Nos. 21-16506 & 21-16695

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPIC GAMES, INC.,

Plaintiff, Counter-Defendant – Appellant, Cross-Appellee,

v.

APPLE, INC.,

Defendant, Counterclaimant – Appellee, Cross-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 4:20-CV-05640-YGR-TSH
Hon. Yvonne Gonzalez Rogers

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF APPELLEE, CROSS-APPELLANT APPLE, INC.

Jeffrey A. Ogar
Michael Pepson
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
571.329.4529
mpepson@afphq.org

March 31, 2022

Attorneys for *Amicus Curiae*

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The *amicus curiae* Americans for Prosperity Foundation is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is a strong supporter of the consumer welfare standard in antitrust law as an essential element for promoting innovation and the development of new technologies and has an interest in ensuring that California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, is applied in a manner consistent with the consumer welfare standard as required by previous decisions of the Ninth Circuit and California Supreme Court.

SUMMARY OF ARGUMENT

"Success is not illegal." 1-ER-4. But is it unfair? For companies on the losing end, it often feels that way. But when rivals seek refuge from the results of competition in the antitrust laws, courts should—and do—reject those claims. The "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'"

---

[1] All parties have consented to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than *amicus* authored this brief in whole or in part, and no counsel or party other than *amicus* made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (citation omitted). The same principle governs a competitor's use of unfair competition laws modeled after Section 5 of the Federal Trade Commission Act ("Section 5")—such as the UCL. *See Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 167, 186 (1999); *see also Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 735–36 (9th Cir. 2007) (discussing *Cel-Tech*).

That is not to say that these two types of laws must be read as *completely* identical in scope. As the district court noted, in cases between competitors, the UCL may reach beyond the antitrust laws to reach certain "incipient violation[s] of antitrust law" or conduct that "violates the policy or spirit of one of those laws" because it violates the consumer welfare standard. *See* 1-ER-164 (citing *Cel-Tech*, 20 Cal. 4th at 186–87; *Hodson v. Mars, Inc.*, 891 F.3d 857, 866 (9th Cir. 2018)). But *Cel-Tech* goes on to explain that it may do so only where the violation has effects that "are comparable to or the same as a violation of the law, or otherwise [must] significantly threaten[] or harm[] competition." 20 Cal. 4th at 187. That means the UCL (like other unfair competition laws) does not provide a vehicle for evading the well-defined limits of antitrust law. *Cf. Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (declining to allow Section 5 to be used in conscious parallelism cases "where there is a complete absence of evidence" to support a Sherman Act claim because it would "blur the distinction between guilty and innocent commercial behavior"). The district court failed to apply these principles in three critical ways, each of which independently supports reversal.

First (Sections I and II below), the district court did not limit itself to *Cel-Tech*'s tethering test, as required by *Lozano* and *Levitt*. Instead, it created a new category of "quasi-consumer" standing that finds no precedent in decisions of the Ninth Circuit or California Supreme Court, and then applied the UCL as though *Cel-Tech* did not exist. The district court admits as much, noting "[t]here is no specific third category for non-competitor business." 1-ER-163. Even assuming there was a question as to what standard to apply, the Ninth Circuit has held courts must look to "the crux of the [plaintiff's] complaint." *See* 1-ER-163–64 n.628 (citing *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1136 (9th Cir. 2014)).

Here, that crux was clear. Epic Games brought this case because it "is a would-be and self-avowed competitor of Apple in the distribution of apps." 1-ER-20. It alleged that absent Apple's policies, Epic could design an "app that could compete with Apple for the distribution of apps in iOS." 4-SER-897 (Compl. ¶ 7); *see also* 4-SER-899 (¶ 17); D.C. Dkt. 1 (¶¶ 20, 80, 83, 89, 90, 137, 147, 165). And in pleading the UCL claim itself, Epic alleged that this was a case about being able "to fairly compete with the relevant markets." D.C. Dkt. 1 (¶ 287). Given these undisputed facts, application of anything but the *Cel-Tech* tethering test (*see* 1-ER-168–69) to find a violation of the UCL in a competitor case was reversible error.

Lozano, 504 F.3d at 735 (noting the "California Supreme Court rejected the balancing test in *South Bay* in suits involving unfairness to the defendant's competitors" because it "provide[d] too little guidance to courts and businesses").

Second (Section III below), had the district court limited itself to the tethering test and applied it correctly, Apple would have prevailed on the UCL claim. None of the three cases cited by the district court to support its decision tethers Apple's anti-steering provisions to the antitrust laws. *FTC v. Neovi, Inc.*, 604 F.3d 1150 (9th Cir. 2010), was cited for the proposition that the UCL requires that "consumers ha[ve] a free and informed choice" under the FTC test for unfairness, *id*. at 1158 (cited by district court at 1-ER-167). But *Neovi* was a consumer fraud case and applied the FTC *balancing test* that has been rejected for use in UCL competitor cases. *Id*. at 1153–54 (discussing the claims brought on behalf of consumers whose bank accounts had been looted by fraudsters). Moreover, the question of "free and informed choice" went to whether the plaintiffs' injuries were reasonably avoidable—not whether they arose out of an incipient violation of an antitrust law or were a violation of the policy or spirit of those laws. *Id.* at 1158. Its application here was simply inapposite.

Nor is the district court's reliance on *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), or *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), persuasive on the question of whether Apple's anti-steering provisions violated the spirit of the antitrust laws. *Bates* was decided on First Amendment grounds, as the restrictions on speech were imposed by the government. 433 U.S. at 357, 363 (holding the Sherman Act did not apply to the regulation because it was state action). *Eastman Kodak* was decided on antitrust grounds, but the similarities end there; it merely held "information costs and switching costs" might lead to "market power in the service and parts market," thus making summary judgment inappropriate. 504 U.S. at 477, 479. It is wholly inapplicable to a case—like this one—where the trial record showed the plaintiff "did not meet its burden" of proving an antitrust claim. *See* 1-ER-167.

Third (Section IV below), the district court's injunction was a remedy Epic had not sought and was based on a record the district court concedes was "less fulsome." 1-ER-166. The district court justifies its injunction by citing *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982), but here too the case is inapposite. In *Sears*, the FTC was seeking relief in a broad set of markets after proving a Section 5 violation in a narrow market. *Id.* at 391. The Ninth Circuit allowed this, noting "'those caught violating the Act must expect some fencing in.'" *Id.* (quoting *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957)). In contrast, Epic proved no antitrust or UCL violation at all—so there is no basis at all for using the UCL to fence in its business practices. Any injunction—under the antitrust laws or the UCL—must be based on evidence of competitive effects in a relevant market.

See Facebook, Inc. v. BrandTotal Ltd., No. 20-CV-7182, 2021 WL 2354751, at *15 (N.D. Cal. June 9, 2021). Speculative theories of possible harm based on a limited record and untethered to a single antitrust case are not enough.

ARGUMENT

Based on the first 162 pages of the district court's Order, Apple should be the prevailing party. Apple did not violate Section 1 of the Sherman Act by restraining an iOS distribution market or an iOS In-App Payment Solutions market. Apple committed no Section 2 violation for monopolizing such markets, or for denying an essential facility in an iOS app distribution market. Epic had no tying claim. No Cartwright Act claim. No evidence of concerted action. No evidence of monopoly power in a single relevant product market. Judgment was entered against Epic on each of its nine antitrust claims. Yet the district court still enjoined Apple's business practices—not because they violated any antitrust law, but instead because they were supposedly "unfair." Zero plus zero does not equal one, and zero times nine should not equal 17200.

I. THE CALIFORNIA SUPREME COURT CLEARLY FORBIDS USING THE UNFAIR COMPETITION LAWS TO EVADE THE ANTITRUST LAWS OR THE CONSUMER WELFARE STANDARD

A. *Cel-Tech* Requires UCL Claims Brought By A Competitor To Be Tethered To An Antitrust Injury

Cel-Tech is the seminal California case on the question of parallel antitrust and UCL litigation. It was decided over twenty years ago, and has been applied consistently by the Ninth Circuit ever since. The antitrust claim in *Cel-Tech* was a relatively easy one for the California Supreme Court to dismiss. The plaintiffs alleged L.A. Cellular was engaged in below-cost pricing and use of loss leaders in violation of sections 17043 and 17044 of the California Business & Professions Code. *Cel-Tech*, 20 Cal. 4th at 169–70. These antitrust claims flew in the face of "50 years of contrary judicial interpretation," which required evidence of "purpose" to harm a competitor. *See id.* at 174–78. Given it was clear L.A. Cellular's purpose in giving away cellular telephones was to "compete with AirTouch Cellular, not to harm the plaintiffs," these claims were quickly and correctly rejected. *Id.* at 170. But as is the case here, victory on the antitrust claims left the UCL claims unresolved.

1. An "Unfairness" Claim Under The UCL Cannot Reach Conduct For Which The Law Provides A Safe Harbor

The Court of Appeal in *Cel-Tech* held that L.A. Cellular's conduct "might nevertheless have violated the unfair competition law and remanded the matter for retrial." *Id.* While the California Supreme Court affirmed, it held that such a claim must be "tethered" to an antitrust claim. *Id.* at 186–87, 191. The UCL proscribes "unfair" conduct because "it would be impossible to draft in advance detailed plans and specifications for all acts and conduct to be prohibited." *People ex rel. Mosk v. Nat'l Research Co. of Cal.*, 201 Cal. App. 2d 765, 772 (1962) (cited by *Cel-Tech*, 20 Cal. 4th at 181). But where "specific legislation provides a 'safe harbor'" for conduct, "plaintiffs may not use the [UCL] to assault that harbor." *Cel-Tech,* 20 Cal.

4th at 182. Regulations may provide a safe harbor as well. *See Davis v. HSBC Bank Nevada*, 691 F.3d 1152, 1166 (9th Cir. 2012) (citing *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1082 (9th Cir. 2007)). Even without legislation or a regulation permitting the conduct, "courts may not apply purely subjective notions of fairness." *Cel-Tech*, 20 Cal. 4th at 184.

This last category of safe harbors is particularly important in the context of antitrust laws, which are in large part a creature of judicial interpretation. "The Rule of Reason, with its origins in common law precedents long antedating the Sherman Act, has served that purpose." *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 688 (1978). To that end, the U.S. Supreme Court has consistently held that the antitrust laws contain a safe harbor from claims seeking to protect competitors (rather than consumers), calling it "inimical to the purposes of these laws to award damages for the type of injury claimed here." *Brunswick*, 429 U.S. at 488. Such a rule is critical to ensure the antitrust laws are applied as a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). It is equally critical in the applying the UCL. *See Cel-Tech*, 20 Cal. 4th at 185 (warning that failing to do so "may even lead to the enjoining of *pro*competitive conduct and thereby undermine consumer protection, the primary purpose of the antitrust laws," and citing *Della Penna v. Toyota Motor Sales*, 11 Cal. 4th 376, 392 (1995)).

2. Competitors Raising Antitrust Issues Must "Tether" A UCL Claim To The Antitrust Laws

Given this existing legal framework, the California Supreme Court needed to impose a new, stricter rule for UCL cases brought by competitors. Drawing from cases like *Brunswick*, *Cel-Tech* looked to the interplay between the Sherman Act and Section 5 for guidance and required that "any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id*. at 186–87. Specifically, this requires proof of:

- "an incipient violation of an antitrust law";
- conduct that "violates the spirit of one of those laws because its effects are comparable to or the same as a violation of the law"; or
- conduct that "otherwise significantly threatens or harms competition."

Id. at 187.

While conduct need not "violate an antitrust law to be actionable under the unfair competition law," it cannot be "'unfair' if the conduct is deemed reasonable and condoned under the antitrust laws." *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 365, 375 (2001). This principle applies to *any* "action by a competitor alleging anticompetitive practices." *See Cel-Tech*, 20 Cal. 4th at 187 n.12. And as *Cel-Tech* noted, the United States Supreme Court has repeatedly found that "[i]njury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws." *Id.* at 187 (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990); *Brunswick*, 429 U.S. at 488–89). In other words, the consumer welfare standard applies to the UCL.

B. The Ninth Circuit Has Rejected Using Unfair Competition Laws To End-Run The Limits Of Antitrust Law, Consistently Applying *Cel-Tech* To Direct And Indirect Competitor Cases

The Ninth Circuit has long been skeptical of attempts to use unfair competition laws to end-run the limits of antitrust law. *Boise Cascade* rejected the FTC's attempt to avoid the Sherman Act's requirement that an agreement among competitors be proven in a price fixing case—that mere "conscious parallelism" was not enough. 637 F.2d at 577 ("a mere showing of parallel action will not establish a section 5 violation"). The Ninth Circuit did so because to do otherwise "would be to blur the distinction between guilty and innocent commercial behavior." *Id.* at 582.

"'[O]urs is a culture firmly wedded to the social rewards of commercial contests, [so] the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties.'" *Cel-Tech*, 20 Cal. 4th at 185 (quoting *Della Penna*, 11 Cal. 4th at 392). As such, allowing the UCL to provide a remedy that undermines key antitrust principles by applying a limitless definition of "unfairness" would create the same lack of clarity the Ninth Circuit feared in *Boise Cascade*. Thus, it is unsurprising the Ninth Circuit has repeatedly and consistently applied *Cel-Tech*. *See, e.g.*, *Lozano*, 504 F.3d at 735–36 (citing *Cel-*

Tech as holding that in a case involving allegations of "anti-competitive conduct," only the tethering test should apply).

Like California state courts, federal courts in the Ninth Circuit have rejected claims based on conduct that, even if proven, would not violate the antitrust laws. A UCL plaintiff must "plead a relevant market" and conduct that at a minimum violates the *spirit* of the antitrust laws "because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *See Facebook, Inc. v. BrandTotal Ltd.*, No. 20-cv-07182-JCS, 2021 U.S. Dist. LEXIS 165209, at *15-17, *23-24 (N.D. Cal. Aug. 31, 2021). And if after trial, the district court makes "the determination that the conduct is not an unreasonable restraint of trade[, it] necessarily implies that the conduct is not 'unfair' toward consumers." *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 691 (9th Cir. 2015) (citing *Chavez*, 93 Cal. App. 4th at 375); *see also LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557 (9th Cir. 2008); 2-ER-189–90. Given that Epic's case is based on a desire to compete with Apple, the tethering test applies here.

II. THE DISTRICT COURT'S APPLICATION OF A TEST OTHER THAN *CEL-TECH'S* "TETHERING" TEST WAS IN ERROR

The district court applied two tests to Apple's anti-steering policies—a "Tethering Test" and a "Balancing Test." 1-ER-164–69. As the district court notes, "a competitor who claims to have suffered injury" in a UCL case must satisfy the tethering test. 1-ER-164 (citing *Cel-Tech*, 20 Cal. 4th at 186–87; *Hodson*, 891 F.3d at 866). The district court's application of anything but the tethering test was inconsistent with *Cel-Tech* and Ninth Circuit precedent, and as such was error.

A. *Cel-Tech* And *Lozano* Apply The "Tethering" Test To Direct Competitor Cases

Cel-Tech's requirement that courts use a tethering test in UCL cases alleging unfairness to competitors is binding on California federal district courts and the Ninth Circuit. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts."); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961). For example, in *Lozano* the Ninth Circuit held that "[i]n 1999, the California Supreme Court rejected the balancing test in *South Bay* in suits involving unfairness to the defendant's competitors." 504 F.3d at 735. The "balancing" test applied in other contexts was "'too amorphous'" and "'provide[d] too little guidance to courts and businesses,'" and thus the claim of "unfairness must 'be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.'" *Id.* (quoting *Cel-Tech*, 20 Cal. 4th at 185, 186–87).

B. *Levitt* Extends *Cel-Tech* To Indirect Competitor Cases But Does Not Limit Its Application To Direct Competitors

Where the parties' relationship is purely competitive (such as AT&T and Sprint), it is obvious which standard applies. But even where the relationship is more complex, the Ninth Circuit has provided clear guidance by extending *Cel-Tech* to any case in which the crux of the claim is alleged harm to competition. *See Levitt*, 765 F.3d at 1136. While the defendant (Yelp) did not compete with the plaintiffs in *Levitt*, the parties and the Ninth Circuit all "acknowledge[d] that the *Cel-Tech* standard applies." *Id.* Despite the lack of direct competition between the parties, the Ninth Circuit looked to "the crux of the business owners' complaint," which was "that Yelp's conduct unfairly injures their economic interests to the benefit of other businesses who choose to advertise with Yelp." *Id.* The Ninth Circuit then applied the tethering test and rejected the claim because there was no plausible allegation of an antitrust violation or harm to competition. *See id.* at 1136–37.

The district court "recognize[d]" *Levitt* but found it "distinguishable." 1-ER-163 n.628. Specifically, the district court noted that in *Levitt*, the plaintiffs competed with Yelp's customers. By contrast, here Epic "is not claiming that it is injured relative to other developers—developers are all subject to the same restrictions," making Epic "a consumer of Apple's two-sided platform." 1-ER-163–64 n.628. But the district court failed to provide a detailed explanation for why this distinction makes *Cel-Tech* any less applicable here. Epic's UCL complaint was not that Apple treated it unfairly as a customer; it was seeking to compete with Apple:

- "Rather than tolerate this healthy competition and compete on the merits of its offering . . . ." D.C. Dkt. 1 (Compl. ¶ 20).

- "[A]pp developers must agree not to distribute or create app stores that could compete with Apple's App Store . . . ." D.C. Dkt. 1 (¶ 80).
- "Apple's conduct has unreasonably restricted Epic's ability to fairly compete in the relevant markets with these products." D.C. Dkt. 1 (¶ 287).

It appears the distinction the district court is relying upon is that Levitt was *not* a customer of Yelp's services, while Epic *is* a customer of Apple. *See* 1-ER-164 n.628 ("This action, unlike *Levitt*, includes a view that Epic Games is a consumer of Apple's two-sided platform."). But this misses the point of both *Levitt* and *Cel-Tech*. The reason competitor standing made sense in *Levitt* was not the simple form of the business relationship—it was "the crux of the business owners' complaint." *Levitt*, 765 F.3d at 1136; *see also Eastman Kodak*, 504 U.S. at 466–67 (holding "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law"). And *Cel-Tech* limited the scope of competitor standing because cases between competitors run the risk of stifling vigorous competition. 20 Cal. 4th at 185. That Epic is also a customer of other Apple services does not change the fact that the crux of the UCL claim is Epic's desire to compete against Apple's App Store.

C. The Creation Of "Quasi-Consumer" Standing Would Eviscerate *Cel-Tech* In Any Market Where Competitors Trade With Each Other

If the district court's interpretation of *Levitt* were correct, it would mean *Cel-Tech* only applied in cases where a plaintiff has no business relationship with its competitor. Yet in today's economy, this would limit *Cel-Tech* to only the very simplest markets. Some of the most active areas for antitrust enforcement would be excluded, like two-sided markets (*see, e.g.*, *Ohio v. Am. Express*, 138 S. Ct. 2274, 2289 (2018)), dual-distribution markets (*see, e.g.*, Compl., *In the Matter of Fortiline, LLC*, FTC Dkt. No. C-4592 (Sept. 23, 2016)), and any other market in which competitors do business with each other (*see, e.g.*, *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 801 F.3d 758, 763 (7th Cir. 2015) ("Although the two companies were competitors, DFA was also one of Schreiber's main suppliers, and Schreiber was one of DFA's largest customers[.]")).

There is no reason to believe the principles behind *Cel-Tech* should apply with any less force in such markets where actual or potential competitors are also consumers, nor does the district court offer any such reason. Indeed, given the complexities of these markets, it is even *more* important for courts to keep competitor claims tethered to the antitrust laws instead of applying a broader, unclear balancing test. For example, a retailer upset about a minimum advertised price could evade antitrust precedent upholding such policies under the Sherman Act by repleading it as a UCL claim. *See, e.g., In re Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186 (9th Cir. 2015) (dismissing a complaint alleging that a MAP policy was unlawful under the Sherman Act because "Plaintiffs have failed to allege enough nonconclusory facts"). Neither the California Supreme Court nor the Ninth Circuit has ever suggested that *Cel-Tech* should be so limited.

D. The District Court's Reliance On "Quasi-Consumer" Standing To Use A Balancing Test Was Error

The district court's error in treating Epic as a quasi-consumer for purposes of its anti-steering analysis was not harmless—indeed, it formed the basis for its injunction against Apple's anti-steering policies. The district court held "the harm from the anti-steering provisions outweighs its benefits, and the provision violates the UCL under the balancing tests." 1-ER-169. While the district court cites *Drum* to justify application of the balancing test (*see* 1-ER-164; 1-ER-168), that case is distinguishable for two reasons. First, the California Court of Appeal held it was "unclear which test would apply" where the plaintiff was both a consumer and a potential competitor of the defendant's members—but did not reach the question because it was unnecessary. *Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 253–54 (2010). In so holding, *Drum* did not create a new category of standing as the district court did. *See id*. Second, *Drum* held there was no violation of the UCL under either the tethering or the balancing tests—making the issue irrelevant to the outcome. Here, by contrast (and as discussed below), the district court's application of the balancing test was outcome determinative because there was nothing to tether Epic's UCL claim to the antitrust laws, and under *Cel-Tech* judgment should have been entered in Apple's favor.

III. EPIC'S UCL CLAIM AGAINST APPLE'S ANTI-STEERING PROVISIONS IS UNTETHERED TO THE ANTITRUST LAWS

Had the district court limited itself to the tethering test, and then properly applied it, it would have rejected Epic's UCL claims. First, each of Epic's antitrust claims failed because there was no evidence of market power in a relevant market being exploited for an anti-competitive purpose. Second, none of the alternative theories offered up by the district court is tethered to an antitrust theory of harm. Instead, the district court cites three cases—one of which had nothing to do with antitrust (a consumer fraud claim), one of which was decided on First Amendment grounds (because there was no antitrust claim), and one of which merely said a question of fact about market power rendered a claim inappropriate for summary judgment on a lock-in theory (which is different from a decision after a trial on the merits, as is the case here).

A. Each Of Epic's Antitrust Claims Failed

Epic had no shortage of antitrust allegations in its case—yet each was rejected by the district court for lack of evidence. Specifically:

- **Concerted Action Claims:**

- **Counts 3, 5, 7, and 8:** Epic alleged Apple unlawfully restrained the iOS app distribution aftermarket and the iOS in-app payment solutions after market. Count 3 failed because there was insufficient evidence of concerted action *and* because Apple's pro-competitive justifications were sound and there were no less restrictive alternatives. *See* 1-ER-144–52. Count 5 failed for similar reasons. *See* 1-ER-152–53. Counts 7 and 8 alleged the same underlying violations as Counts 3 and 5, but under California's state antitrust law (the Cartwright Act) and failed for the same reasons as Counts 3 and 5. *See* 1-ER-158; 1-ER-160.
- **Counts 6 and 9:** Epic alleged a tying claim based on "a tie between app distribution, on the one hand, and IAP on the other." 1-ER-155. This claim failed because "IAP is not a separate product from iOS app distribution." 1-ER-158. Count 9 as a tying claim under state law, "fails for the same reason as Count 6." 1-ER-160–61.

- **Monopolization Claims:**
  - **Counts 1 and 4:** Epic alleged Apple monopolized the iOS in-App distribution and payment solutions markets. Count 1 failed because Epic failed "to prove the first element, that Apple has monopoly power in the relevant product and geographic market" or "to satisfy

the rule of reason analysis." 1-ER-154. Count 4 for the same reasons as Count 2 (below), as "Apple does not have monopoly power in the relevant product market." 1-ER-155.

- **Count 2:** Epic alleged Apple denied it access to an essential facility in the iOS app distribution market. This claim failed "for myriad reasons, but most convincingly for two." 1-ER-161. Epic did not prove "Apple is an illegal monopolist," or that "the iOS platform is an essential facility." 1-ER-161.

In short, all of Epic's antitrust theories failed because Epic was unable to prove the basic elements of an antitrust case.

As the district court recognized, "'[A]ntitrust courts must give wide berth to business judgments before finding liability.'" 1-ER-152 (quoting *NCAA v. Alston*, 141 S. Ct. 2141, 2163 (2021)). It was not for the district court to "second-guess that judgment on an underdeveloped record." 1-ER-152 (citing *In re Citric Acid Litig.*, 191 F.3d 1090, 1101 (9th Cir. 1999)); *see also Ohio v. Am. Express*, 138 S. Ct. at 2289 (upholding anti-steering provisions); *FTC v. Qualcomm Inc.*, 969 F.3d 974, 989–91 (9th Cir. 2020) (recognizing that *Amex* held the "use of antisteering clauses" to be "*pro*competitive and innovative," and holding that "novel business practices—*especially* in technology markets—should not be 'conclusively presumed to be unreasonable and therefor illegal without *elaborate inquiry* as to the precise harm they have caused or the business excuse for their use'" (citation omitted; emphasis added)). Yet second guess Apple on an underdeveloped record is *precisely* what the district chose to do in applying the UCL.

B. The District Court's UCL Analysis Is Untethered To The Antitrust Laws

As the Supreme Court set out over a century ago:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918). Here, the district court concedes "the record was less fulsome" regarding Apple's anti-steering provisions. 1-ER-166. Indeed, Epic alleged no standalone anti-steering claim at all.

As a result, the district court's UCL analysis provides none of the deep analysis required under the rule of reason (and which was relied upon in entering judgment for Apple on each of the nine antitrust claims) because evidence sufficient to do so does not exist in the record. *See Ohio v. Am. Express*, 138 S. Ct. at 2285 ("'Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.'" (citation omitted)); *Facebook, Inc. v.*

BrandTotal Ltd., 2021 WL 2354751, at *15 (requiring consideration of competitive effects in a relevant market, not simply abstract theories of harm).

For example, in *BrandTotal*, the district court correctly rejected a UCL claim where the plaintiff "has not identified any legislatively declared policy *related to competition* implicated" by the alleged conduct. 2021 U.S. Dist. LEXIS 165209, at *20-21 (emphasis in original). Rather, the plaintiff based its claims on concepts of data privacy. *See id*. at *21-23. And even where the claim might have been tethered to the spirit of the antitrust laws, it was not allowed to proceed because there was no proof of market power. *See id.* at *30. Likewise, the injunction against Apple is based on three cases, none of which tethers Epic's UCL claim to an antitrust theory of harm, and there is nothing in the record to establish the traditional elements of an antitrust claim. But instead of dismissing the UCL claim (as the district court did in *BrandTotal*), the district court here wrongly enjoined Apple's business practices.

1. *FTC v. Neovi* Is Not An Antitrust Case

The district court claims that "although Epic Games has not proven a present antitrust violation, the anti-steering provisions 'threaten[] an incipient violation of an antitrust law' by preventing informed choice among users of the iOS platform." 1-ER-167 (quoting *Cel-Tech*, 20 Cal. 4th at 187). The district court cites *Cel-Tech* for the general rule—but provides no basis for the specific conclusion. *See* 1-ER-167 (citing *Cel-Tech*, 20 Cal. 4th at 187). The district court also cites *Neovi*, 604

F.3d at 1158, for the proposition that the Ninth Circuit has required "that 'consumers ha[ve] a free and informed choice' under the FTC test for unfairness." 1-ER-167.

The district court's use of a *cf* cite is telling, as *Neovi* was a *consumer protection* case brought under Section 5, not a competitor case. *See Neovi*, 604 F.3d at 1152 (noting the case involved "unfair or deceptive practices"). And while the district court is correct that *Cel-Tech* looks "for guidance to the jurisprudence arising under the 'parallel' section 5 of the [FTC] Act" to determine "what is unfair" under the UCL (*Id*. at 164 n.638 (citing *Cel-Tech*, 20 Cal. 4th at 186)), it omits a very important footnote at the end of that paragraph:

> Section 5 contains ***two prohibitions***: one against "unfair methods of competition" and the other against "unfair or deceptive acts or practices." The former generally governs injuries to competitors, the latter injuries to consumers as well as competitors. ***Our notice of federal law under section 5 means only that federal cases interpreting the prohibition against "unfair methods of competition" may assist us in determining whether a particular challenged act or practice is unfair under the test we adopt.*** We do not deem the federal cases controlling or determinative, merely persuasive.

Cel-Tech, 20 Cal. 4th at 186 n.11 (citation omitted; emphasis added). In other words, the California Supreme Court was only looking to unfair competition cases—not unfair or deceptive acts or practices cases like *Neovi*. The Ninth Circuit has confirmed this in *Lozano*, where it declined "to apply the FTC standard" in a consumer UCL case because "the discussion [in *Cel-Tech*] clearly revolves around anti-competitive conduct, rather than anti-consumer conduct." *Lozano*, 504 F.3d at 736 (quoting *Cel-Tech*, 20 Cal. 4th at 186 n.11).

The error in the district court's application of *Neovi* is made clear by following the logic to its natural conclusion. *Cel-Tech* holds that in unfair competition cases, the definition of "unfairness" is more limited than it is in unfair consumer practices cases. The district court washes this distinction away, which is precisely the approach *Cel-Tech* rejected. Therefore, *Neovi* cannot be the basis for tethering Epic's UCL claim to an antitrust theory of harm.[2]

Levitt also compels this result. There, the plaintiffs' theory was that "Yelp's conduct 'harms competition by favoring businesses that submit to Yelp's manipulative conduct and purchase advertising to the detriment of competing businesses that decline to purchase advertising.'" *Levitt*, 765 F.3d at 1136. Like Epic's claim, Levitt's theory was that providing (or not providing) consumers with information is alone sufficient to satisfy the tethering test. The Ninth Circuit rejected this—noting such a "general allegation does not satisfy *Cel-Tech's* requirement that the effect of Yelp's conduct amounts to a violation of antitrust laws 'or otherwise

[2] The question of "free and informed choice" in *Neovi*—an unfair business practice case for which there is a statutory reasonable avoidability requirement that does not apply to "unfair methods of competition" claims brought under Section 5—went to the question of "whether consumer's injuries were reasonably avoidable," not whether the defendant's conduct caused substantial injury to consumers. *Neovi*, 604 F.3d at 1158; *see* 15 U.S.C. § 45(n) (excluding business practices that are "reasonably avoidable by consumers themselves").

significantly threatens or harms competition.'" *Id.* at 1137 (quoting *Cel-Tech*, 20 Cal. 4th at 187).

2. *Bates v. State Bar of Arizona* Was Decided On First Amendment Grounds, Not Antitrust

The district court also cites *Bates* for the proposition that "[r]estrictions on price information 'serve to increase the difficulty of discovering the lowest cost seller . . . and [reduce] the incentive to price competitively[.]" 1-ER-167 (citing *Bates*, 433 U.S. at 377). But *Bates* was not decided on antitrust grounds; rather, the Sherman Act claim was quickly dismissed under the state action doctrine. *See* 433 U.S. at 363 (citing *Parker v. Brown*, 317 U.S. 341 (1943)). The regulation was stricken on First Amendment grounds—the State Bar of Arizona had argued economic justifications to the limitation on commercial speech, and the Supreme Court rejected them because they were economically unsound. *See id.* at 377–78 (rejecting the argument that "advertising will increase the overhead costs of the profession" or "create a substantial entry barrier," finding neither argument persuasive—but in any cause "neither appears relevant to the First Amendment").

This is a key distinction—Apple's restrictions on price advertising were not implemented by a government agency (and thus not prohibited under the First Amendment). While Apple could not avail itself of *Parker* immunity, in *Bates* the Supreme Court did not address whether the antitrust laws could—or even should—proscribe a unilateral restriction on advertising. *See id.* at 363. Indeed, the cases the

Court cited in a footnote even to advert to that possibility *all* involved Sherman Act claims subject to the *per se* rule against price fixing, not unilateral business practices subject to the rule of reason. *Compare id.* at 356 & n.7, *with United States v. Gasoline Retailers Assn.*, 285 F.2d 688, 691 (7th Cir. 1961) ("[w]e are of the opinion that the agreement and the activities in the present case are a *per se* violation of the Sherman Act"); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 217 (1940) (discussing the proper application of the *per se* rule); *United States v. National Society of Professional Engineers*, 555 F.2d 978, 983 (D.C. Cir. 1977) (approving the application of the *per se* rule in that case).[3]

3. ***Eastman Kodak* Did Not Enjoin Behavior Based Purely On The Existence Of Information Costs**

While *Eastman Kodak* is an antitrust case, the district court failed to take notice of the different procedural posture. *Eastman Kodak* was a tying case (and note, the district court here rejected both of Epic's actual tying claims), which required proof of two separate relevant markets that had been tied together. *See* 504 U.S. at 463. Because "[e]nough doubt is cast on Kodak's claim of a unified market that it should be resolved by the trier of fact," summary judgment was inappropriate.

[3] Ironically, the district court's application of the UCL raises its own First Amendment issues, as it is effectively requiring Apple to carry its competitors' speech against its will. *Cf. Am. Bev. Ass'n v. City & Cty of S.F.*, 871 F.3d 884, 891 (9th Cir. 2017) (compelled commercial speech may implicate First Amendment concerns).

Id. By contrast, the district court was acting as the trier of fact here—Epic's failure of evidence may have been enough to survive summary judgment, but it was insufficient to support an injunction on the merits.

For that reason, it was improper for the district court to rely on *Eastman Kodak* to tether Epic's UCL claim to the antitrust laws. It is true "the Supreme Court has recognized that such information costs may create the *potential* for anticompetitive exploitation of consumers" through a lock-in theory (1-ER-167 (citing *Eastman Kodak*, 504 U.S. at 473–75 (emphasis added)), but a plaintiff must show more than that at the merits stage of a case. And in any event, this restriction of information was not independently actionable under the antitrust laws; it was only relevant when tethered to a standalone tying claim—claims the district court rejected because there was no evidence of separate product markets. *See* 1-ER-158 ("IAP is not a separate product"). Nor did the district court address other questions, like whether "the seller can price discriminate between its locked-in customers and potential new customers." *Eastman Kodak*, 504 U.S. at 476. *Cel-Tech* requires a UCL claim to be tethered to the antitrust laws by more than speculation, incomplete analysis, and forced analogies. *See People's Choice Wireless, Inc. v. Verizon Wireless*, 131 Cal. App. 4th 656, 666–67 (Cal. Ct. App. 2005) ("To be frank, a skepticism was born with this forced analogy [to *Eastman Kodak*] . . . . [U]nless there is an exception, the right to refuse to deal remains sacrosanct. Because that is true, the mere refusal to deal does not violate the spirit or policy of antitrust law.").

IV. THE DISTRICT COURT SHOULD NOT HAVE ENJOINED BUSINESS PRACTICES WITHOUT A "FULSOME RECORD" TO SUPPORT ITS RULING

The district court justified its imposition of a narrow remedy despite the fact Epic's request for "broad sweeping relief failed" because the "FTC Act, which California courts have used as guidance on the UCL, similarly permits remedies beyond the 'specific violations alleged in the complaint' that were 'litigated in the manner contemplated by the statute." 1-ER-166 (citing *Sears*, 676 F.2d at 390–91). Once again, the district court reaches too far in its effort to save Epic from the failure of its antitrust claims.

Sears involved a much different—indeed, opposite—set of facts. Sears was found to have engaged in "false and deceptive" advertising for dishwashers, and the FTC issued its final order to cover all "major home appliances." *Sears*, 676 F.2d at 388–89. The Ninth Circuit said it was "too late to argue that when the Commission establishes a violation only as to one product, its power under the Act is limited to the issuance of a single product order." *Id*. at 391; *see also id.* (quoting *National Lead Co.*, 352 U.S. at 431 ("those caught violating the Act must expect some fencing in")). In other words, proof of a narrow violation can justify a broader remedial order in certain cases—such as those involving deliberate and serious violations.

Yet that is not the case here. As demonstrated above, Epic went 0-for-9 on its antitrust claims and would have lost on the UCL claim had the district court properly applied the tethering test. So unlike *Sears*, Epic has failed to prove a violation of law, and thus Apple should *not* expect some "fencing in" at the hands of the district court. One cannot use a case that says proof of a small violation may justify a larger remedy to then justify imposing a smaller remedy when the plaintiff failed to prove the broader (or any) violation.

CONCLUSION

The district court's injunction is based on a theory of harm untethered from antitrust laws. The district court erred by applying the wrong test under the UCL and misapplying the tethering test to a theory of harm untethered to the antitrust laws. The district court also erred by granting a remedy not sought at trial, for which there was no evidence in the record. This Court should reverse.

Respectfully submitted,

/s/ Michael Pepson
Jeffrey A. Ogar
Michael Pepson
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
571.329.4529
mpepson@afphq.org

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 21-16506 and 21-16695

I am the attorney or self-represented party.

This brief contains 6,989 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
    [ ] it is a joint brief submitted by separately represented parties;
    [ ] a party or parties are filing a single brief in response to multiple briefs; or
    [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated ______________.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Michael Pepson **Date** March 31, 2022

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2022, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Appellee, Cross-Appellant with the Clerk of the Court by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
Michael Pepson

Dated: March 31, 2022