THE STEERING PROBLEM: DIFFERING LEGAL APPROACHES TO ADDRESSING LARGE TECH COMPANIES' USE OF ANTISTEERING PROVISIONS BY THE UNITED STATES AND SOUTH KOREA.

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ABSTRACT

Apple and Google are cast more and more as the robber barons of the modern tech market. Whether that reputation is deserved from the perspective of the everyday consumer, for an app developer Apple and Google represent both a necessary tool for distribution and a cruel corporate master. One of the biggest concessions that both Apple and Google force on app developers who hope to draw revenue from online transactions is the contractual promise that apps will not offer a payment option aside from an app store. As the only two controllers of this market, Apple and Google can force developers to deal on their terms.

As a part of the growing concern over the market dominance of these two firms in the app space, there have been multiple proposals to create a new law to address this perceived inadequacy in antitrust law. One of the most extreme, an outright ban on antisteering provisions, was passed as a part of the "Anti-Google Law" by the South Korean Assembly and went into effect in September 2021. The law gained international attention, garnering praise from United States lawmakers and inspiring efforts to pass a similar ban in the United States.

However, such an extreme measure is not needed in the United States, as evidenced by Apple and Google's increasingly vulnerable bargaining position in the face of ongoing litigation and public pressure. Although federal antitrust claims have largely failed, Apple was temporarily bound by an injunction to offer third-party payment options, accomplishing the exact goal of the Anti-Google Law. Therefore, state law litigation targeting antisteering arguably already created a legal solution to the problem that the Anti-Google Law seeks to solve. Pending further litigation on the issue, state law can address antisteering as an interim solution.

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INTRODUCTION

There is growing concern that current federal antitrust regulation via individual litigation is not sufficient to address the growing market power wielded by large technology companies like Apple and Google in the app market space.[1] Apple and Google both face ongoing litigation, interest from lawmakers on both sides of the aisle, and a growing – though not

[1] *Antitrust Applied: Examining Competition in App Stores: Hearing Before the S. Comm. on Competition Policy, Antitrust, and Consumer Rights*, 117th Cong. 6 (2021) (statement of Dr. Mark Cooper, Director of Research of the Consumer Federation of America) ("Each and every one of these practices [by large tech companies] is an abuse that can undermine competition and should be prevented").

uncontested – academic consensus that the app market space requires a more aggressive antitrust approach.[2] Two overt exercises of market power that both Apple and Google use are "antisteering" provisions that force app developers to only use Apple and Google's proprietary payment systems and steep revenue commissions charging developers for use of these systems. Many argue that antisteering is blocking innovation in the market because small app developers are not able to innovate with efficiency due to antisteering and steep commissions.[3]

However, modern jurisprudence has significantly increased plaintiffs' burden in proving that monopolies exist and are being abused.[4] Although some challenges have prevailed on a *per se* standard, the fact remains that Apple and Google are not substantively limited in antisteering practices.[5] Opposite these developments, the Republic of Korea (South Korea) has taken a direct approach in regulating antisteering and app revenue commissions by amending the South Korean Telecommunications Act to directly bar these practices.[6] This law, enforced by the Korean Communications Commission, nakedly outlaws antisteering in developer contracts.[7]

The "Anti-Google Law" is "the first of its kind" and has been praised by several United States Senators, leading to the proposal of the Open App Markets Act in both houses of Congress.[8] The act essentially mimics the language of the South Korean law and has rare bipartisan support.[9] If passed, the act would impose a *per se* bar on conduct, a radical departure from current jurisprudence.[10] However, there is an open question as to

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[2] John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1502–03 (2019); Yunsieg P. Kim, *Does the Anti-Google Law Actually Help Google and Hurt Startups?*, 110 GEO. L.J. ONLINE, 120, 122–23 (2021).

[3] *See Antitrust Applied: Examining Competition in App Stores: Hearing Before the S. Comm. on Competition Policy, Antitrust, and Consumer Rights*, 117th Cong. 2–3, 9 (2021) (statement of Horatio Gutierrez, Head of Global Affairs & Chief Legal Officer, Spotify) ("Consumers are harmed because they are prevented from making informed choices . . . And Apple's actions reduce innovation because Apple's competitors have reduced incentives and financial ability to innovate").

[4] Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U.L. REV. 489, 494 (2021).

[5] *See generally* Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019).

[6] 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/.

[7] Telecommunications Business Act, Art. 50 §§ 1, 9–11 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=50189&lang=ENG (search required).

[8] Shaban, *supra* note 6; Kim, *supra* note 2, at 125.

[9] Open App Markets Act, S. 2710, 117th Cong. § 3(a) (2021); Press Release, Off. of Sen. Richard Blumenthal, Promoting App Store Competition: Bipartisan Support Grows for the Open App Markets Act (Nov. 11, 2021) https://www.blumenthal.senate.gov/newsroom/press/release/promoting-app-store-competition-bipartisan-support-grows-for-the-open-app-markets-act.

[10] Open App Markets Act, S. 2710, 117th Cong. § 3(a) (2021).

whether a law tailored to address antisteering is needed. Although recent federal claims against Apple have failed, there has been some success in addressing antisteering using a combination of state law and other pressures.[11]

Although the South Korean law provides one option to address antisteering, an anti-Google law is unnecessary in the United States because state law already prohibits such behavior. This note argues that the California Unfair Competition Law is a realistic interim solution by analyzing and comparing the United States' approach in addressing abusive app-store practices with the new South Korean law and its enforcement. First, this note addresses Apple and Google's presence in the app market and the background of the United States' and South Korea's antitrust laws. Second, this note analyzes the ongoing limitations of the United States' approach by tracing both the United States' and South Korea's jurisprudence and laws. Third, this note analyzes the proposed Open App Markets Act, the Anti-Google Law, and compares the current state of United States' antitrust law to the South Korean model.

I. BACKGROUND: THE CURRENT STATE OF ANTITRUST IN ADDRESSING APP MARKET DOMINATION IN UNITED STATES MARKETS.

A. Apple's App Store Practices

Apple's App Store contains more than two million applications ("apps") and 20 million registered developers.[12] Apple holds 71% of the United States' domestic app market by revenue and only faces limited competition from Google via its Android platform and app sales.[13] Despite Google's relative dominance abroad, Apple retains uncontested control in domestic app markets.[14] Over recent years, Apple was able to raise iPhone prices by 33% without losing sales.[15] Since 2008, the company has allowed third-party developers like Epic Games to develop and distribute apps on the App Store.[16] In order to distribute apps and sell goods on apps, developers must agree to Apple's contract for developers before Apple

[11] *See* Hannah Albarazi, *Apple Must End App Store Anti-Steering Rules by Dec. 9,* LAW360 (Nov. 9, 2021, 10:31 PM), https://www.law360.com/articles/1439385.
[12] Bapu Kotapati, et. al, *The Antitrust Case Against Apple* 2 (Yale Univ. Thurman Arnold Project, Digit. Platform Theories of Harm Paper Series, Paper No. 2, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id =3606073.
[13] *Id.* at 2–3.
[14] *See* Simon O'Dea, *Manufacturers' Market Share of Smartphone Sales in the United States from 1st Quarter 2016 to 2nd Quarter 2021*, STATISTA (Nov. 22, 2021), https://www.statista.com/statistics/620805/smartphone-sales-market-share-in-the-us-by-vendor/ (Apple has never held less than a 29% share of smartphone sales between 2016 and 2021 and held a maximum of 65% of the sales market as of the fourth quarter of 2021).
[15] Katapati, *supra* note 12, at 2.
[16] Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 942 (N.D. Cal. 2021).

reviews the app and the developers distribute the app to testers and publish it on the App Store.[17] Google follows a similar process.[18]

Apple's developer agreement imposes a 30% commission on app sales and revenue from in-app purchases.[19] However, Apple recently lowered the 30% commission to 15% for certain Amazon digital products and qualified developers under Apple's "App Store Small Business Program."[20] The App Store Small Business Program is part of a settlement to class action litigation by a group of developers alleging that they have suffered due to Apple's market control.[21]

An antisteering provision is a contractual term that requires a contracting merchant not to imply preference or persuade a consumer to use a payment option other than that provided by the payment system provider.[22] Apple utilizes an antisteering provision which effectively forces app developers to only use the app-store system for any end-user purchases.[23] Apple's developer contract states, "[i]f you want to unlock features or functionality within your app . . . you must use in-app purchase."[24] Applied to apps, this means that app developers cannot undertake measures to steer consumers away from third-party payment

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[17] *See Epic v. Apple*, 559 F. Supp. 3d at 942–43 (N.D. Cal. 2021); APPLE – DEVELOPER, *Apple Developer Program License Agreement*, https://developer.apple.com/support/terms/ (last visited Nov. 3, 2022).

[18] PLAY CONSOLE HELP – GOOGLE, *Policy Center, Monetization and Ads, Payments*, Item 1, https://support.google.com/googleplay/android-developer/answer/9858738?hl=en (last visited Nov. 22, 2022).

[19] APPLE – LEGAL, *Apple Developer Program License Agreement Schedule 2*, https://developer.apple.com/support/downloads/terms/schedules/Schedule-2-and-3-20220225-English.pdf (last updated Feb. 25, 2022) ("[f]or sales of Licensed Applications to End-Users, Apple shall be entitled to a commission equal to thirty percent (30%) of all prices payable by each End-User").

[20] APPLE – LEGAL, *supra* note 19 ("For Developers who have qualified and been approved by Apple for the App Store Small Business Program, Apple shall be entitled to a reduced commission of 15% of all prices payable by each End-User for sales of Licensed Applications."); Kim Lyons, *Documents Show Apple Gave Amazon Special Treatment to Get Prime Video Into the App Store*, THE VERGE (July 30, 2020, 12:44 PM) https://www.theverge.com/2020/7/30/21348108/apple-amazon-prime-video-app-store-special-treatment-fee-subscriptions.

[21] Complaint at 1, Cameron v. Apple, Inc., 2019 WL 8334787 (N.D. Cal. 2021) (No. 19-cv-03074-YGR (TSH)); Rachel Lerman, Cat Zakrzewski & Heather Kelly, *Apple Loosens Rules for Developers in Major Concession Amid Antitrust Pressure*, WASH. POST (Aug. 26, 2021) https://www.washingtonpost.com/technology/2021/08/26/apple-app-store-payment-settlement/.

[22] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283 (2018) ("Antisteering provisions prohibit merchants from implying a preference for non-Amex cards; dissuading customers from using Amex cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, or fees on Amex cards; or promoting other cards more than Amex").

[23] Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 923 (N.D. Cal. 2021).

[24] APPLE – DEVELOPER, *App Store Review Guidelines*, § 3.1.1, https://developer.apple.com/app-store/review/guidelines/#business (last updated Oct. 22, 2021).

options to avoid the 30% revenue fee.[25] Apple has suggested that the antisteering provision is an important part of Apple's overall goal to ensure that app purchases are secure from malware and to protect the privacy of consumers.[26]

B. Google's app store practices

Google came later to the app market than Apple, but now has over 2 million registered apps as of December 2021.[27] As Apple's only serious competitor in the app market, Google instituted similar measures to boost revenue and maintain control over its own app store, called Google Play.[28] This strategy garnered commercial success for Google, as its share of the worldwide market for smartphone operating systems has consistently exceeded 60% since 2015.[29]

Google's developer terms stipulate an antisteering provision that developers charging for app downloads from Google Play must use Google Play's billing system.[30] Further, apps on Google Play that accept payment for access to in-app features or services must use Google Play's billing system for those transactions.[31] Google charges a "service fee" commission from app revenue, stating in guidance that "apps and in-app products sold through Google Play's billing system are subject to a 15% service fee up to one million U.S. Dollars each year, then 30% for earnings over one million U.S. Dollars."[32] Google's definition of app services that require Google Play billing includes digital items, subscription services, app functionality, and cloud services.[33]

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[25] *Id.*
[26] *Epic v. Apple,* 559 F. Supp. 3d at 1003.
[27] Laura Ceci, *Number of Available Applications in the Google Play Store from December 2009 to September 2021*, STATISTA (Jan. 6, 2022), https://www.statista.com/statistics/266210/number-of-available-applications-in-the-google-play-store/.
[28] Complaint at 24, United States v. Google LLC. No.1:20-cv-03010-APM (D.D.C. 2022).
[29] Federica Laricchia, *Market Share of Mobile Operating Systems Worldwide 2012–2022*, STATISTA (Aug. 30, 2022), https://www.statista.com/statistics/272698/global-market-share-held-by-mobile-operating-systems-since-2009/.
[30] PLAY CONSOLE HELP - GOOGLE, *Policy Center, Monetization and Ads, Payments*, Item 1, https://support.google.com/googleplay/android-developer/answer/9858738?hl=en (last visited Nov. 22, 2022) ("developers charging for app downloads from Google Play must use Google Play's billing system as the method of payment for those transactions").
[31] *Id.* at item 2 ("[Google] Play-distributed apps requiring or accepting payment for access to in-app features or services, including any app functionality, digital content or goods . . . must use Google Play's billing system for those transactions").
[32] PLAY CONSOLE HELP - GOOGLE, *Policy Center, Service Fees*, https://support.google.com/googleplay/android-developer/answer/112622?hl=en (last visited Nov. 22, 2022).
[33] PLAY CONSOLE HELP - GOOGLE, *Policy Center, Monetization and Ads, Payments*, Item 2, https://support.google.com/googleplay/android-developer/answer/9858738?hl=en (last visited Nov. 22, 2022) Google, *supra* note 30, at item 2 (Google defines items as "virtual currencies, extra lives, additional playtime, add-on items, characters and avatars", subscriptions as "fitness, game, dating, education, music, video, service upgrades and other

Apple and Google's app store practices are essentially equal in effect. Both use a broad prohibition against developers directing customers to an alternative payment option to force transactions on their proprietary systems.[34] Both leverage this "walled-garden" approach to impose a 30% revenue fee.[35] Thus, this note treats the two companies equally, despite the difference between their relative market dominance.

C. The United States' Antitrust Law Background

Federal agencies and private claims enforce antitrust law in the United States.[36] Throughout the 1970s and 1980s, many economists were critical of an interventionist approach by regulators and the courts using *per se* rules at the cost of decreased innovation and low prices for consumers.[37] This consumer welfare-based approach led to a decline in both regulatory aggressiveness towards firms undertaking anticompetitive practices and tightening of criteria for private litigants to prevail.[38]

Current federal law requires the plaintiff to establish that a defendant "(1) has monopoly power in the relevant market, and (2) engage[s] in exclusionary conduct."[39] Section 1 of the Sherman Act bans any restraint on trade that is "effected by a contract, combination, or conspiracy."[40] Sherman Act claims alleging a restraint is unreasonable are governed by a *per se,* rule-of-reason analysis, and the closely linked but largely unutilized "quick-look" analysis.[41] The rule of reason analysis involves balancing "whether its anticompetitive effects outweigh its procompetitive effects," whereas *per se* violations are found where restraints "have…predictable

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content subscription services", app functionality as "an ad-free version of an app or new features not available in the free version" and cloud software as "data storage services, business productivity software, and financial management software.").

[34] *Compare*, APPLE, *supra* note 24, at item 3.1.1 *with* GOOGLE, *supra* note 30, at items 1–2.

[35] *Compare* APPLE, *supra* note 19, at item 3.4(a), *with* GOOGLE, *supra* note 32.

[36] *See* CONG. RSCH. SERV., IF11234, ANTITRUST LAW: AN INTRODUCTION 2 (2019).

[37] *See* Samuel Cote, *Combatting Monopolies in the Digital Age: Translating the Sherman Act from the Industrial Revolution to the Tech Boom*, 54 SUFFOLK UNIV. L. REV. 493, 503 (2021); Edward D. Kavanaugh, *Whatever Happened to Quick Look?*, 26 U. MIAMI BUS. L. REV. 39, 49 (2017).

[38] *See generally* DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 81–86, 163 (2011) (Chapter tracking trend of decline in antitrust cases filed by the Department of Justice) (Chapter arguing that absent reform, the limitations of private enforcement actions make the effect of private actions inadequate to achieve the goals of federal antitrust laws).

[39] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001); CONG. RSCH. SERV., R46875, THE BIG TECH ANTITRUST BILLS 4 (2021).

[40] Sherman Antitrust Act of 1890 § 1, 15 U.S.C. § 1; United States v. Apple, Inc., 791 F.3d 290, 314 (2d Cir. 2015) (*quoting* Bell v. Twombly, 550 U.S. 544, 533 (2007)).

[41] *See* United States v. Apple, Inc., 791 F.3d 290, 320–21 (2d Cir. 2015); Kavanaugh, *supra* note 39, at 56 ("Not once has the [Supreme] Court invoked quick look post *Cal-Dental*. In [Texaco v. Dagher, 547 U.S. 1, 7, n.3 (2010)], the Court rejected quick look out of hand").

and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*."[42]

Monopoly power violating Section 2 of the Sherman Act is defined as the ability to control prices and exclude competition in a given market, marked by the ability to profitably raise prices without causing competing firms to expand output and drive down prices.[43] The Clayton Act addresses some of the perceived shortcomings in the Sherman Act and proscribes certain conduct as anticompetitive practices.[44] The major substantive sections of the Clayton Act prohibit price discrimination, exclusive dealing, and mergers that establish a monopoly.[45]

Courts rely on a firm's relative market share within a group of similar products or services to measure market power indirectly.[46] Antitrust statutes can be enforced via litigation by private parties, the government, or states.[47] Further, antitrust action by the government has a "dual federal" model.[48] The Federal Trade Commission ("FTC") is charged with regulation under the Federal Trade Commission Act, while the Department of Justice's Antitrust Division focuses on civil enforcement of the Sherman Act and Clayton Act and criminal enforcement of the Sherman Act.[49]

D. California's Unfair Competition Law

In *Epic v. Apple*, Epic challenged Apple's conduct under California's Unfair Competition Law ("UCL") in addition to federal claims.[50] The UCL contains broad language prohibiting "unfair", "unlawful", and "fraudulent" business practices and does not proscribe specific conduct.[51] California courts have established three tests to interpret the broad language of "unfair business practices": (1) balancing, (2) tethering to policy based on impact to competition, and (3) fairness as defined by section 5 of the Federal Trade Commission Act.[52] The most relevant test in the context of antisteering is

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[42] *United States v. Apple*, 791 F.3d at 320–21 (*quoting* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)).
[43] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 306–07 (3d. Cir. 2007).
[44] MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER: A GUIDE TO THE OPERATION OF UNITED STATES, EUROPEAN UNION AND OTHER KEY COMPETITION LAWS IN THE GLOBAL ECONOMY 24 (4th. ed. 2017).
[45] JOELSON, *supra* note 44, at 25; FED. TRADE COMM'N, THE ANTITRUST LAWS, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws.
[46] Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1958 (2021).
[47] 15 U.S.C. §§ 15(a), 15(c).
[48] CRANE, *supra* note 38, at 27; FED. TRADE COMM'N., *supra* note 45.
[49] *Id*.
[50] Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 921 (N.D. Cal. 2021).
[51] CAL. BUS. & PROF. CODE § 17200 (2021) ("unfair competition shall mean and include any unlawful, unfair or fraudulent business act practice and unfair, deceptive, untrue or misleading advertising").
[52] Brief of the State of California as Amicus Curiae in Support of Neither Party at 3, Epic Games, Inc. v. Apple Inc., 2021 WL 6755197 (No. 21-1605) (9th Cir. Mar. 31, 2022).

the "tethering" test.[53] The tethering test requires the court to ascertain whether the alleged conduct violates antitrust laws, violates the "policy or spirit" of antitrust laws, or otherwise threatens or harms competition.[54] Thus, the UCL applies a flexible standard for a plaintiff to allege anticompetitive practices, meaning that there are cases where conduct that is not a violation of federal laws may be enjoined under the UCL.[55]

Federal competition law derived from the Sherman Act and Clayton Act does not preempt state competition laws if the state law meets the two part test set forth in *California Retail Liquor Dealer's Association v. Midcal Aluminum.*[56] In *Midcal*, the Supreme Court ruled that a state regulation is immune to challenge as a violation of federal antitrust law if the policy is clearly articulated and actively supervised by state officials.[57] This presumption against preemption extends to state enforcement of state antitrust regulations as well.[58] Therefore, in cases like *Epic v. Apple* it is permissible for a federal judge to rule on both federal and state antitrust claims.[59]

E. The South Korea's Antitrust Law Background

South Korea has taken a similar approach to the United States in regulating monopolies, albeit using a slightly different administrative structure. The South Korean administrative and judicial systems share an inherited American model as a result of the United States' influence after the Korean War.[60] South Korea has an independent judiciary like the United States, although the establishment of a separate Constitutional Court in 1987 means the appellate structure and jurisdiction of South Korean courts differ from their American counterparts.[61] The crucial difference between South Korean and United States jurisprudence is that South Korea

[53] *Id.* at 9–10. (citing Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 539–40 (Cal. 1999)).
[54] Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 544 (Cal. 1999) ("[T]he word 'unfair' in [] section [17200] means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.").
[55] Brief of the State of California as Amicus Curiae at 13, *Epic v. Apple*, 2021 WL 6755197 ("A focus of the UCL is fair competition . . . the statute is expressly intended to be broader and more flexible than antitrust statutes.").
[56] CRANE, *supra* note 38, at 146.
[57] California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc., 447 U.S. 97, 105 (1980); CRANE, *supra* note 44, at 146.
[58] *See* CRANE, *supra* note 38, at 159–60.
[59] Injunctive Order, Epic Games, Inc. v. Apple Inc., 2021 WL 4128925 (N.D. Cal. 2021) (No. 4:20-cv-05640-YGR).
[60] *See* Doori Song, *Judicial Approaches to Political Questions: A Comparative Study of the United States and South Korea*, 19 INT'L. & COMPAR. L. REV. 234, 234–35 (2019).
[61] *See id.* at 240.

uses a civil law system.[62] In practice, the South Korean judiciary has an independent power of review to decide cases which enables the Supreme court to have appellate review of some executive decisions.[63]

The South Korean approach to antitrust is more of an exercise in administrative action rather than case by case litigation.[64] Korean antitrust statutes are more recent than the Sherman Act and Clayton Act and were passed in response to the sweeping and sudden market control of dominant firms in the 1970s.[65] The Market Regulation and Fair Trade Act ("Fair Trade Act") is the primary statutory vehicle by which South Korea regulates anticompetitive conduct.[66] The Korean Fair Trade Commission handles investigation and adjudication of antitrust claims.[67]

II. ANALYSIS: JUDICIAL DISCRETION LED TO SIMILAR PROPOSALS TO DEAL WITH ANTISTEERING, BUT EPIC'S SUCCESS UNDER STATE LAW VITIATES THE NEED FOR A PER SE STANDARD.

The issue with antisteering is that it upholds a "walled garden" model in app markets – meaning that neither developers nor consumers can turn to another platform if they find the terms within that garden too onerous.[68] Comparison of South Korea's and the United States' approach to antisteering demonstrates similarities that ultimately elicited similar responses. However, there is an open question as to whether a per se bar is needed since California's Unfair Competition Law provides a solution in the interim.

A. The flawed application of traditional antitrust doctrines to large tech firms in the United States.

Federal decisions hamper the application of antitrust law to tech markets because litigants and courts fail to define tech markets accurately and courts define anticompetitive intent too narrowly. At issue here is the mismatched application of United States antitrust law to a target it is ill

[62] Joetak Lee, *South Korea – Legal System*, BRILL FOREIGN L. GUIDE (June 6, 2019) https://referenceworks.brillonline.com/entries/foreign-law-guide/south-korea-c1000045659.
[63] Lee, *supra* note 62; CRANE, *supra* note 38, at 222.
[64] *See* CRANE, *supra* note 38, at 217–18 ("South Korea and Japan . . . [rely] on a single agency, the Fair Trade Commission, to investigate and adjudicate complaints of anticompetitive conduct. Decisions by the Fair Trade Commissions are only appealable to the country's . . . Supreme Court.").
[65] Danny Abir. *Monopoly and Merger Regulation in South Korea and Japan: A Comparative Analysis*, 13 INT'L TAX & BUS. L. 143, 153 (1996) (citation omitted).
[66] JOELSON, *supra* note 44, at 441.
[67] CRANE, *supra* note 38, at 217–18.
[68] Marshall Steinbaum, *Establishing Market and Monopoly Power in Tech Platform Antitrust Cases*, 67 THE ANTITRUST BULL. 8* (2022).

equipped to attack: the dominance of Apple and Google.[69] Both regulators and private litigants have attempted to use claims under the Sherman Act and Clayton Act to challenge anticompetitive tech practices.[70] Recent litigation against Apple's 30% commission and antisteering provision culminated in *Epic v. Apple* with Epic Games, a large video game company, challenging both these practices under multiple theories of liability.[71] Although Epic's claims ultimately failed under federal law, the District Court held that Apple violated the California Fair Competition Act via the anticompetitive practice of antisteering.[72] District Court Judge Yvonne Rogers ordered a permanent injunction barring Apple from forcing developers to use the app-store for all purchases.[73]

Epic v. Apple, currently on appeal to the Ninth Circuit, indicates the limitations to approaching the issues posed by digital market control that loom as a barrier for private litigants and regulators under federal antitrust law.[74] Judge Posner's admonition from 2001 still rings true: "the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly."[75]

1. The Federal Judiciary struggles to define markets and defines anticompetitive intent narrowly.

The Federal Judiciary's view of relevant markets and the definition of anticompetitive conduct is difficult to apply to large tech companies like Apple and Google where developers cannot escape to any platform aside from Apple and Google. In cases like *Bell v. Twombly*, *Broadcom v. Qualcomm,* and *Apple v. Psystar*, the courts struggled not only in defining the relevant markets controlled by large tech companies, but also in differentiating between market forces and actual exclusionary conduct.[76]

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[69] STAFF OF H. SUB. COMM. ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, at 11.
[70] *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019) (private litigants challenging App Store practices under section 4 of the Clayton Act); United States v. Apple Inc., 791 F.3d 290, 311 (2d. Cir. 2015) (Department of Justice and States challenging book price setting practices under section 1 of the Sherman Act).
[71] Epic Games, Inc. v. Apple Inc., 559 F.Supp.3d 898, 922 (N.D. Cal. 2021).
[72] *Id.,* at 1055–56.
[73] *Id.* at 1068–69.
[74] *Epic v. Apple*, 559 F.Supp.3d at 1068 (Epic failing to demonstrate Apple market dominance in app based online video games); Newman, *supra* note 2, at 1502 ("Digital defendants have received, and continue to receive, a free pass in the form of de jure and de facto immunity and leniency").
[75] Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001).
[76] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 548–49 (2007) (holding class action failed to state a claim upon which relief could be granted under the Sherman Act by failing to demonstrate intent by the defendants to participate in exclusionary conduct); Broadcom

The Department of Justice prevailed on a Sherman claim in *United States v. Apple Inc.* because the conduct at issue there, vertical price controls over eBooks, is traditionally a *per se* violation.[77]

Further, the Supreme Court held in *Apple Inc. v. Pepper*, that under *Illinois Brick Co. v. Illinois*, iPhone users were direct consumers who have standing to bring antitrust claims under the Clayton Act because "Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone owners to pay Apple higher-than-competitive prices for apps."[78] But, recent cases like *Ohio v. American Express Co.* demonstrate the difficulty of imposing traditional definitions of market and anticompetitive intent to antisteering in a tech market with no escape options.

Before *Epic v. Apple*, the most recent case addressing antisteering came from the credit card market.[79] In *Ohio v. American Express,* the state of Ohio and other parties challenged American Express' ("Amex") contractual terms with merchants that bar encouraging the use of other payment options to avoid Amex's high exchange commissions.[80] The court ruled that the relevant market included credit card companies, merchants, and consumers – not just card companies and merchants as the plaintiffs argued.[81] The court further held that the plaintiffs failed to carry their burden of proof of anticompetitive effects in the market because Amex's model spurred competition rather than restricting it.[82]

The Supreme Court's decision in *Ohio v. American Express* indicates the difficulty of defining markets in digital economies. Defining a two-sided market by its whole undercuts the effects of anticompetitive conduct

Corp. v. Qualcomm Inc., 501 F.3d. 297, 319–20 (3d. Cir. 2007) (holding in action between two participants in cellular telephone market that plaintiff lacked standing because there was no evidence defendant intended to cause harm to plaintiff and no causal connection between the practice and harm suffered by plaintiff); Apple, Inc. v. Psystar Corp., 586 F. Supp. 1190, 1197–99 (N.D. Cal. 2008) (holding plaintiff corporation failed on its Sherman sections 1 and 2 and Clayton section 4 claims because the court did not accept its argument that like *Eastman Kodak,* Apple's MacOS represented an identifiable market wholly dependent on a single company's product) (citation omitted).

[77] United States v. Apple, Inc., 791 F.3d 311, 314 (2d. Cir. 2015) (affirming the Southern District of New York in a permanent injunction that Apple's agreement with publishers to raise ebook prices was unlawful because it represented a horizontal price control).

[78] Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019); Illinois Brick Co. v. Illinois, 431 U.S. 720, 742–46 (1977) (court holding that private litigants only have standing under the Clayton Act when such litigants are directly harmed by anticompetitive conduct rather than indirectly affected by passed on costs); Konstantin G. Vertsman, *The Direct Purchaser Requirement in Clayton Act Private Litigation: The Case of* Apple Inc. v. Pepper, 28 CATH. U.J. OF L. & TECH. 1, 16 (2021).

[79] *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2287 (2018); Hovenkamp, *supra* note 4, at 537.

[80] *Ohio v. Am. Express*, 138 S. Ct. at 2283 (2018).

[81] *Id.* at 2285, 2287.

[82] *Id.* at 2290.

where two companies control one side of that market via their platforms.[83] The court defined the relevant market broadly, contrary to other areas where conduct is defined narrowly.[84] Although there are convincing policy reasons for not distinguishing the transactions between merchants and Amex as a single market, by doing so the court allows coercive conduct to stand. This application is more dangerous when applied to Apple and Google because, unlike the merchants in *Ohio v. American Express*, app developers cannot "vote with their feet" by using a different purveyor. Instead, to reach any substantial audience an app developer is essentially tied to dealing with either Apple or Google.[85]

2. *Epic v. Apple* cements the futility of challenging antisteering using federal law but offers a solution via state law.

Epic v. Apple indicates the barriers to meaningfully challenging anticompetitive conduct by large tech companies because the court found no violation despite noted anticompetitive conduct. Epic mounted an intentional attack on Apple's steering provisions after it attempted to negate the 30% commission by flouting the provision and was summarily ejected from the App Store.[86] Similar to *Ohio v. American Express,* Epic focused its claims on Apple's control over the App Store as a monopolist and the antisteering provision, specifically challenging it as unlawful restraint on trade.[87]

In her opinion, District Court Judge Yvonne Rogers narrowly defined the relative market of Apple operating system-based gaming transactions rather than the wider market of app-based transactions in general.[88] Epic's relevant claims under Sherman section 2 failed for two reasons: "(1) Epic Games fail[ed] to prove the first element, that Apple has monopoly power in the relevant product and geographic market; and (2) Epic Games alternatively fail[ed] to satisfy the rule of reason analysis."[89] For similar reasons, the court rejected Epic's claims that the antisteering provision constituted an attempt at tying or an unreasonable restraint on trade under the Sherman Act.[90] Although Epic demonstrated some anticompetitive

[83] *See* Elettra Bietti, *Self-Regulating Platforms and Antitrust Justice*, 101 TEX. L. REV. (forthcoming 2022) (manuscript at 5–6) (available at SSRN: http://dx.doi.org/10.2139/ssrn.4072084).
[84] *See* Ohio v. Am. Express, 138 S. Ct. at 2287.
[85] *Cf.* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1056 (N.D. Cal 2021) ("Apple created a new and innovative platform which was also a black box. It enforced silence to control information and actively impede users from obtaining the knowledge to obtain digital goods on other platforms. Thus, the closer analogy is not American Express' prohibiting steering towards Visa or Mastercard but a prohibition on letting users know that these options exist in the first place").
[86] *See generally id*. at 935–41.
[87] *Id.* at 923, 1033.
[88] *Id.* at 1025–26.
[89] *Id.* at 1043.
[90] *Id.* at 1046.

effects of antisteering, under a rule of reason analysis Apple successfully countered with evidence of procompetitive effects and Epic did not plead a less restrictive alternative.[91]

Epic failed to prevail on all federal claims. The court was limited by doctrinal considerations so that despite the control found in the tailored market defined by the court, that control was insufficient to show antitrust conduct without further evidence of intent.[92] Thus, *Epic v. Apple* represents the lack of sufficient avenues under federal law to hold Apple or Google liable for abusive practices absent either new legislation or a new doctrinal approach. Even though Apple is using the App Store as a monopolist, given the lack of other practicable options for Epic to sell its content on, Epic could not prove under the rule of reason that those practices were an unreasonable restraint.[93]

However, Epic did succeed in reaching its desired remedy via state law. Epic attached a claim under California's Unfair Competition Law ("UCL") in addition to its federal claim.[94] Judge Rogers found that Apple's antisteering provision violated the UCL because the antisteering provision was unfair under the tethering test.[95] The public policy tethered to this violation was lack of substitution and a limit on the free flow of information to the consumer.[96] Additionally, the court ruled that the 30% commission represents harm to the consumer that outweighs its benefit – especially because Apple failed to plead any purpose for the 30% commission aside from revenue.[97] As a remedy for Epic's injuries under the UCL, Judge Rogers issued a national injunction against continuation of the antisteering provision, though elements of the injunction have been stayed by the Ninth Circuit pending appeal.[98]

3. The Open App Markets Act as a legislative solution to antisteering.

While United States courts appear unable to address the antisteering problem under existing federal law, policymakers have looked abroad for possible templates to curb Apple and Google's leverage of market power.[99] The current domestic proposal that most directly mirrors the South Korean

[91] *See id.* at 1039–40.
[92] *See id.* at 1043–44.
[93] *See Id.*; Bietti, *supra* note 83, at 7–8.
[94] *Epic v.v. Apple*, 559 F. Supp. 3d at 1051.
[95] *Id.* at 1055.
[96] *Id.* at 1055–56.
[97] *Id.*
[98] *Id.* at 1058 ("Accordingly, a nationwide injunction shall issue enjoining Apple from prohibiting developers to include in their: Apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to IAP"); Epic Games, Inc. v. Apple, Inc. 2021 WL 6755197, 1* (9th Cir. 2021).
[99] 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/.

Anti-Google Law is the Open App Markets Act. The proposed Act, S.2710, would work as a per se bar on antisteering, making it unlawful to,

> (1) require developers to use an In-App Payment System owned or controlled by the Covered Company or any of its business partners as a condition of being distributed on an App Store or accessible on an operating system;
>
> (2) require as a term of distribution on an App Store that pricing terms or conditions of sale be equal to or more favorable on its App Store than the terms or conditions under another App Store; or
>
> (3) take punitive action or otherwise impose less favorable terms and conditions against a developer for using or offering different pricing terms or conditions of sale through another In-App Payment System or on another App Store.[100]

The Act would be enforced by the FTC with its delegated power under the Fair Trade Commission Act and the Clayton Act.[101] The Open Apps Market Act grants independent litigation authority to states and the FTC to commence civil actions and grants standing to injured private parties to pursue damages or injunctive relief.[102]

If passed, the Act would constitute a revolutionary change in antitrust jurisprudence: where the current regime allows the court to set doctrinal standards on unlawful conduct, the Open App Markets Act would substitute a per se standard of violation for covered entities.[103] However, the Open App Markets Act has generated little attention and is overshadowed by more generalized approaches to tech antitrust policy.[104] The amount of proposed legislation in the last year demonstrates concern over the jurisprudential limits on antitrust law and Congress' openness to new legal solutions similar to South Korea's Anti-Google Law.[105]

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[100] Open App Markets Act, S.2710, 117th Cong. § 3(a) (2021).
[101] S.2710 § 5(a)(1).
[102] S.2710, § 5(a)(2), (b)(1).
[103] S.2710, § 3(a).
[104] CONG. RSCH. SERV., *supra* note 39, at 2, 8, 11, 14 (detailing four legislative proposals generated in a report by the House Subcommittee on Antitrust, Commercial, and Administrative Law excluding the Open App Markets Act).
[105] *See* Cecilia Kang, *Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust*, N.Y. TIMES (June 11, 2021), https://www.nytimes.com/2021/06/11/technology/big-tech-antitrust-bills.html; Cristiano Lima, *The Biggest Threat to Lawmakers' Big Tech Antitrust Agenda: Time*, WASH. POST (Nov. 19, 2021), https://www.washingtonpost.com/politics/2021/11/19/biggest-threat-lawmakers-big-tech-antitrust-agenda-time/.

B. South Korean antitrust law mirrored United States law until the passage of the Anti-Google Law.

South Korean antitrust law in application paralleled United States' antitrust law until the passage of the Anti-Google Law. This is because South Korean courts previously held that antitrust enforcement require proof of market and anticompetitive intent but have since replaced that standard with a per se bar applied to antisteering via the Anti-Google Law.[106] Therefore, the passage of the Anti-Google law signals a dramatic shift in approach by the South Korean Assembly to Apple and Google's market power regarding antisteering.

1. South Korea's Antitrust statute before the Anti-Google Law.

Before the passage of the Anti-Google Law, South Korea's antitrust law relied on the Monopoly Regulation and Fair Trade Act ("Fair Trade Act") as the primary tool for the Korean Fair Trade Commission ("KFTC") to pursue antitrust enforcement. The Fair Trade Act is a comprehensive statute that makes it unlawful to abuse a dominant market position in horizontal form by joining in a cartel or rigging bids.[107] Further, the statute outlaws "unfair" trade practices, such as:

> (1) unfairly refusing to any transaction; (2) unfairly excluding competitors; (3) unfairly coercing or inducing customers of competitors to deal with oneself; (4) trading with a certain transaction partner by unfairly taking advantage of her trading position; (5) trading under terms and conditions which unfairly restrict business activities of a counterpart or obstructing business activities of other enterprises, and; (6) unjustly assisting persons who have special interests.[108]

Article 56 of the Fair Trade Act authorizes private claims to recover damages but not injunctive relief.[109] The KFTC is empowered to investigate and adjudicate violations of the Fair Trade Act and has an internal administrative structure to adjudicate cases.[110] The Seoul High Court has a right to review KFTC Fair Trade Act decisions.[111] The South

[106] *See* Daebeobwon [S. Ct.], Nov. 22, 2007, 2002Du8626 (S. Kor.) (en banc); Yunsieg, *supra* note 2, at 121.
[107] JOELSON, *supra* note 44, at 443.
[108] Korea Ministry of Government Legislation, Monopoly Regulation and Fair Trade Act, art. 23 (*translated in* JOELSON, *supra* note 44, at 445).
[109] Korea Ministry of Government Legislation, Monopoly Regulation and Fair Trade Act, art. 56.
[110] *See* JOELSON, *supra* note 44, at 442–43.
[111] *Id.* at 43.

Korean Supreme Court has appellate jurisdiction over the Seoul High Court.[112]

2. The South Korean Judiciary's limits on the reach of the Monopoly Regulation Fair Trade Act.

The South Korean Judiciary enforces limits on the reach of the Fair Trade Act, like limits in United States jurisprudence, because the South Korean Supreme Court's decision in *Posco* requires proof of the relevant market share and intent of anticompetitive conduct.[113] South Korean high courts have less doctrinal influence because they are more deferential to administrative adjudications than domestic courts interpreting antitrust statutes.[114] However, like United States courts interpreting the Sherman Act and Clayton Act, South Korean courts have exercised their powers of judicial review to strike down KFTC enforcement decrees.

The most influential case regarding the Fair Trade Act came in 2008 as a result of the KFTC attempting to enforce abuse of dominance provisions against Posco, a multinational steel corporation that refused to sell steel coils to Hyundai Hysco.[115] The Korean Supreme Court, in interpreting article 3-2(1) or the Fair Trade Act, held similarly to United States courts that a relative market must be accurately tailored for the KFTC to prevail in its claim.[116] Here, the court defined the relevant market for Posco's product as trade in steel parts rather than specific steel coils as urged by the KFTC.[117]

In order for the KFTC to prevail on appeal under article 23 of the Fair Trade Act, the agency needed to prove that Posco's actions were not simply the normal course of business. The court reasoned that:

> Under Article 2 (7) and (8) of the Fair Trade Act, a market dominating enterprise means one . . . with the ability to solely or collectively determine, maintain or alter price, quantity, quality or other transaction conditions of the commodities or services as a supplier or demander in the

[112] *Id*.
[113] *See generally* Daebeobwon [S. Ct.], Nov. 22, 2007, 2002Du8626 (S. Kor.) (en banc).
[114] CRANE, *supra* note 38, at 223.
[115] JOELSON, *supra* note 44, at 449.
[116] Daebeobwon [S. Ct.], Nov. 22, 2007, 2002Du8626 (S. Kor.) (en banc) (case concerning POSCO's Refusal to Supply Hot Rolled Steel Coils) ("For the determination of market dominant status, the market for a related commodity as the object of transaction in a specific *category* of transactions associated with the competition issue and the market of the related transactional and geographical scope should be delineated, and the potential for market dominance in that particular market should be determined.") (emphasis added).
[117] *Id.*

> areas subject to competitive relations as to items, phases, or locations.[118]

The court further reasoned that Posco's refusal to sell to Hyasco was a strategic business decision, not an unfair trade practice as defined under the Fair Trade Act.[119] Rendering such a decision unlawful would be against the intent of the Fair Trade Act, which is to protect competition and not individual competitors.[120] *Posco*, by demonstrating the Korean Supreme Court's willingness to question the judgement of the KFTC, reaffirmed a high burden of proof similar to the United States' standard requiring both anticompetitive effect and intent.[121] *Posco* had immediate effects, namely chilling the KFTC's enforcement of abuse of dominance provisions of the Fair Trade Act.[122] Additionally, in two cases in 2011, the Korean Supreme Court applied the same reasoning as *Posco* to strike down KFTC actions under the Fair Trade Act. In *Gmarket* and *Melon,* the Court struck down actions on the grounds that the KFTC offered no affirmative proof of intent, although the companies were abusing market dominance.[123]

Despite *Posco*'s effect in cementing a high burden of proof, the KFTC has continued to exercise its enforcement powers.[124] In an administrative action against Qualcomm, the KFTC responded to the same practices at issue in *Broadcom v. Qualcomm* by issuing a 273 billion won fine under the Fair Trade Act.[125] The KFTC reasoned that Qualcomm's chip preferencing practices constituted an abuse of market dominant position.[126] The KFTC recently issued a 229.4 billion won fine against Google for barring software developers from using operating systems other than Android.[127] Google is challenging the KFTC's fine and the case is still pending at the time of writing.[128] Therefore, although *Posco* made pleading more difficult for the KFTC, it has seen some success in enforcing the Fair

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[118] *Id.*
[119] *Id.*
[120] *Id*.
[121] John H. Choi and Jooyoung Park, *Korea: Abuse of Dominance*, GLOBAL COMP. REV. (Mar. 1, 2021) https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/the-asia-pacific-antitrust-review-2012/article/korea-abuse-of-dominance. *Compare* Daebeobwon [S. Ct.], 2002Du8626 (holding that government failed to prove anticompetitive intent), *with* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007) (holding that class action failed at pleading stage to prove defendant's anticompetitive intent).
[122] *Cf.* JOELSON, *supra* note 44, at 450.
[123] Daebeobwon [S. Ct.], June 10, 2011, 2008Du16322 (S. Kor.); Daebeobwon [S. Ct.], Oct. 13, 2011, 2008Du18322 (S. Kor.).
[124] *See* JOELSON, *supra* note 44, at 450.
[125] Broadcom Corp. v. Qualcomm Inc., 501 F.3d. 297, 304 (3d Cir. 2007). *See* JOELSON, *supra* note 44, at 450.
[126] JOELSON, *supra* note 44, at 450.
[127] *South Korean regulator sets antitrust fine on Google at $187.8mn*, BUS. STANDARD, (Feb. 16, 2022) https://www.business-standard.com/article/international/south-korean-regulator-sets-antitrust-fine-on-google-at-187-8mn-122021600841_1.html.
[128] *Id.*

Trade Act, but not enough for the South Korean Assembly to rely on the Fair Market Act in addressing antisteering.

3. The Anti-Google Law: South Korea's legislative response to antisteering.

The passage of the Telecommunications Business Act amendment, widely known as the Anti-Google Law ("AGL"), represents a unique departure from characteristic Korean antitrust enforcement because it creates a per se bar on antisteering, unlike previous enforcement under the Fair Trade Act. The AGL is enforced by the Korean Communications Commission, which issued enforcement decrees as of November 2021 to set up new regulations based on the law.[129] The AGL clearly defines the app market and its participants rather than allowing the court to determine the relevant market, stating,

> The term "app market business operator" means a person who conducts business of registering and selling mobile contents, etc. and brokering transactions to ensure that users can purchase mobile contents, etc., among the business of providing value-added telecommunications services.[130]

The substantive provisions of the AGL constitute a per se bar on including antisteering provisions in contracts, stating conclusively that,

> (1) Telecommunications business operators (limited to app market business operators in cases of subparagraphs 9 through 11 . . .) shall not be liable to harm or harm fair competition or the interests of users. *You shall not engage in any of the following acts* . . . or have other telecommunications business operators or third parties perform prohibited acts.
>
> (9) An act of forcing a specific payment method on a provider of mobile content, etc. by unfairly using his or her transactional status when an app market operator brokers a transaction for mobile content, etc.
>
> (10) An act of unreasonably delaying the review of mobile contents by an app market operator

[129] KOREA COMMUNICATIONS COMMISSION, NEWS RELEASE: KCC DRAFTS AMENDMENTS TO TELECOMMUNICATIONS BUSINESS ACT ENFORCEMENT DECREE AND ENACTS NOTICE PROHIBITING FORCING CERTAIN IN-APP PAYMENTS (2021).
[130] Telecommunications Business Act, Art. 2 § 13 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, http://elaw.klri.re.kr/eng_service/main.do (search required).

> (11) An act of unfairly deleting mobile contents, etc. from the app market by the app market operator.[131]

When the bill was proposed, Apple and Google voiced concerns in media releases that the bar on antisteering would affect the privacy of end users and have negative effects.[132] Google has already changed its terms to comply with South Korea's new law.[133] Apple has also opted to comply with the law and allows third party payment options in South Korea.[134] Whether this strategy ends up working well in South Korea, there is still an open question if this kind of law is needed in the United States.

C. An Anti-Google Law or State Law?

Although there are myriad differences between the structure of antitrust law in the United States and South Korea, application of those laws is surprisingly similar because both systems impose high burdens of proof in relevant market and anticompetitive conduct.[135] As a result, both the United States and South Korea have responded, or attempted to respond, with narrow legislation targeting the practice.[136] However, in *Epic v. Apple*, Epic prevailed and secured a nationwide injunction on Apple's antisteering provision, albeit short-lived.[137]

1. The Anti-Google Law and Open App Markets Act use exhaustive language to head off judicial discretion.

Current South Korean law governing the app market has exhaustive language, whereas the current United States antitrust regime governing the app market is open to judicial interpretation and doctrinal limitations. Where the Sherman Act lays the groundwork for judicial interpretation by not exactly defining the conduct barred, the AGL, and its counterpart proposal in the United States, constitute a per se barrier on the judiciary in

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[131] Telecommunications Business Act, Art. 50 §§ 1, 9–11(S. Kor.).
[132] *See* Shaban et al, *supra* note 99.
[133] GOOGLE, *supra* note 30, at item 8 ("[d]evelopers of Play-distributed apps on mobile phones and tablets requiring or accepting payment from users in South Korea for access to in-app purchases may offer users an in-app billing system in addition to Google Play's billing system for those transactions").
[134] Yoon So-Yeon, *Apple Agrees to Korean App's Own Payment Systems*, KOREA JOONGANG DAILY (Jan. 11, 2022), https://koreajoongangdaily.joins.com/2022/01/11/business/tech/Apple-Google-KCC/20220111164353361.html?detailWord=.
[135] *See* Ohio v. Am. Express Co., 138 S.Ct. 2274 (2018); Daebeobwon [S. Ct.], Nov. 22, 2007, 2002Du8626 (S. Kor.) (en banc).
[136] The Open App Markets Act, S. 2710, 117th Cong. § 3(a) (2021); Korea Ministry of Government Legislation, Telecommunications Business Act, art. 50 §§ 1, 9–11 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, http://elaw.klri.re.kr/eng_service.main.do (search required).
[137] Injunctive Order, Epic Games, Inc. v. Apple Inc., 2021 WL 4128925 (N.D. Cal. 2021) (No. 4:20-cv-05640-YGR).

interpreting the statute by including the words *shall not* and describing the exact conduct that is barred.[138] This is likely the result of unfavorable results under the language of the Fair Trade Act, which closely mirrors the language of the Sherman Act and Clayton Act by pronouncing certain actions unlawful, but leaving interpretation up the discretion of the courts and agencies.[139]

2. The purpose of both the AGL and the Open App Markets Act is proscriptive.

The purposes of the AGL and the Open App Markets Act proscribe a venture away from a per se bar on antisteering provisions because the purpose of both laws is proscriptive. This proscriptive purpose was a clear choice by the South Korean Assembly. The Assembly stated that the purpose of the AGL is to promote fair competition, "by prohibiting the act of forcing the provider of mobile content, etc. to use a specific payment method by unfairly taking advantage of their trading position by the app market operator."[140] Similarly, the authors of the Open Apps Market Act have emulated the South Korean Assembly, providing that the purpose of the bill is "[t]o promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers."[141]

3. The AGL and the Open App Markets Act substantially lower the burden of proof by imposing a per se standard.

The AGL and the Open App Markets Act substantially lower the burden of proof for litigants to prevail against large tech companies because both eliminate the need to establish relevant market or anticompetitive conduct. *Ohio v. American Express* and *Epic v. Apple* both demonstrate that one of the chief limits on bringing a successful antitrust claim under the current regime is proof of intent to monopolize.[142] As the

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[138] *Compare* 15 U.S.C § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . *shall* be deemed guilty of a felony.") (emphasis added), *with* Telecommunications Business Act, art. 50 §§ 1, 9–11 (No telecommunications business operator . . . *may* engage in any of the following conduct… or allow other telecommunications business operators or third parties perform prohibited acts. (9) An app market business entity's compelling a mobile content supplier, etc. to use certain means of payment by unduly taking advantage of his or her position her in a transaction when brokering the transaction of mobile content") *and* S.225, 117th Cong. § 3(a)(1) (2021) ("A covered company *shall not* (1) require developers to use or enable an in-app payment system owned or controlled by the covered company").

[139] *Compare* Daebeobwon [S. Ct.], Nov. 22, 2007, 2002Du8626 (S. Kor.) (en banc), *with* Ohio v. Am. Express, 138 S. Ct. at 2283 (2018), *and* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021) (all three cases in which a plaintiff failed in part due to the courts' discretion in applying permissive language).

[140] Telecommunications Business Act, art. 50.

[141] S.2710, § 3(a).

[142] *See Ohio v. Am. Express*, 138 S. Ct. at 2283; *Epic v. Apple*, 559 F. Supp. 3d at 1042 (N.D. Cal. 2021).

South Korean line of cases emanating from *Posco* illustrate, similar concerns impact the KFTC's success in pursuing abuse of dominance claims.[143] This demonstrates a doctrinal similarity between the two countries' jurisprudence despite the greater effect of American precedent.

Where the United States currently has a long line of applicable jurisprudence that imposes doctrinal limits, imposing a per se bar under an AGL-companion in the United States will circumvent some doctrinal limits. This would lead to cases where litigants are successful in claims against antisteering under a per se doctrine, such as *United States v. Apple*.[144] Under the Open App Markets Act, for Epic to challenge antisteering it would only need to prove that it was injured by Apple's violation of the Act by not offering third party payment.[145] There is sufficient evidence in the record of *Epic v. Apple* to suggest that Epic lost millions of dollars in possible profit due to the antisteering provision in Apple's developer contract.[146] Under the new law, Epic would have standing and evidence of a violation to enjoin Apple's conduct.[147] Therefore, the Open App Markets Act would work as a solution to antisteering because it would give litigants like Epic a clearer path to challenging antisteering.

4. Litigation under state law accomplished the same result as an Anti-Google Law.

However, as *Epic v. Apples* demonstrates, the UCL, for a short period, accomplished the exact goal of barring antisteering that the Anti-Google Law and the Open App Markets Act are meant to reach. In *Epic v. Apple*, the flexibility of the UCL allowed the court to apply the test it deemed best suited to addressing antisteering.[148] Under the tethering test, the court was able to recognize the anticompetitive effects of antisteering and fashion a narrow remedy that did not interfere with other areas of Apple's business.[149] In cases like *Ohio v. American Express*, the UCL could be

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[143] *See generally* Daebeobwon [S. Ct.], Nov. 22, 2007, 2002Du8626 (S. Kor.) (en banc) (Lee Hong-hoon, J. dissenting); Daebeobwon [S. Ct.], June 10, 2011, 2008Du16322; Daebeobwon [S. Ct.], Oct. 13, 2011, 2008Du18322.

[144] *Compare* United States v. Apple, Inc., 791 F.3d 290, 33–14 (2d Cir. 2015) (plaintiff prevailing applying a per se bar to a horizontal price fixing arrangement by Apple.) *with* Daebeobwon [S. Ct.], Nov. 22, 2007, 2002Du8626 (South Korean Supreme Court finding no violation of the Monopoly Regulation Fair Trade Act due to the KFTC's failure to demonstrate that Posco intended not to sell to Hyasco specifically motivated by that action's anticompetitive effects).

[145] S. 2710, § 3(a)(1).

[146] *Epic v. Apple*, 559 F. Supp. 3d at 998 ("[Epic] provides some evidence that iOS game revenue grew faster than the game market as a whole and, importantly, that game revenue on iOS grew faster than on Android. Growth rates, however, are difficult to compare because of different initial starting points").

[147] S. 2710, § 5(b)(1).

[148] *Epic v. Apple*, 559 F. Supp. 3d at 1053.

[149] *Id.* at 1053–56.

applied in a similar manner to withdraw the argument from defining the market to consider the effects of antisteering on consumers and merchants.[150] Therefore, the UCL, if it withstands Apple's challenge to the district court ruling on appeal, could provide a path to challenging Google's antisteering practices as well.

Further, there are convincing policy reasons to use the UCL to address antisteering rather than an AGL-like law. If passed, the Open App Markets Act may foreclose an opportunity to gain more concessions out of Apple and Google.[151] For example, class actions have already forced Apple to negotiate down its commission.[152] Additionally, there is limited political capital to pursue antitrust.[153] It may be better to use existing law to pursue remedies to antisteering rather than passing a single narrow law when there is some support for more sweeping efforts.[154] Further, federal enforcers are already taking a more broad-based approach. The Department of Justice has challenged general anticompetitive practices, recently filing an action under Sherman Act section 2 against Google for using tying arrangements to force apps to use Google Search features.[155]

5. Counterarguments: the UCL as an interim solution.

Given that *Epic v. Apple* is still on appeal at the Ninth Circuit, the UCL's application to antisteering is vulnerable to an unfavorable decision.[156] However, there are long term threats to the UCL's application to antisteering. These threats render the UCL an interim solution until judicial doctrine evolves or a more comprehensive antitrust regulation is passed. The first and most obvious issue is that Apple and Google could "vote with their feet" and remove their companies' business to another state with friendlier laws.[157] However, Apple has already pulled its national, but not international, headquarters out of California to Texas.[158] It is unclear

[150] *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2297–98 (2018) (Breyer, J., dissenting) (arguing market definition is irrelevant to step one rule of reason analysis because there was direct evidence of anticompetitive effects).
[151] Kim, *supra* note 2, at 126.
[152] Lerman, *supra* note 21. Lerman, *supra* note 21.
[153] *See* Fillipo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement Enforcement in the United States*, 45 (Univ. of Chi. Booth Sch. of Bus. Working Paper, Paper No. 315, 2022), https://ssrn.com/abstract=4011335.
[154] *See* CONG. RSCH. SERV., *supra* note 39, at 1.
[155] Complaint at 57–58, United States v. Google LLC. No.1:20-cv-03010-APM (D.D.C. 2022).
[156] Order Staying Injunction, Epic Games, Inc. v. Apple Inc., 2021 WL 6755197, (9th Cir. 2021) (No. 21-16506).
[157] Adam A. Millsap, *Businesses Are Fleeing California Along With Its Residents, And President Biden Should Pay Attention*, FORBES (Aug. 21, 2021) https://www.forbes.com/sites/adammillsap/2021/08/27/businesses-are-fleeing-california-along-with-its-residents-and-president-biden-should-pay-attention/?sh=a11fe6923273.
[158] *Id.*

how much more Apple and Google could remove business to avoid the application of the UCL without leaving the state entirely.[159]

A more cogent issue for the UCL as a solution is its flexibility when compared to a robust categorical standard like a per se bar. However, the flexibility of the UCL is seen at least by California state officials as a key feature of the law.[160] Further, the antisteering provisions of the AGL and Open App Markets Act could be rendered useless if companies like Apple or Google use other actions aside from antisteering to reach the same substantive end of upholding the "walled-garden".[161] As applied, the UCL is well adapted to address other attempts at upholding the walled garden because it allows trial courts to consider a variety of factors rather than barring a single practice.[162] Therefore, because of some limits on the UCL's application it is best suited as an interim solution until there is an evolution in the judicial approach to antitrust or a more sweeping regulation.

III. CONCLUSION

If the Open App Markets Act was passed in the United States, the law would constitute an extreme limit on the ability of large tech companies to use antisteering to bar app developers from evading unfavorable requirements. Aside from the immediate likely constitutional and administrative challenges such a statute would face, in cases like *Epic v. Apple* and *Ohio v. American Express*, the discretion to decide whether antisteering and linked practices are manifestations of anticompetitive conduct would be stripped from the judiciary.[163]

But there is a more important question in comparing these two opposite legal approaches to apply lessons in United States antirust: *do we even need a federal antisteering law?*[164] The Supreme Court has liberalized standing to challenge anticompetitive conduct in the app market, as evidenced by *Apple v. Pepper*.[165] As *Epic v. Apple* demonstrates, private litigants can obtain relief through state laws and public pressure without relying on

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[159] Brief of the State of California as Amicus Curiae at 23–24, Epic Games, Inc. v. Apple Inc., 2021 WL 6755197 (No. 21-1605) (9th Cir. Mar. 31, 2022).
[160] *Id.* at 6.
[161] *See* Open App Markets Act, S.2710, 117th Cong. § 3(a) (2021) (outlining three specific outlawed practices: antisteering, self-preferencing, and punitive action against developers for steering); *See* Elettra Bietti, *supra* note 83, at 14.
[162] Brief of the State of California as Amicus Curiae, *supra* note 52, at 3.
[163] *Cf. generally* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021); Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).
[164] Injunctive Order, Epic Games, Inc. v. Apple, Inc., 559 F.Supp.3d 898 (N.D. Cal. 2021) (No. 4:20-cv-05640-YGR), 2021 WL 4128925 (permanent injunction issued by Judge Rogers enjoining Apple from prohibiting developers from actions directing consumers to purchasing mechanisms). *See* Order Denying Apple's Motion to Stay Injunction Pending Appeal, *Epic Games, Inc. v. Apple, Inc.*, 559 F.Supp.3d 898 (N.D. Cal. 2021) (No. 4:20-cv-05640-YGR), 2021 WL 4128925.
[165] Apple, Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019).

regulators' increased interest in bringing tech companies to heel.[166] Depending on the outcome of *Epic v. Apple* at the Ninth Circuit, the UCL may become a potent tool for private litigants to challenge antisteering because it is has more reach than federal law and is more flexible than the Open App Markets Act.[167]

In sum, through litigation under the UCL and other pressures, the current antitrust regime is on the cusp of delivering the AGL's primary promise in the United States. *Epic* demonstrates the possibility of a discontinuation of the 30% revenue commission and antisteering provisions by Apple and Google.

[166] *Epic v. Apple,* 559 F.Supp.3d at 1069.
[167] *See* Epic, Inc. v. Apple Inc., No. 21-16506, 2021 WL 6755197, at *1 (9th Cir. Dec. 8, 2021); Brief of the State of California as Amicus Curiae in Support of Neither Party at 3, Epic Games, Inc. v. Apple Inc., 2021 WL 1052172 (9th Cir. Mar. 31, 2022) (No. 21-1605).