telecommunications Business Act] art. 50 § 1(9)–(11), amended by Act. No. 18451, Sept. 14, 2021 (S. Kor.), <https://www.law.go.kr/%EB%B2%95%EB%A0%B9/%EC%A0%84%EA%B8%B0%ED%86%B5%EC%8B%A0%EC%82%AC%EC%97%85%EB%B2%95>.