No. 21-16506

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPIC GAMES, INC.,
Plaintiff-Counter-Defendant-Appellant,

v.

APPLE, INC.,
Defendant-Counter-Claimant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. 4:20-cv-05640-YGR (Honorable Yvonne Gonzalez Rogers)

BRIEF OF FORMER FEDERAL ANTITRUST ENFORCERS AS *AMICI CURIAE* IN SUPPORT OF APPLE AND AFFIRMANCE

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INTEREST OF AMICI CURIAE[1]

Amici curiae Ethan Glass, Abbott B. Lipsky, Jr., Leslie Overton, Bilal Sayyed, James Tierney, and Joshua Wright are former government officials charged with enforcing the Nation's federal antitrust laws. As former government officials and as antitrust practitioners, *amici* have a strong interest in the consistent enforcement and predictable construction of the Sherman Act and other core antitrust statutes so as to promote competition and innovation throughout the U.S. economy. *Amici* submit this brief in their individual capacities. The views expressed herein do not necessarily reflect the views of any entity with which they are affiliated, or of any client. Additional information concerning each of the *amici* is set forth in an Addendum to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal antitrust law provides a powerful tool for protecting free competitive enterprise and promoting consumer welfare in the Nation's markets. Due in part to careful antitrust enforcement, the United States is home to an unusually dynamic and innovative business environment. But that environment is not guaranteed. It is especially important to ensure the proper application of antitrust principles in cases

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel has authored this brief in whole or in part, or contributed money to fund its preparation or submission, and that no person other than *amici* or their counsel contributed money intended to fund its preparation or submission. The parties have consented to the filing of this brief.

involving dynamic new technology markets, where novel products and business models—forms of innovation that are "essential to economic growth and social welfare"—are sometimes erroneously treated as anticompetitive, thereby impairing significant "consumer benefits." *FTC v. Qualcomm*, 969 F.3d 974, 991 (9th Cir. 2020) (quoting Rachel S. Tennis & Alexander Baier Schwab, *Business Model Innovation and Antitrust Law*, 29 Yale J. on Reg. 307, 319 (2012)).

This case concerns antitrust claims that implicate highly innovative technology and business practices in the digital technology marketplace. Since the iPhone's inception, Apple has treated iPhones as "walled gardens." The only applications that may be used on the iPhone's operating system (iOS) must be downloaded through Apple's App Store, and such applications may not be made available on the App Store unless they meet Apple's specifications. App developer Epic Games ("Epic") claims that the App Store's closed ecosystem constitutes a violation of Sections 1 and 2 of the Sherman Act. Following a lengthy bench trial, the district court found, among other things, that this walled-garden quality contributed to the privacy and security of the iPhone consumer experience, and helped drive the iPhone's success in the market for smartphones. Based on its findings, the district court concluded that Apple's restrictions on iOS app distribution do not violate either Sections 1 or 2.

Amici submit this brief because of their concerns over the arguments presented by the United States as *amicus curiae*. The United States' arguments with respect to the elements of a rule of reason analysis would do significant harm to antitrust law if adopted by this Court. Those arguments should be rejected.

First, the district court properly subjected Epic's claims to a rule of reason analysis, applying a three-step burden-shifting framework that is well established by Supreme Court and Ninth Circuit precedent. The court properly evaluated the market realities surrounding the App Store, ultimately concluding that Epic failed to carry its legal burden at the third step, and that "Apple's business choice of ensuring security and protecting its intellectual property rights through centralized app distribution is reasonable." ER152. The United States argues that the district court erred by failing to engaging a *fourth* step consisting of "weigh[ing] the harms and benefits" of Apple's practices, after engaging in the three-part burden-shifting analysis called for by law. U.S. Br. 17 (citation omitted). That is mistaken: The three-part analysis applied by the district court *is* the test for analyzing the benefits and harms posed by allegedly anticompetitive business practices. The United States' call for an additional "weighing" inquiry would pit incommensurable values against each other, which is why this kind of case does not lend itself to such an inquiry. *See* Herbert Hovenkamp, *Antitrust Balancing*, 12 NYU J.L. & Bus. 369, 373 (2016). This Court should not heed that call here.

Second, the district court properly respected the limitations of the Sherman Act—and of the generalist courts that must construe the Sherman Act—when it recognized that courts are ill-equipped to act as central planners, and should not "impose a duty that [they] cannot explain or adequately and reasonably supervise." ER151 (quoting *NCAA v. Alston*, 141 S. Ct. 2141, 2163 (2021)); *see also Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 415 (2004). Given the district court's finding that Epic failed to carry its burden of proof on its claims, it correctly rejected Epic's call for the court to "micro-manage" Apple's App Store platform. ER151. This is consistent with the antitrust rule that, absent certain limited circumstances, firms are generally permitted to set the terms and conditions of any course of dealing with third parties. *See Pac. Bell Tel. Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 448 (2009).

Given the district court's finding that Epic failed to meet its burden of proof, the insistence that the district court nevertheless should have ordered Apple to deal on terms and conditions selected by Epic (or by a generalist antitrust court) would upend settled precedent respecting monopolization claims under the Sherman Act. If endorsed by this Court, such an unwarranted expansion of the Sherman Act would present a serious threat to innovation, impairing businesses' legitimate efforts to control the design and operation of their own products and services. The district

court correctly analyzed Epic's monopolization claims, and the United States' arguments respecting the district court's decision on that front lack merit.

The district court's judgment should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ARTICULATED AND APPLIED THE RULE OF REASON FRAMEWORK

The district court's treatment of the core antitrust claims at issue here, concerning Apple's alleged restraints on the markets for iOS app distribution and in-app payments, turned on its analysis of those claims under a well-established rule of reason framework. That framework sets out a "three-part, burden-shifting" standard governing allegations of anticompetitive conduct. *Alston*, 141 S. Ct. at 2160 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)).

At the first step in that framework, a plaintiff must "prove that the challenged restraint that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Am. Express*, 138 S. Ct. at 2284. If the plaintiff does so, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* Finally, if the defendant has articulated a legitimate procompetitive rationale, the plaintiff must show that the defendant's desired "procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* Here, the district court undertook that three-part analysis and found that Epic's claims against Apple foundered at the third step,

because the procompetitive interests behind Apple's App Store policies—namely, its interests in iPhone device security, differentiating the iPhone from other products in the market, and the protection of its intellectual property—could not reasonably be accomplished by the alternative policies proffered by Epic. ER150-52.

The United States argues that the district court erred by neglecting to undertake a *fourth* step in this rule of reason analysis. In the United States' view, the fact that Epic failed to identify a plausible, alternative means of accomplishing Apple's legitimate business interests should not have doomed its claims. Instead, the United States contends, the district court should have proceeded past that third step and ventured to "'weigh[ ] all of the circumstances' in order to 'assess whether a challenged restraint harms competition.'" U.S. Br. 15 (quoting *Alston*, 141 S. Ct. at 2160). The United States asserts that by "erroneously halt[ing] its analysis" at the third step of the rule of reason framework, the district court failed to "mak[e] the ultimate assessment of reasonableness at the . . . heart" of the rule of reason. *Id.*

This argument subverts Supreme Court and Ninth Circuit precedent, which recognizes that the way "reasonableness" is assessed under the rule of reason is through the "*three*-part" framework identified above. *Alston*, 141 S. Ct. at 2160 (emphasis added). The United States' approach cannot be reconciled with that binding precedent. And the United States' proposed approach raises intractable administrability problems that this Court should avoid. By superimposing a free-

form, "all of the circumstances" balancing inquiry on top of the three-part standard prescribed by time-honored precedents, the United States' approach would force the district court to weigh the relative merits of values that cannot be "cardinally measured and weighed against each other." Hovenkamp, *Antitrust Balancing*, 12 NYU J.L. & Bus. at 370. As a result, the United States' approach invites, "[a]t best," a reliance on a "complex mixture of soft economic and even ideological judgments" that lie beyond the ken of federal courts, and will jettison predictability for never ending litigation and appeals. *Id.* at 374. The proper analysis for rule of reason cases is the familiar three-part standard articulated and applied by the district court below.

A. The United States' Effort To Add A Fourth Step To The Rule Of Reason Framework Contradicts Binding Precedent

To start, the United States' four-step approach to rule of reason analysis conflicts with binding Supreme Court and Ninth Circuit precedent. In its amicus brief, the United States rips scattered language out of its context to suggest that the Supreme Court and this Court have endorsed such a four-step approach requiring, at the fourth step, a "weigh[ing of] all of the circumstances of a case." U.S. Br. 18 (quoting *Alston*, 141 S. Ct. at 2160). But that language stands for the proposition that the *three*-step rule of reason framework is *itself* a kind of "weighing" device, in which courts assess the circumstances of a case to determine first whether the case involves restraints on competition, and then whether the restraints are justified by procompetitive interests that are reasonably served by the challenged restraint. The

Supreme Court and this Court follow this three-step rule of reason framework as the vehicle for addressing these often complex questions. Departing from that framework in the manner proposed by the United States would erroneously cause uncertainty that may well harm legitimate competition and innovation.

In *Alston*, for example, the Court restated the "three-step, burden-shifting framework" that courts use to distinguish "between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Alston*, 141 S. Ct. at 2160 (quoting *Am. Express*, 138 S. Ct. at 2284). While the Court recognized that those "three steps do not represent a rote checklist" and may not "be employed as an inflexible substitute for careful analysis," it did not suggest that there is yet a *fourth* "weighing" or "balancing" step that must be completed after those three steps are considered. *Id.* To the contrary, the Court described its "three-step" test as being a "means" by which courts distinguish between anticompetitive and reasonable restraints on trade—full stop. *Id.*

Furthermore, the rest of *Alston* rejected the proposition that courts should engage in fine-grained balancing analyses comparing the anticompetitive costs of a challenged practice with the efficiencies of the pro-competitive justification for that practice. Significantly, in discussing the third step of the rule of reason analysis, the Court affirmed the proposition that "antitrust law does not require businesses to use

anything like the least restrictive means of achieving legitimate business purposes." *Id.* at 2161. That is because the lawfulness of a business's conduct should not turn upon "judgments of degrees of efficiency." *Id.* (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986)). In other words, "[t]o know that the Sherman Act prohibits only *unreasonable* restraints of trade is . . . to know that attempts to '[m]eter small deviations [are] not an appropriate antitrust function.'" *Id.* (quoting Hovenkamp, *Antitrust Balancing*, 12 NYU J.L. & Bus. at 377). The *Alston* Court thus appropriately recognized, as described further below, that such "balancing" inquiries are not administrable, and are "not an appropriate antitrust function." *Id.*

Consistent with the three-part test described in the Supreme Court's decisions in *Alston* and *American Express*, this Court has repeatedly described the rule of reason framework governing Section 1 claims as involving a "three-part burden-shifting test" involving the same steps described above. *Qualcomm*, 969 F.3d at 991; *see also O'Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (setting out the "three-step framework of the Rule of Reason"); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001); *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996).

This Court's decisions in *Tanaka* and *Hairston* are instructive. There, the Court correctly held that a "restraint violates the rule of reason if the restraint's harm

to competition outweighs its procompetitive effects." *Tanaka*, 252 F.3d at 1063 (citing *Hairston*, 101 F.3d at 1319). The court's ultimate role is to "determine[ ] whether the restraint's harm to competition outweighs the restraint's procompetitive effects." *Hairston*, 101 F.3d at 1319. But the *means* by which a court should make that determination is through the three-part test that both *Tanaka* and *Hairston* articulated: first, whether the plaintiff has shown that the restraint imposes significant anticompetitive effects; second, whether the defendant has proffered evidence of the restraint's procompetitive effects; and third, whether the defendant's "legitimate objectives can be achieved in a substantially less restrictive manner." *Tanaka*, 252 F.3d at 1063 (quoting *Hairston*, 101 F.3d at 1319). If the plaintiff cannot prove that a defendant's "legitimate"—i.e., lawful—objectives could be achieved in a less restrictive way, then the plaintiff cannot show that the defendant's conduct pursuing that objective is unreasonable. And so the Sherman Act's prohibition on "*unreasonable* restraints of trade" does not come into play. *Alston*, 141 S. Ct. at 2161.

Against this body of case law, the United States does not offer any Supreme Court case law embodying the kind of four-step analysis it advocates, and it offers a scattershot set of Ninth Circuit precedents that do not aid its position. Indeed, the most recent Ninth Circuit decision cited by the United States cuts squarely *against* its position. *See* U.S. Br. 17 (citing *Aya Healthcare Servs., Inc. v. AMN Healthcare,*

Inc., 9 F.4th 1102, 1108 (9th Cir. 2021)). In *Aya*, this Court noted that the "rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects." 9 F.4th at 1108 (quoting *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003)). But the *Aya* Court went on to explain how such weighing should play out in practice: "To determine whether a restraint violates the rule-of-reason, we apply a three-step, burden-shifting framework," in which the last step is to shift the burden "'back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.'" *Id.* at 1111 (quoting *Am. Express*, 138 S. Ct. at 2284). *Aya* shows why the United States is wrong, not why it is right.

The rest of the Ninth Circuit cases cited by the United States add little support for its position. In *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404 (9th Cir. 1991), this Court (consistent with its later explanation in *Aya*) noted that the rule of reason requires a factfinder to "analyze the anti-competitive effects along with any pro-competitive effects to determine whether the [challenged] practice is unreasonable on balance." 929 F.2d at 1413 (citations omitted). The court then walked through the usual burden-shifting framework for analyzing rule of reason cases, explaining that after a defendant has brought forth "evidence of pro-competitive effects," the "plaintiff, driven to this point, *must then try to show* that any legitimate objectives can be achieved in a substantially less restrictive manner." *Id.* (emphasis added).

Bhan does not suggest, as the United States asserts, that this showing is purely optional, and that a plaintiff may prevail even if it fails to make this showing. Rather, *Bhan* suggests that this showing is mandatory if the plaintiff is to prevail at the third step. To be sure, *Bhan* also says that a court "must weigh the harms and benefits to determine if the [defendant's] behavior is reasonable on balance." *Id.* But this Court's decisions in the three decades since that case was decided have not read *Bhan* as establishing that such "weigh[ing]" is independent of the three-step framework. Just the opposite: This Court's decision in *Hairston*, articulating a three-step rule of reason framework, relied on *Bhan* as establishing that framework. *See Hairston*, 101 F.3d at 1319 (citing *Bhan*).[2]

That leaves only *County of Tuolumne v. Sonora Community Hospital*, 236 F.3d 1148 (9th Cir. 2001), in which this Court appended a "balancing stage" to its rule of reason analysis after reaching the third step of the burden-shifting framework and finding that the plaintiffs had "failed to meet their burden of advancing viable less restrictive alternatives." 236 F.3d at 1160. *Sonora Community Hospital* did not

[2] The United States also cites *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996), in which this Court set out a free-form "balancing test" for determining whether a restraint is "unreasonable," and entirely failed to articulate or apply the well-established burden-shifting framework described above. *American Ad Management* does not stand for the kind of four-step analysis advocated by the United States, but rather stands for an unformed mode of analysis that has long since been superseded by Supreme Court and Ninth Circuit case law mandating a structured burden-shifting framework in rule of reason cases.

cite any Ninth Circuit precedent for this step, and its analysis is clearly an outlier. Before and after *Sonora Community Hospital*, this Court articulated a three-step test, not a four-step test, for analyzing rule of reason cases. *See O'Bannon*, 802 F.3d at 1070; *Tanaka*, 252 F.3d at 1063; *Hairston*, 101 F.3d at 1319.

In any event, the United States does not linger on *Sonora Community Hospital*, and it is easy to see why. In that case, which concerned credentialing criteria for physicians performing cesarean-section surgeries at a small private hospital, the Court's "balancing stage" did no analytical work at all. Indeed, it consisted of a single sentence: "[A]ny anticompetitive harm [worked by the credentialing criteria] is offset by the procompetitive effects of [the hospital's] effort to maintain the quality of patient care that it provides." 236 F.3d at 1160. In other words, the Court merely restated the hospital's "legitimate" interest in "optimizing patients' health," which it had already reviewed at the second step of the burden-shifting framework. *Id.* at 1159. And it is hard to imagine what more the Court might have said: How is a court supposed to weigh a hospital's interest in its patients' health against the anticompetitive effects that a policy effectuating that interest might impose on the local market for C-section surgeries? As discussed further below, there is no clear way to do so, which is why this Court and the Supreme Court properly limit themselves to asking whether the challenged policy

reasonably effectuates a legitimate procompetitive interest at the second and third steps of the three-step rule of reason framework. *See Alston*, 141 S. Ct. at 2161.

Supreme Court and Ninth Circuit precedents foreclose the position taken by the United States in this case. The way to determine whether a restraint on trade violates the rule of reason is to undertake the three-step analysis set out above.

B. The "Weighing" Or "Balancing" Analysis Proposed By The United States Is Unworkable In This Case

Even setting aside the precedential barriers to the United States' "weighing" argument, the argument fails on its merits because it is not administrable in this case. As the nation's leading antitrust scholar has explained, the notion of an additional "antitrust balancing" or "weighing" analysis in Sherman Act cases beyond the three-step rule of reason analysis is often misplaced because "[b]alancing requires that two offsetting effects"—that is, anticompetitive effects and procompetitive effects—"can be measured by some common cardinal unit, such as dollars or tons or centimeters, and then weighed against each other." Hovenkamp, *Antitrust Balancing*, 12 NYU J.L. & Bus. at 373. But many rule of reason cases, such as the *Sonora Community Hospital* case discussed above, do not "lend themselves to such treatment" because the considerations involved are not measurable in equivalent terms, but rather call for the consideration of disparate interests or values, such as a "state's interest in promoting temperance with the federal interest in promoting competition. It's a little like balancing pride and prejudice, or harmony and ecstasy."

Id. at 373-74. This Court has previously warned that such balancing inquiries may prove "not just unwise," but indeed "unadministrable." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 1000 (9th Cir. 2010).

This is a case in point. As the district court summarized it, the opposing values at issue here are the "harm [to] competition" that Apple's App Store regime has imposed among game developers, "precluding [them], especially larger ones, from opening competing game stores on iOS and compet[ing] for other developers and users on price," ER147, as against Apple's procompetitive interest in user "security," including the prevention of "social engineering attacks" and protection against "fraud, privacy intrusion, and objectionable content," as well as Apple's procompetitive interest in "interbrand competition" with Google, ER149, and its interest in "guard[ing] its intellectual property from uncompensated use by others," ER150. It is unclear how the district court could weigh these disparate interests or effects against each other, at least without attaching some kind of (arbitrary) economic value to each and then attempting to sum them up. The United States' amicus brief makes no effort to explain how this could be done here, much less in a predictable fashion, and in the absence of any principled methodology for establishing a common basis of comparison, a "weighing" inquiry is certain to devolve into an unprincipled mix of "soft economic and even ideological judgments" about complex business arrangements. Hovenkamp, *supra*, at 374; *see also Allied*

Orthopedic, 592 F.3d at 1000 (9th Cir. 2010) (noting the absence of any "criteria" by which the pro-competitive "benefits" of a firm's conduct may be weighed against "resulting injuries to competitors").

Indeed, even assuming that the anticompetitive and procompetitive effects at stake in this case could be made commensurate in quantifiable terms, the Supreme Court has cautioned that this kind of elaborate social-welfare calculation and balancing is often misbegotten because it cannot be employed effectively by courts. Rules "that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." *Alston*, 141 S. Ct. at 2161 (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)). Antitrust rules must be susceptible to administration by generalist federal courts. They also must be designed so as not to encourage courts to police "'small deviations'" from lawful conduct, since the Sherman Act proscribes only "*unreasonable* restraints of trade," and "mistaken condemnations of legitimate business arrangements" impose considerable social costs—including costs to competition. *Id.* (quoting Hovenkamp, *supra*, at 377). The balancing inquiry called for by the United States in this case greatly heightens the risk of administrative error and attendant social costs by mistakenly treating the district court as if it were an

omniscient central planner. *See id.* at 2163-64 ("[J]udges make for poor 'central planners' and should never aspire to the role.").

Outside the antitrust context, the Supreme Court has cautioned against multi-factor balancing tests that "jettison[] relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock,* 513 U.S. 527, 547 (1995). But at least multifactor balancing tests have *factors*. Here, the United States has not even begun to articulate how a "weighing" analysis should work, or what would factor into it. In the antitrust context, such an amorphous and rudderless test would prove particularly harmful to the very interests in the maintenance of stable and competitive markets that antitrust law is designed to promote.

The three-part rule of reason framework recognized by this Court and the Supreme Court offers a clear and administrable standard, and nothing more was required of the district court. That established framework identifies unreasonable restraints of trade by giving plaintiffs the opportunity to prove first that a defendant's conduct has imposed anticompetitive effects on the relevant market, and then that the defendant's "proffered justification [is] either a pretense or else that a substantially equivalent benefit could be achieved in a less anticompetitive manner." Hovenkamp, *supra*, at 371. Those burden-shifting inquiries into pretext and

tailoring are the sort of inquiries with which generalist federal courts are well acquainted. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (describing a three-part burden-shifting test for evaluating employment-discrimination claims); *see also, e.g.*, *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454-55 (2015) (discussing the application of First Amendment narrow-tailoring rules). The three-part rule of reason standard allows courts to evaluate antitrust claims in a familiar kind of framework, and to stay "out of the business of 'balancing' abstractions." Hovenkamp, *supra*, at 384. This Court should expressly reject the United States' proposal for a fourth, "weighing" step in this case.

II. THE UNITED STATES' ANALYSIS OF EPIC'S MONOPOLIZATION CLAIMS CONFLICTS WITH BINDING SUPREME COURT PRECEDENT AND THREATENS INNOVATION

It is a basic principle of American antitrust law that, as a general matter, individual firms—even monopolists—have no duty to make their platforms or facilities available to others. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) ("*Trinko*"). That rule is grounded in several important policy concerns, the most important of which is that recognizing such a duty would "lessen the incentive for [firms] . . . to invest in those economically beneficial facilities." *Id.* A Sherman Act monopolization claim resting on allegations that a single firm has engaged in "refusals to deal" with other businesses is, generally speaking, no monopolization claim at all.

As the district court properly recognized below, Section 2 "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." ER151 (quoting *Trinko*, 540 U.S. at 415-16). To the contrary, even market-dominant firms are entitled to "choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell Tel. Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 448 (2009) (citation omitted). Here, the district court found that Apple has consistently treated iPhones as walled gardens by allowing iPhone users to download apps only from the App Store, and has consistently imposed certain terms and conditions of dealing on its App Store in order guarantee the security of apps made available to iPhone users. ER30-31; ER148. It also found that the competitive success of the iPhone in the marketplace rests in large part on these practices. ER148-49. Based on these factual findings, the district court correctly determined that those business practices are lawful under Section 2. ER155.

The United States argues (at 24-27) that the district court should have applied greater scrutiny to Apple's conduct when evaluating Epic's Section 2 monopolization claims. It asserts that "[b]ehavior that might otherwise not be of concern to the antitrust laws . . . can take on exclusionary connotations when practiced by a monopolist." U.S. Br. 25 (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting)). For the reasons

explained below, the United States' analysis of Epic's monopolization claims cannot be reconciled with Supreme Court precedent applying the antitrust laws, and would—if embraced by this Court—pose a real threat to innovation.

A. The Expansive Monopolization Theory Advanced By The United States Cannot Be Reconciled With The Supreme Court's Decision In *Trinko*

In *Trinko*, the Supreme Court reaffirmed the "long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Trinko*, 540 U.S. at 408 (alteration in original) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). Thus, as a general rule under the Sherman Act, while a business may not unreasonably burden competition, a business has "no duty to aid competitors." *Id.* at 411. That is true even if a firm has monopoly power. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985).[3]

[3] The Supreme Court's decision in *Aspen Skiing* recognized a "limited exception" to this general principle in cases where a monopolist's "unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggest[s] a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko*, 540 U.S. at 409 (emphasis omitted) (citing *Aspen Skiing*, 472 U.S. at 608); *see also Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074 (10th Cir. 2013) (Gorsuch, J.) (describing the *Aspen Skiing* exception as a "narrow-eyed needle"). As Apple has explained, Apple Br. 63, that exception does not apply here because Apple has not terminated a voluntary course of dealing, but has rather adhered to the same basic App Store policies ever since the App Store's inception. *See infra* at 21-23.

Section 2 of the Sherman Act does not prohibit the mere "possession of monopoly power in [a] relevant market," *Trinko*, 540 U.S. at 407, but rather "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident," *id.* (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). And firms may permissibly "acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." *Id.*

This case, as the district court found, involves Apple's development of an "innovative ecosystem" surrounding its signature product, the iPhone. ER30. The district court concluded that nobody "disputes that the iPhone was revolutionary and fundamentally changed the cellular device market" when it was introduced in 2007. *Id.* As a product, it was "fundamentally different" from the cellular phones that preceded it, characterized by its "multi-touch interface" that "offered users the ability to access email, browse the web, and perform certain software applications by simply tapping a square-ish icon on the screen called an 'app.'" *Id.* Given how pervasive this basic concept has become in the fifteen years since iPhone launched, the district court noted that "one may forget" just how novel it was when it arose. *Id.*

The district court found that, when it first launched the iPhone, Apple flatly "prohibited downloads of native apps from *any* third party." *Id.* (emphasis added).

Among other things, Apple was concerned about "securing the device from malicious software." *Id.* But the practice of "jailbreaking"—that is, modifying the iPhone's operating system (iOS) to "enable the installation of unauthorized software, including applications from other interfaces"—raised the specter of "severe security risks regarding installation of malicious apps and data exposure." ER31.

The district court found that this phenomenon caused Apple to rethink its app-development model, and drove Apple to "permit authorized native apps to be developed by third-party developers." *Id.* Yet Apple's concern for "device security" and "reliability" remained paramount. *Id.* Thus, Apple began developing a system that would "allow third-party developers to create iOS apps by licensing them with the interfaces and technology to do so," *id.*, subject to numerous restrictions, *see* ER32-36, ER39-44, including a set of "App Guidelines" that "address issues of safety, privacy, performance, and reliability," ER40. Apple also developed a centralized "App Store" allowing "third-party developers to reach customers with their apps," ER37, and required third-party developers to agree that "apps for Apple products . . . could only be distributed through the App Store," ER33.

The district court found that Apple has adhered to these basic practices since the iPhone's early days. As the court explained in its findings, "[i]n the beginning, the App Store's U.S. storefront offered 452 third-party apps . . . by 312 distinct developers." ER32. Today there are "over 30 million registered iOS developers,"

and "it is not particularly surprising, or necessarily nefarious, that Apple does not negotiate terms" with developers, but "[w]ith few exceptions, . . . maintains the same relationships with developers whether big or small." *Id.*

Overall, the district court found that Epic was in essence attacking "Apple's *own system* of distributing apps on Apple's *own devices* in the App Store," as well as "Apple's *own system* of collecting payments and commissions of purchases made on Apple's *own devices* in the App Store." ER4 (emphases in original). In light of those findings, the district court's refusal to impose duties on Apple that it cannot "adequately and reasonably supervise," ER151 (quoting *Alston*, 141 S. Ct. at 2163), and to "second-guess" Apple's "business choice of ensuring security and protecting its intellectual property rights through centralized app distribution," ER152, was consistent with *Trinko* and its progeny. Given Epic's failure to meet its burden of proof, it was not legal error for the district court to resist Epic's call to judicially "micro-manage" Apple's "policy decisions" and force Apple to accept "alternative[ ]" practices for guaranteeing the iPhone's "privacy, security, and quality." ER151. To hold otherwise would have raised exactly the sort of "central plan[ing]" concerns that *Trinko* cautions against. 540 U.S. at 408. On this record, the district court was right to "give wide berth" to Apple's legitimate business judgments. ER152 (quoting *Alston*, 141 S. Ct. at 2163). As the district court noted, the Sherman Act "does not give judges *carte blanche* to insist that a monopolist alter

its way of doing business whenever some other approach might yield greater competition." ER150-51 n.610 (quoting *Trinko*, 540 U.S. at 415-16).

B. United States' Proposed Approach Would Deter Innovation In Dynamic Technology Markets

Rather than upholding these core antitrust principles, the United States' amicus brief suggests that the district court erred by failing to recognize that "[b]ehavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." U.S. Br. 25 (quoting *Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting)). Thus, the United States contends that the district court should have used Epic's Section 2 claims as an opportunity to examine whether the "anticompetitive harm of [Apple's] conduct outweighs the procompetitive benefit" of that conduct. *Id.* at 26 (quoting *Qualcomm*, 969 F.3d at 991).

Taking the district court's factual findings as a given, the underdeveloped argument advanced by the United States is mistaken because a firm's unilateral decision to deal on certain terms with third parties does not become unlawful simply because the firm gains market power. *See Aspen Skiing*, 472 U.S. at 600 (explaining that it is "surely correct" that "even a firm with monopoly power has no general duty" to deal with third parties); *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 454 (7th Cir. 2020) ("[E]ven monopolists are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.") (internal

quotation marks and citation omitted); *Novell*, 731 F.3d at 1074 ("Even a monopolist generally has no duty to share (or continue to share) its intellectual or physical property[.]"). A contrary approach would turn the rule stated by the Supreme Court in *Trinko* and *linkLine* into a dead letter, since the rule has always operated to protect firms with significant market power against Section 2 monopolization claims. *See, e.g.*, *Trinko*, 540 U.S. at 407 (holding that "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers" and generally may not be "[c]ompell[ed] . . . to share the source of their advantage").

As the *Trinko* Court warned, the approach endorsed by the United States here would undermine "the incentive to innovate" and would badly distort "important element[s] of the free-market system." *Id.* The district court's findings highlight that danger well. As the district court found, Apple initially determined to keep the iPhone *entirely* walled off from third-party apps in the interest of device stability and security. ER30. Apple then chose to open the iPhone up to third-party developers on a conditional basis through the App Store after those developers began "jailbreaking phones and writing native applications" in order to force their way onto the platform. ER31. But if a company in Apple's position could be prohibited under the Sherman Act from dictating the terms and conditions under which third parties could use an innovation, it might choose to limit third parties' access to the product.

Thus, if a security-conscious Apple had decided to stick to its original plan by barring third-party apps entirely and devoting its creative energies to cracking down on "jailbreaking," the "innovative ecosystem" of the iPhone App Store might never have come into being. ER30.

Trinko is a vitally important procompetitive bulwark against antitrust claims that would turn courts into "central planners." *Trinko*, 540 U.S. at 408. Indeed, this Court has cautioned that "antitrust economists, and in turn lawyers and judges, tend to treat novel business practices as anticompetitive," which makes them "likely to decide cases wrongly in rapidly changing dynamic markets," thereby stifling innovation and "consumer benefits." *Qualcomm*, 969 F.3d at 991 (quoting Tennis & Schwab, *Business Model Innovation and Antitrust Law*, 29 Yale J. on Reg. at 319). This Court should steer clear of that tendency here, and reject the novel and unsound approach that the United States urges this Court to adopt.

CONCLUSION

The district court's judgment should be affirmed.

Dated: March 31, 2022

Respectfully submitted,

s/ *Gregory G. Garre*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,330 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font.

Dated: March 31, 2022

s/*Gregory G. Garre*
Gregory G. Garre

CERTIFICATE OF SERVICE

I certify that on March 31, 2022, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users.

s/*Gregory G. Garre*
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ADDENDUM

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Ethan Glass is a partner at Cooley LLP, where he practices antitrust and competition law. He previously served for nearly a decade in the U.S. Department of Justice's Antitrust Division, where he was involved in leading many of the Division's most significant matters, including a successful challenged to the merger of two major home appliance manufacturers—one of the largest and most high-profile merger challenges ever brought to trial in the United States—and the seminal trial victory against American Express. During his time at the Department of Justice, he was honored with the Attorney General's Distinguished Service Award (the second-highest award at the Department of Justice), the Attorney General's John Marshall Award for Trial of Litigation, and multiple Assistant Attorney General awards.

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Joshua Wright is a university professor of law and the executive director of the Global Antitrust Institute at George Mason University. He previously served as an FTC Commissioner (2013-2015), a position to which he was nominated by President Obama and unanimously confirmed by the U.S. Senate. He previously served in the FTC's Bureau of Competition as its inaugural Scholar-in-Residence (2007-2008), where his research focused on competition enforcement and policy. He is the co-author of a leading antitrust casebook, and has published widely on topics in antitrust law, economics, and consumer protection.