Docket Nos. 21-16506 (L), 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.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 4:20-cv-05640-YGR · Honorable Yvonne Gonzalez Rogers

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF DEFENDANT-COUNTERCLAIMANT-APPELLEE-CROSS-APPELLANT

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FED. R. APP. P. 29(a)(4)(E) STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* declare that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (3) no person—other than the *amici curiae* or their counsel—contributed money that was intended to fund preparing or submitting this brief.

INTEREST OF AMICI CURIAE

The undersigned *amici curiae* are professors of antitrust law who have an interest in its correct interpretation and enforcement. See Addendum A. We respectfully submit this brief, pursuant to Federal Rule of Appellate Procedure 29(a)(2), to support the district court's decision that unilateral conduct should not be subject to Section 1 of the Sherman Act. 15 U.S.C. § 1. We submit that the court's ruling is supported by antitrust law and policy, and that extending Section 1 to unilateral conduct would undermine the role of Section 2 of the Sherman Act, 15 U.S.C. § 2. For these reasons, the district court's order should be allowed to stand on this issue.

SUMMARY OF THE ARGUMENT

Section 1 prohibits "[e]very contract, combination […], or conspiracy, in restraint of trade." 15 U.S.C. § 1. Expounding upon the statute's plain language, the Ninth Circuit has determined that the "essence" of a Section 1 claim is "concerted action" that deprives the marketplace of the independent centers of decision-making. *E.W. French & Sons, Inc. v. Gen. Portland Inc.*, 885 F.2d 1392, 1397 (9th Cir. 1989). Beyond a technical contract between two parties, concerted action therefore requires an agreement as to a common design, objective, or purpose. Absent such an agreement, the Supreme Court has routinely held that unilateral conduct falls short of the requirements of Section 1. *See, e.g.*, *Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752, 761, 764 (1984). Instead, unilateral conduct must be judged under the

standards of Section 2 that have been developed to balance concerns related to monopolistic conduct against the risk of chilling procompetitive conduct.

The district court applied this doctrine to find that Apple's DPLA reflected a unilateral contract by Apple that did not meet the concerted action requirements of Section 1. *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR, at 143 (N.D. Cal. Sept. 10, 2021) ("Order"). Apple unilaterally set the terms of its product license to reflect the closed system design of its product and chose not to deal with users who did not comply with those rules. Product design generally involves a unilateral decision by a single economic actor that does not give rise to concerted action for purposes of Section 1. Instead, courts have consistently analyzed the potential anticompetitive effects of product design under Section 2. *See, e.g.*, *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998 (9th Cir. 2010). Even under Section 2, courts have recognized that the standards for assessing product design decisions should be applied carefully to avoid stifling innovation. *Id.*

The proposal by Epic and its *amici* to extend Section 1 of the Sherman Act to any conduct that involves a contract even if there is no agreement as to a common design, purpose, or objective threatens to collapse the careful distinction made by Congress and the courts between concerted action and unilateral conduct. The effect would be to undermine the policy justifications for the specific standards developed

for Section 2. Importantly, a decision to apply carefully developed standards of Section 2 does not immunize unilateral conduct from scrutiny. Instead, it makes sure that the appropriate standards are applied that take into account the nature of the challenged conduct and the risks to competition.

ARGUMENT

I. UNILATERAL CONDUCT DOES NOT SATISFY THE CONCERTED ACTION REQUIREMENT OF SECTION 1 OF THE SHERMAN ACT

To establish liability under Section 1 of the Sherman Act, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was an unreasonable restraint of trade. Order at 140. The district court held that Epic did not satisfy the first element of the existence of an agreement as to the Developer Program Licensing Agreement ("DPLA") between Apple and all of its iOS platform developers, including Epic. *Id.* at 142. The conclusion was based on its finding that the "DPLA is a unilateral contract which the parties agree that a developer must accept its provisions (including the challenged restrictions) to distribute games on iOS." *Id.* at 142. The district court's finding appropriately reflects unilateral conduct as part of a deliberate design and licensing decision that fell short of concerted action between Apple and the iOS platform developers to satisfy the first element of Section 1 under antitrust jurisprudence.

A. Section 1 Requires an Element of Concerted Action

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. However, as the Supreme Court made clear in *Nat'l Soc'y of Pro. Eng'rs v. United States*, "[o]ne problem presented by the language of § 1 of the Sherman Act is that *it cannot mean what it says*." 435 U.S. 679, 687 (1978) (emphasis added). Thus, Congress could not have intended the text of the Sherman Act to "delineate the full meaning of the statute or its application in concrete situations." *Id.* at 688.

Expounding upon the plain language of the statute, the Ninth Circuit has stated that an action under Section 1 requires proof of three elements, the first being "a contract, combination, or conspiracy to restrain trade." *E.W. French*, 885 F.2d at 1397. To this end, the Ninth Circuit has determined that "[t]he essence of a Section 1 claim is concerted action." *Id.* (citing *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 525 (9th Cir. 1987)) (internal quotation omitted).

This reading joins the previously semantically separated terms of "contract… or conspiracy" in Section 1. This is based on the canon of interpretation *noscitur a sociis*, or "it is known by its associates," which posits that the meaning of an unclear or ambiguous word should be determined by considering the words with which it is associated in the context. Merriam Webster Dictionary (2022); *see also* Antonin

Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 30 (Thomson West 2012). "Combination" and "conspiracy" inform the meaning of "contract" to accordingly mean a form of "concerted action." *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010) ("[A]n arrangement must embody concerted action in order to be a 'contract, combination…, or conspiracy' under § 1.") (Alteration in the original); *see also* Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 Cal. L. Rev. 683, 727 (Jun. 2011).

While the distinction is "not always clearly drawn by parties and courts," the Supreme Court has repeatedly explained that concerted action requires "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Monsanto*, 465 U.S.at 761, 764 (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). The essence of concerted action therefore goes beyond a technical "agreement," and requires an agreement as to a common design, objective, or purpose. *See concerted action*, Black's Law Dictionary (11th ed. 2019) (defining "concerted action" as an "action that has been planned, arranged, and agreed on by parties acting together to further some scheme or cause, so that all involved are liable for the actions of one another"). In the antitrust context, this requires a "sudden joining of two independent sources of economic power previously pursuing separate interests," *Copperweld Corp. v.*

Indep. Tube Corp., 467 U.S. 771 (1984), that "deprives the marketplace of …actual or potential competition" *Am. Needle*, 560 U.S. at 195 (quotation marks omitted).

B. Unilateral Conduct Falls Outside the Scope of Section 1

The courts have drawn a sharp distinction between the rules applicable to concerted action and unilateral conduct that reflects the separate provisions of the Sherman Act. While Section 1 requires concerted action, the Supreme Court has routinely held that unilateral conduct falls under the standards of Section 2. *See, e.g.*, *id.* at 190 ("The meaning of the term 'contract, combination …, or conspiracy' is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes § 1 of the Sherman Act from § 2") (internal quotation marks omitted). Courts have emphasized that "[u]nilateral conduct by a single firm, *even if it appears restrain trade unreasonably*, is not unlawful under [S]ection 1 of the Sherman Act." *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988) (emphasis added) (internal quotation marks omitted); *see also Monsanto*, 465 U.S. at 761 ("Independent action is not proscribed [under Section 1]").

As the district court noted, the Sherman Act's distinction between concerted and unilateral conduct is appropriately based in the different standards that apply to each type of conduct. Order 141–42. Concerted action subject to Section 1 is "judged more sternly than unilateral activity under [Section] 2." *Copperweld*, 467 U.S. at

768. This is precisely because concerted action—whether between independent competitors or vertically related parties at different levels of the supply chain—"deprives the marketplace of the independent centers of decision-making that competition assumes and demands." *Id*. at 769: *see also* Nathaniel Grow, *American Needle and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 Am. Bus. L.J. 449, 475 (2011).

Accordingly, courts have rejected Section 1 claims in which the defendant merely promulgated policies or contractual terms to which potential counterparties were required to adhere. "A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto*, 465 U.S. at 761 (citing *United States v. Colgate & Co*., 250 U.S. 300, 307 (1919)) (rejecting Section 1 claim where manufacturer refused to sell to customers who will not maintain specified resale prices). The Supreme Court in *Monsanto* declared that under *Colgate*, manufacturers "can announce their resale prices in advance and refuse to deal with those who fail to comply." 465 U.S. at 761. Likewise, distributors are also "free to acquiesce in the manufacturer's demand in order to avoid termination." *Id.* To constitute concerted action, these restrictions must be part of an agreement on a common design, purpose, or objective.

II. PRODUCT DESIGN AND RELATED LICENSING DECISIONS REFLECT UNILATERAL CONDUCT BY THE LICENSOR

The Ninth Circuit and other courts have held that product design is a unilateral decision most appropriately analyzed under Section 2. *See Allied Orthopedic*, 592 F.3d at 998; *Cal. Comput. Prods., Inc. v. Int'l Bus. Machines Corp.*, 613 F.2d 727, 742 (9th Cir. 1979); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979). Further, imposing licensing conditions on users as part of this product design does not constitute concerted action under Section 1. *See Levi Case Co. v. ATS Prods., Inc.*, 788 F. Supp. 428, 432 (N.D. Cal. 1992) (finding no concerted action between patent holder and exclusive licensee).

Portfolio licenses like the DPLA define the field of use covered by the license and set out the terms of use. There is no "meeting of [the] minds" between the app store developer and the software developers who gain access to the proprietary technology to facilitate the distribution of their software (here, apps). *See Am. Tobacco*, 328 U.S. at 810. Instead, portfolio licenses define the product through terms uniformly and unilaterally imposed by the licensor. In exchange for access to Apple's proprietary technology, Apple has said that app developers must abide by the same terms of the DPLA that Apple imposes on each app developer.

A. Product Design Reflects Unilateral Conduct

Product design fundamentally involves a unilateral decision by a single economic actor that does not give rise to concerted action for purposes of Section 1. As a result, courts have analyzed the potential anticompetitive effects of product design under Section 2 of the Sherman Act. *Allied Orthopedic*, 592 F.3d at 998 ("[C]hanges in product design…may constitute an unlawful means of maintaining a monopoly under Section 2"); *see Berkey Photo*, 603 F.2d at 282–83 (analyzing decision to use new film format in new camera under Section 2).

Here, the district court's decision reflects that Epic has failed to present evidence that reasonably tends to prove that Apple "had a conscious commitment to a common scheme designed to achieve an unlawful objective" in its product design. *E.W. French*, 855 F.2d at 1397 (citing *Monsanto*, 465 U.S. at 764) (defining concerted action under Section 1). Apple has maintained throughout the litigation that the terms at issue are fundamentally part of a design decision to offer a closed system. Order at 110 ("When Apple first launched the App Store, it sought to 'strike a really good path' between the dependability of a closed device and the ability to run third-party apps of a PC."); Apple's Final Proposed Findings of Fact at ¶65. That decision has not changed materially at least since Epic signed the DPLA. Order at 18 ("Since 2010, there has been no material change in the terms of Epic Games' agreements with Apple, nor in Apple's business design."). Epic argues that Apple

designed anticompetitive technical restrictions into iOS that prevent certain behaviors—namely, downloading alternative app stores or circumventing Apple's proprietary IAP system. Epic Br. at 2–4. However, Apple posits that these systems reflect its unilateral decision to design its products as a closed system, thereby making it necessary for third party developers to seek a license for access, and to impose restrictions on the access that Apple does grant.

B. Licensing Terms Inherently Set the Terms by which the Licensor Will Offer its Services

It is well established that patent holders like Apple generally have the right to exclude others from using their proprietary technology, absent a special obligation to do so. *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980) ("[T]he essence of a patent grant is the right to exclude others from profiting by the patented invention"). Patent holders also by extension have the right to set the terms by which it is willing to do business with others. "[I]t is a longstanding antitrust principle that Section 1 of the Sherman Act does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business." *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1078 (S.D. Cal. 2002) (citing *49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463, 1468 (9th Cir.1986)); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074 (10th Cir. 2013) (Gorsuch, J.) ("Even a monopolist generally has no duty to share (or continue to share) its intellectual or physical property with a rival.").

A patent holder's decisions regarding how and to whom it will license its property do not constitute concerted action. The simple fact that the licensing terms are set out in a written agreement—whether we call it a "contract" or a "license"—does not transform the unilaterally set conditions into concerted action. *See Toscano v. Pro. Golfers' Ass'n*, 258 F.3d 978, 985 (9th Cir. 2001) (no concerted action despite written contract where "defendants played no role in the creation or enforcement of those rules and regulations"). It is the substance of the terms, and not their form, that governs. *See Copperweld*, 467 U.S. at 772–73; *Levi, Inc.*, 788 F. Supp. at 432 (finding that no agreement involving "the exploitation of the patent in which they both held an interest can be considered to deprive the marketplace of independent sources of economic power previously pursuing separate interests.") (Internal quotation marks omitted). At least one court in this circuit has held that agreements "unilaterally impose[d]" by technology platforms upon developers that "utilize the [platform]" do not constitute concerted action. *Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1077 (S.D. Cal. 2012) (holding Facebook's requirement that application developers agree to use only approved advertising partners, with whom Facebook had separate agreements, were not actionable under Section 1).

A software developer's decision to abide by the terms of a licensing agreement in exchange for the ability to access proprietary information like Apple's platform does not result in a "sudden joining of economic resources that had previously served

different interests." *Copperweld*, 467 U.S. at 753. App developers do not compete with Apple on iOS prior to signing the DPLA. Nor, in signing, do they cease to compete with other app developers on iOS or competing platforms.

The DPLA terms do not "deprive[] the marketplace of…independent centers of decisionmaking." *Copperweld*, 467 U.S. at 769. Epic and other app developers offer very different products and are otherwise unrestricted in how they choose to distribute or monetize their apps. Apple's terms do not extend beyond the intellectual property that Apple owns and properly seeks to protect and monetize. Other than abiding by Apple's rules when using Apple's products, app developers are otherwise free to compete with Apple in any manner and on any other platform they choose. Agreeing to the terms of the DPLA gives developers access to Apple's product, but does not amount to concerted action as to a common purpose or objective under Section 1.

C. Unilateral Product Design Should Be Reviewed Under Section 2

Multiple circuits have recognized that an overly interventionist approach to product design can stifle innovation and thus inadvertently harm competition. *Allied Orthopedic*, 592 F.3d at 998 ("[A]s a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes.") (quoting *United States v. Microsoft*, 253 F.3d 35, 65 (D.C. Cir. 2001)). Thus, the creation of a "superior product" is not monopolizing conduct, *Cal.*

Comput., 613 F.2d at 735, 742, because "[i]t is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests." *Berkey Photo*, 603 F.2d at 281.

Concerns for the potential stifling of innovation should product design be found anticompetitive are heightened when a business's decisions protect its intellectual property. Thus, while "[Section] 2 of the Sherman Act prohibits a monopolist from refusing to deal in order to create or maintain a monopoly absent a legitimate business justification," a monopolist's "desire to exclude others from its [protected] work is a presumptively valid business justification for any immediate harm to consumers." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1209, 1218 (9th Cir. 1997). *See also Cal. Comput.*, 613 F.2d at 742 ("[T]he Supreme Court excepted from monopolizing conduct those actions directed toward establishing growth by means of "a superior product, business acumen, or historic accident") (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)).

In the present case, Apple posits that its decision to create a closed ecosystem for its app store is an act of product design with procompetitive effects because it created a superior product. Order at 110; Apple's Final Proposed Findings of Fact at ¶ 65. Apple has explained that a closed ecosystem limits the proliferation of malware and enhances security on Apple's platform, which can create a superior product

where consumers can trust that the apps offered are safe for use. Order at 110. Given these potential procompetitive effects, the well-developed standards for product design claims under Section 2 should be applied carefully to avoid unforeseen consequences for safety and innovation.

III. DISTRICT COURT'S FINDING IS CONSISTENT WITH SUPREME COURT'S APPLICATION OF SECTION 1 TO SPECIFIC CONDUCT

Epic and its *amici* argue that the district court's conclusion is inconsistent with precedent applying Section 1 in the specific context of tying, exclusive dealing, or anti-steering claims where a supplier is imposing restrictions on the activities of another party as part of a sales or service arrangement. Epic Br. at 14; COSAL Br. at 17-18. While the district court expressed some uncertainty about consistency with these arrangements, Order at 142–43, the application of its analysis is consistent with the relevant Supreme Court precedent. While there may be an element of coercion required as part of these claims, they are appropriately applied to conduct that otherwise reflects concerted action between the parties as to their independent interactions with competitors.

A. The Supreme Court's Tying Jurisprudence Does Not Broadly Extend Section 1 to Unilateral Conduct

Tying arrangements generally exist when a seller of a product (the tying product) requires the consumer to also purchase a second product (the tied product). No less than four overlapping statutes have been applied to tying arrangements,

depending on the facts: Section 1 of the Sherman Act; Section 2 of the Sherman Act; Section 3 of the Clayton Act; and Section 5 of the FTC Act. While tying jurisprudence borrows freely from cases tried under these different statutes, these statutes continue to impose distinct underlying requirements.

Tying claims under Section 1 of the Sherman Act requires the satisfaction of specific elements, such as the separate-products doctrine that itself incorporates aspects of the concerted action requirements of Section 1. The fact that the theory of harm includes an aspect of coercion by the supplier with respect to one particular aspect of the arrangement does not eliminate the broader concerted action requirements of Section 1. Nor does tying precedent lack an alternative standard for unilateral conduct. Section 2 applies more broadly to unilateral tying conduct requiring "only that the defendant be a dominant firm…and that the practice be unreasonably exclusionary." Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. Rev. 1611, 1620 (2010); *see Novell*, 731 F.3d at 1072 (listing tying as an example of Section 2 misconduct).

Furthermore, the crux of a Section 1 tying arrangement is the forced purchase of the tied product that restricts the purchaser's choice to buy elsewhere. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *abrogated on other grounds by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). Fundamentally, tying reflects an agreement with the distributor not to purchase from other

competitors. A unilateral product design restriction by contrast has no impact on the user's ability to interact with third parties. Apple's position is that Epic can freely offer its products on other competing platforms and otherwise deal with any of its competitors.

Notably, current tying jurisprudence reflects the historical development of a specific standard applied to particular conduct. Courts that apply Section 1 often cite the definition of a "tying arrangement" stated in *N. Pac. Ry. Co. v. United States*; "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." 356 U.S. 1, 5–6 (1958); *see* Christopher R. Leslie, *Unilaterally Imposed Tying Arrangements and Antitrust's Concerted Action Requirement*, 60 Ohio St. L.J. 1773, 1793 (2010). When *N. Pacific* was decided, *Copperweld* was not yet decided and a corporation could be liable for conspiring with its own wholly owned subsidiary. Leslie, *supra*, at 1794. That was the case in *N. Pacific*, where Northern Pacific Railway Co. and its wholly-owned subsidiary, Northwestern Improvement Co., agreed to tie railway access to land purchases. *N. Pac. Ry.*, 356 U.S. at 4 n.3; Leslie, *supra*, at 1794.

B. The District Court's Findings Are Consistent with the Analysis of Exclusive Dealing and Anti-Steering Provisions

Notwithstanding its language questioning the consistency of the concerted action doctrine with the application of Section 1 to exclusive dealing and anti-steering claims, the district court's approach is consistent with the Supreme Court's precedent. In each case, the conduct similarly includes concerted action reflected in the restrictions on the distributor's dealings with third parties. Apple posits that none of the unilateral restrictions in the DPLA implicated developers' ability to deal with competitors.

In particular, *Ohio v. Am. Express Co* has little precedential value for examining whether the licenses underpinning Apple's closed system reflect concerted action with developers. 138 S. Ct. 2274 (2018). Importantly, the courts provided only cursory analysis of whether American Express's commercial arrangement with merchants constituted concerted action. The district court concluded summarily that concerted action existed because the provisions were "contained in American Express's card acceptance agreements with its merchants." *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 167 (E.D.N.Y. 2015). The Department of Justice further observed in its brief that American Express's anti-steering provisions were "only rarely subject to negotiation." Brief for the United States as Respondent Supporting Petitioners, *Ohio v. Am. Express Co.*, No. 16-1454,

2017 WL 6205804, at 6–7 (Dec. 7, 2017). In short, the record of whether the arrangement with merchants reflected concerted action was not fully developed.

Furthermore, card acceptance agreements addressed commercial terms on which merchants would offer American Express's payment services to consumers and the benefits they would receive in return.[1] These anti-steering provisions controlled how the merchants would agree to promote American Express's payment services relative to competing payment services that they offer to consumers. Even if there was limited opportunity to negotiate, there was an agreement on how these services would be promoted by the merchant and the benefits to the merchant for agreeing not to steer business to other services. This commercial arrangement governing each party's rights and obligations in promoting competing services going forward is distinct from the product design decisions reflected in the licensing terms of a platform that offers a closed system for app developers. The challenged restrictions may govern who Apple itself is willing to give access to its own system; they do not impact the app developers' ability to compete elsewhere.

[1] The anti-steering provisions allegedly "prohibit[ed] merchants from implying a preference for non-Amex cards; dissuading customers from using Amex cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, or fees on Amex cards; or promoting other cards more than Amex." *Am. Express*, 138 S. Ct. at 2283.

IV. POLICY CONSIDERATIONS SUPPORT DIFFERENT STANDARDS FOR CONCERTED ACTION AND UNILATERAL CONDUCT

The distinction between Section 1 and Section 2 is foundational to the antitrust laws. Epic's interpretation of the Sherman Act threatens to collapse the careful distinction made by Congress between concerted action and unilateral conduct. For firms that clearly lack monopoly power sufficient to support a Section 2 claim, conflating the standards opens up burdensome litigation, creating an unnecessary strain on the courts and chilling potentially procompetitive competition. This is particularly true in the case of innovative industries driven by dynamic competition, where there is a legitimate risk of discouraging investment in product design.

In *Copperweld*, the Supreme Court opined that it may be "difficult to distinguish robust competition from conduct with long-run anti-competitive effects." 467 U.S. at 767–68. Congress therefore authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will "dampen the competitive zeal of a single aggressive entrepreneur." *Id.* Furthermore, conspiracies between two or more parties are "more easily appraised for reasonableness" than unilateral action, which is by contrast "often difficult to evaluate or remedy by any means short of government management of the enterprise." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their*

Application, at ¶1402a (Wolters Kluwer 2022). Plaintiffs challenging unilateral conduct must therefore satisfy the higher market power standard of Section 2.

Epic and their *amici* cite public policy concerns with applying a rigorous analysis of whether a commercial arrangement reflects concerted action. *See* Epic Br. at 37 (citing "disastrous consequences" of "incentiviz[ing] anticompetitive behavior"; State AG Br. at 14 (citing "bad public policy" that would "both complicate and impede effective antitrust enforcement"). These arguments ignore the careful distinctions that have been developed by the courts over time. Importantly, a decision to apply thoughtfully developed standards of Section 2 does not immunize unilateral conduct from scrutiny. Instead, it makes sure that the appropriate standards are applied that take into account the nature of the challenged conduct.

Similarly, the district court expresses some hesitancy about the application of its analysis of concerted action on the basis that applying a "narrow view" would conflict with the goals of antitrust law. Order at 142. This is based on an assumption that "ending the analysis" with a finding of unilateral conduct would not allow the courts to test the competitive effect of particular conduct in concentrated markets. *Id.* However, the conclusion that conduct is unilateral does not definitively end the analysis. It simply shifts the conduct to consideration under Section 2 standards—as the court did in its own analysis of Epic's monopoly maintenance claims.

Areeda and Hovenkamp identify four rationales for Section 1 analysis based on concerted action: increased risk of anticompetitive action and results, expansion of market power, creation of an anticompetitive restraint not otherwise possible, or surrender of decision-making autonomy regarding something of competitive significance. Areeda & Hovenkamp, *supra*, at ¶1402a. Indeed, "many contacts are 'natural' or desirable or do not implicate the statutory purpose," and where an "assumed meeting of the minds implicates no statutory concern about conspiracy," there is no reason for application of Section 1 analysis. *Id*. Where these elements are lacking, particularly the risk of expansion of market power and creation of a restraint not otherwise possible, treatment under Section 2 is most appropriate. *Id*.

If all conduct that involves any form of contract becomes subject to scrutiny under Section 1, the effect would further be to undermine the policy justifications for the specific standards developed for Section 2. A more rigorous analysis should be required to distinguish unilateral conduct from true concerted action between independent actors that supports the standard applied in Section 1. Since all commercial arrangements involve some form of contract, a strict reading of the contract requirement of Section 1 would theoretically capture all conduct other than a pure refusal to deal.

Dated: March 31, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Douglas Tween
Douglas Tween

Dated: March 31, 2022

ADDENDUM

ADDENDUM A

List of Academic Signatories*

Professor Amitai Aviram
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* The brief presents the view of the individual signers. Institutions are listed for identification purposes only.