

Supreme Court could allow suit over Apple iPhone apps' sales

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This March 19, 2018, file photo shows Apple's App Store app in Baltimore. Apple is at the Supreme Court to defend the way it sells apps for iPhones against claims by consumers that the company has unfairly monopolized the market. The justices are hearing arguments Monday, Nov. 26, in Apple's effort to end an antitrust lawsuit that could force the iPhone maker to cut the 30 percent commission it charges software developers whose apps are sold exclusively through Apple's App Store. (AP Photo/Patrick Semansky, File)

The Supreme Court seemed ready Monday to allow an antitrust lawsuit

to go forward that claims Apple has unfairly monopolized the market for the sale of iPhone apps.

Apple faced skeptical questions from justices who seemed concerned about the control the Cupertino, California-based company exerts over iPhone users who must purchase software for their smartphones exclusively through its App Store.

The arguments dealt with the fruits of technology that, over the past 10 years, have made more than 2 million apps available to iPhone users, but in the courtroom there were also references to older antitrust cases involving concrete, aluminum, natural gas and shoes.

The suit by iPhone users could force Apple to cut the 30 percent commission it charges software developers whose apps are sold through the App Store. A judge could triple the compensation to consumers under antitrust law if Apple ultimately loses the suit.

But the issue before the high court at this early stage of the suit is whether the case can proceed at all. Justice Stephen Breyer, who used to teach antitrust law at Harvard Law School, said the consumers' case seemed straightforward and in line with a century of antitrust law.

Apple argues it's merely a pipeline between app developers and consumers, and that iPhone users have no claims against Apple under federal laws that prohibit unfair control of a market.

Tens of thousands of software developers set the prices and agree to pay Apple a 30 percent commission on whatever they sell, the lawyer representing Apple said in the courtroom. If anyone should be able to sue Apple, it's a developer, Daniel Wall said. "There have been plenty of disputes, but none has ever gone to litigation," he said.

Chief Justice John Roberts was alone among the nine justices who seemed prepared to agree with Apple.

Among the justices who appeared to be on the other side, Justice Elena Kagan said consumers appear to have a direct relationship with Apple. "I pick up my iPhone. I go to Apple's App Store. I pay Apple directly with credit card information that I've supplied to Apple. From my perspective, I've just engaged in a one-step transaction with Apple," Kagan said.

Justice Brett Kavanaugh said if consumers are paying more than they should, then perhaps they should be able to sue. The relevant federal antitrust law says "any person injured" can sue, Kavanaugh said.

His comments could align him with justices who would allow the suit to proceed. In other cases, the court has ruled there must be a direct relationship between the seller and a party complaining about unfair, anti-competitive pricing.

Consumers can choose from among more than 2 million apps, compared with the 500 apps that were available when Apple created the App Store in 2008. "The phrase 'there's an app for that' is now part of the popular lexicon," Roberts noted in a 2014 decision limiting warrantless searches of cellphones by police. Apple has trademarked the phrase.

But the company says the popularity of software for iPhones and its App Store shouldn't obscure that consumers buys apps from developers, not Apple. Developers set the prices, though Apple requires prices to end in .99, Wall said. The Trump administration is backing Apple at the high court.

Representing consumers, lawyer David Frederick said the monopoly Apple has over iPhone apps is unique in the digital age. "Apple can't

point to another e-commerce distributor that does what it does," Frederick said. Even Apple allows third parties to sell computer software directly to purchasers of its laptop and desktop computers, he said.

A trial court initially dismissed the suit. The 9th U.S. Circuit Court of Appeals revived it.

A victory for Apple could severely restrict consumers' ability to sue over antitrust violations even though Congress envisioned such suits "would form a central component of enforcement of the antitrust laws," warned 18 scholars of antitrust law in a Supreme Court filing.

A decision in *Apple Inc. v Pepper*, 17-204, is expected by late spring.

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