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
The Honorable Yvonne Gonzalez Rogers

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLANT, CROSS-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization with members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents its members' interests in litigation and as amicus curiae.

Public Citizen believes that vigorous enforcement of antitrust laws is critical to protecting consumers against corporate practices that diminish consumer choice and increase prices. Public Citizen has often submitted or joined in amicus curiae briefs in cases involving antitrust claims. *See, e.g.*, *Ohio v. Am. Express*, 138 S. Ct. 2274 (2018); *N.C. Bd. of Dental Examiners v. FTC*, 574 U.S. 494 (2015).

[1] Counsel for both parties have consented to the filing of this brief through blanket consents filed with this Court. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to preparation or submission of this brief.

INTRODUCTION

Section 1 of the Sherman Act provides that "[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, is declared to be illegal." 15 U.S.C. § 1. "The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 186 (2010). The requirement of a "contract, combination …, or conspiracy" for a section 1 claim requires proof of concerted action. *See id.* at 189–190.

Here, the district court erred in holding that the contract between the parties failed to satisfy the concerted-action requirement of section 1. Under the plain language of section 1, "[e]very contract" between separate decisionmakers satisfies the concerted-action requirement. Section 1 makes no exception for contracts of adhesion. Moreover, as this Court has recognized, a contract itself is direct evidence of concerted action where the contract operates to restrain trade. The district court's reliance on *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and cases citing *Monsanto* was wrong.

FACTUAL BACKGROUND

To distribute an app to iOS users, Apple requires an app developer to enter into a non-negotiable, standardized contract—that is, a contract of adhesion. *See* 1ER29, 93.[2] Specifically, Apple requires developers to sign the Developer Product Licensing Agreement (DPLA), which requires developers, among other things, to distribute iOS apps exclusively through Apple's App Store. 1ER96. The DPLA further requires developers to use Apple's in-app payment system for all in-app purchases of digital content, and Apple charges a thirty percent commission for every digital purchase. 1ER34–36. The DPLA also requires developers to agree to comply with the App Store Review Guidelines, which include an anti-steering provision that prohibits "direct[ing] customers to purchasing mechanisms other than in-app purchase." 1ER34.

In this challenge by app developer Epic Games, the district court found that Apple's app-distribution restrictions have anti-competitive effects. 1ER147–48. It stated that Apple's "restrictions harm competition by precluding developers, especially larger ones, from opening competing

[2] "1ER" refers to Volume 1 of the Appellant, Cross-Appellee Epic Games, Inc.'s Excerpts of Record, filed at Docket Entry No. 42-2.

game stores on iOS and compet[ing] for other developers and users on price." 1ER147. Nonetheless, the district court ruled against Epic on its claim under Sherman Act § 1. As to the first element of the § 1 claim, the court held that the concerted-action requirement was not satisfied because "the DPLA is a unilateral contract" and "the parties agree that a developer must accept its provisions (including the challenged restrictions) to distribute games on iOS." 1ER145.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE DPLA FAILS TO SATISFY THE CONCERTED-ACTION REQUIREMENT OF SECTION 1.

Under Sherman Act § 1, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce … is declared to be illegal." 15 U.S.C. § 1. In explaining the elements of a section 1 claim, this Court has stated that "a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016).

The first element of section 1 requires proof of concerted action. As the Supreme Court has explained, "an arrangement must embody

concerted action in order to be a 'contract, combination ..., or conspiracy' under § 1." *Am. Needle*, 560 U.S. at 191. "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." *Id.* at 190 (internal quotation marks omitted). "Section 1 applies only to concerted action that restrains trade," whereas "[s]ection 2 … covers both concerted and independent action" that monopolizes or threatens monopolization. *Id.* "Any concerted action in restraint of trade or commerce" is prohibited by section 1. *Id.* at 191.

A. The DPLA satisfies the concerted-action requirement because it is a contract between separate decision-makers.

1. All contracts between independent economic actors, including contracts of adhesion, come within the scope of section 1.

Section 1 of the Sherman Act provides that "*[e]very* contract … in restraint of trade or commerce" is unlawful. 15 U.S.C. § 1 (emphasis added). Thus, the plain meaning of section 1 encompasses all contracts, regardless of the type or form of the contract. *See Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1153 (9th Cir. 2003) (holding that

signed contracts between two entities "are direct evidence of 'concerted activity'" under section 1); *id.* at 1154 n.7 (stating that "every commercial agreement" between separate entities satisfies the first element of a section 1 claim).

The Supreme Court "has long recognized that Congress intended th[e] language [of section 1] to have a broad sweep, reaching any form of combination." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 785 (1984). Discussing Congress's purpose, the Court stated:

> [I]n view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation.

Id. Thus, "when Congress passed the Sherman Act, it left no area of its constitutional power [over commerce] unoccupied. Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329 n.10 (1991) (internal quotation marks and citation omitted).

Contrary to the plain language and the Supreme Court's confirmation of its comprehensive sweep, the district court ruled that the DPLA was outside the scope of section 1 because it was a contract of adhesion—that is, a non-negotiable contract that the "developer must accept." 1ER145.[3] Because section 1 encompasses "[e]very contract," 15 U.S.C. § 1, contracts of adhesion (including the DPLA) are within its scope. The district court's ruling thus contravenes both the broad statutory text and Congress's intent "to make sure that no form of contract," *Copperweld*, 467 U.S. at 785, would escape section 1 of the Sherman Act.

[3] The district court characterized the DPLA as a "unilateral contract," 1ER145, but its use of that term was both inaccurate and irrelevant. A "unilateral contract" has a specific meaning under contract law: "In contrast to a bilateral contract, a unilateral contract involves the exchange of a promise for a performance. The offer is accepted by rendering a performance rather than providing a promise," such as through "offers of rewards or prizes." *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 785 (9th Cir. 2012) (internal citation omitted). Here, the DPLA is a bilateral contract between Apple and Epic (or other developers). In particular, it is a "contract of adhesion," in which the "contractual terms are standardized and nonnegotiable." 1ER96. In addition to being incorrect as a matter of contract law, the district court's usage confused the distinct and unrelated questions of whether a contract is unilateral or bilateral for contract-law purposes, and whether conduct is unilateral or *concerted* for purposes of Sherman Act § 1.

Further, this Circuit and other courts have found section 1 violations arising from standardized form contracts. *See, e.g.*, *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 870 (9th Cir. 1986) (finding "overwhelming evidence of vertical agreement" where "Blue Cross signed several thousand express agreements with physicians"); *see also Wheel Ctr. Co. v. W. Die Casting Co.*, 1974 WL 868, at *5 (N.D. Cal. Jan. 31, 1974) (concluding that an anti-competitive provision in the defendant's "standard form contracts" "amounted in substance and effect … to an unreasonable agreement in restraint of interstate commerce within the meaning of Sherman Act Section 1"); *see also United States v. Apple Inc.*, 952 F. Supp. 2d 638, 698 (S.D.N.Y. 2013) (stating that although "[i]t is … not illegal for a company to adopt a form 'click-through' contract" or other business practices, "[t]hat does not … make it lawful for a company to use those business practices to effect an unreasonable restraint of trade"), *aff'd*, 791 F.3d 290 (2d Cir. 2015). As these courts recognized, a contract of adhesion—like any other contract—may form the basis for a section 1 claim.

Moreover, a contrary holding would significantly undermine antitrust enforcement in light of how ubiquitous contracts of adhesion

are today. *See* Anjanette H. Raymond, It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion, 91 Neb. L. Rev. 666, 695 (2013) (stating that "[c]ontracts of adhesion, especially those involving consumers and the purchase of basic goods, are ubiquitous in modern commercial life"); *see also* Steven J. Burton, The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate, 2006 J. Disp. Resol. 469, 479 (2006) (stating that "[a]dhesion contracts are ubiquitous in the American economy" and that "[o]ne scholar suggests that ninety-nine percent of contracts entered into in the United States are adhesion contracts").

2. The DPLA satisfies the *American Needle* test for concerted action.

In *American Needle,* the Supreme Court elaborated on the test for concerted action under Sherman Act § 1. 560 U.S. 183. The Court explained that in determining whether there is concerted action, it is not "formalistic distinctions" that matter, but rather "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Id.* at 191.

> The key is whether the alleged "contract, combination ..., or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination ..., or conspiracy" amongst "separate economic actors pursuing separate economic interests," such that the agreement "deprives the marketplace of independent centers of decision-making," and therefore of "diversity of entrepreneurial interests," and thus of actual or potential competition.

Id. at 195 (internal citations omitted). If an "agreement joins together 'independent centers of decisionmaking,'" "the court must decide whether the restraint of trade is an unreasonable and therefore illegal one." *Id.* at 196.

Applying this test, the Supreme Court concluded that the licensing activities of National Football League Properties—a joint venture formed by the thirty-two National Football League teams—constitute concerted action because the "teams are acting as 'separate economic actors pursuing economic interests,' and each team therefore is a potential 'independent cente[r] of decisionmaking.'" *Id.* at 197 (quoting *Copperweld*, 467 U.S. at 769). "Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned," the Court explained. *Id.* at 198. Their

actions are concerted because the teams "do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action." *Id.* at 196.

As *American Needle* recognizes, any arrangement—including any contractual arrangement—that "joins together separate decision-makers," *id.* at 195, meets the concerted-action requirement of section 1. The DPLA satisfies that test. Apple and Epic's interests are not aligned, and their agreement in the DPLA "deprive[d] the marketplace of independent centers of decisionmaking." *Id.* Like the NFL teams in *American Needle*, Epic and Apple are "separate economic actors" because each "is a potential 'independent center[] of decisionmaking.'" *Id.* Indeed, the record reflects that Epic requested exemption from certain provisions in the DPLA and that Apple denied that request, citing Epic and Apple's different interests. *See* 1ER27 (quoting letter from Apple to Epic stating that Apple "understand[s] [Epic's request] might be in Epic's financial interests, but Apple strongly believes these rules are vital to the health of the Apple platform and carry enormous benefits for both consumers and developers"). Because the DPLA "joins together independent centers

of decisionmaking," *Am. Needle*, 560 U.S. at 195, it satisfies the concerted-action requirement of section 1.

B. The DPLA is direct evidence of concerted action because the contract itself operates to achieve anti-competitive results.

Where a contract itself achieves anti-competitive results, this Court has recognized that the contractual agreement satisfies section 1's requirement of concerted action. *See William O. Gilley Enterprises, Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 665 (9th Cir. 2009) (stating that "[i]f the bilateral agreements in themselves have an illegal effect on competition …, then the bilateral agreements constitute the 'contract, combination or conspiracy' required for a claim under § 1 of the Sherman Act").

For example, in *Paladin Associates*, this Court held that the agreement to contract terms that were allegedly anti-competitive was direct evidence of concerted action. 328 F.3d at 1154. There, a natural-gas marketer sued a pipeline company, alleging that the company's contractual assignment of rights to a competitor marketer was an illegal boycott of the plaintiff that violated section 1. *Id.* at 1153. This Court concluded that "[t]he district court erred in concluding that the

assignments" in the written contracts were not direct evidence of concerted action." *Id.* at 1154. Rather, the assignment contracts were "express 'agreements,'" and those contracts, signed by representatives of the defendant-company and the competitor, were "direct evidence of 'concerted activity.'" *Id.* at 1153.

Likewise, in the context of a section 1 claim alleging illegal tying arrangements, this Court held that "the 'contract' requirement [of section 1] is satisfied in tie-in cases by the coerced *sales contract* for the tied item." *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1427 (9th Cir. 1995).[4] As the Court explained, "[a] showing that the buyer of the tied product was coerced by the tying arrangement into making the purchase is sufficient to show that the buyer was not merely 'acting independently.'" *Id.* (citation omitted). The contract was "evidence of a coerced agreement to purchase the tied product" and thus satisfied the requirement of concerted action. *Id.*[5]

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[4] "A tying arrangement is 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." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 461 (1992).

[5] Similarly, the Tenth Circuit held that "a contract between a buyer and seller satisfies the concerted action element of section 1 of the Sherman

In *William O. Gilley*, where a class of gasoline purchasers alleged that a network of bilateral sales-or-exchange agreements among the oil producers "facilitat[ed] coordinated action by the defendants that unlawfully restrains trade," the Court noted the "critical" "distinction" between allegations that a network of contracts facilitated coordinated action and allegations that the contracts *themselves* "violated the anti-trust laws due to their anti-competitive effect." 588 F.3d at 655. Although the plaintiffs had failed to plead the latter claim, the Court recognized that a claim alleging that the contracts "in themselves have an illegal effect on competition" would satisfy the "contract, combination or conspiracy" requirement of section 1. *Id.*

Other courts agree that a contract itself is proof of concerted activity in restraint of trade where the contract includes anti-competitive provisions. *See, e.g.*, *Spex Techs., Inc. v. Kingston Tech. Corp.*, 2019 WL 8198300, at *4 (C.D. Cal. Sept. 24, 2019) (finding that the counter-claimant plausibly alleged concerted action based upon an allegedly anti-competitive signed settlement agreement between the counter-defendant

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Act where the seller coerces a buyer's acquiescence in a tying arrangement imposed by the seller." *Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137, 1145 (10th Cir. 1997) (en banc).

and other parties); *United States v. American Express Co.*, 88 F. Supp. 3d 143, 167 (E.D.N.Y. 2015) (stating that the alleged anti-competitive provisions "are contained in American Express's card acceptance agreements with its merchants—satisfying the 'concerted action' element of a Section 1 violation"), *rev'd and remanded on other grounds*, 838 F.3d 179 (2d Cir. 2016); *Procaps S.A. v. Patheon Inc.*, 36 F. Supp. 3d 1306, 1321 (S.D. Fla. 2014) (concluding that "the Collaboration Agreement itself can provide the basis for satisfying the contract type of concerted action requirement" because "[b]y its express terms, section 1 is satisfied when there is a 'contract' between the parties[] [a]nd there is one here"); *United States v. Delta Dental of Rhode Island*, 943 F. Supp. 172, 175 (D.R.I. 1996) (concluding that "the requisite concerted action has been alleged" because "every contract between Delta and a participating dentist contains the [alleged anti-competitive] clause," and "Delta dentists expressly agree to comply" with that clause); *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81, 91–93 (S.D.N.Y. 1995) (concluding that allegations that the defendants entered into "various contracts and merger arrangements" with other parties satisfied the concerted-action element of section 1).

Accordingly, here, the district court erred in ruling that contracts of adhesion like the DPLA fail to satisfy the concerted-action requirement of section 1. The DPLA is an "express agreement[]," *Paladin Assocs.*, 328 F.3d at 1153, between Apple and Epic (or other app developers). The contract includes provisions that have anti-competitive effects, as the district court found. *See* 1ER146–48. Thus, the DPLA itself is direct evidence of concerted activity in restraint of trade.

Moreover, for an adhesive contract like the DPLA, the contract itself is direct evidence of concerted action for the same reason that the contract itself may be concerted action in the tying context. In *Datagate*, this Court explained that, in the tying context, the "coerced *sales contract* for the tied item" satisfies the concerted-action requirement because "[a] showing that the buyer of the tied product was coerced by the tying arrangement into making the purchase is sufficient to show that the buyer was not merely 'acting independently.'" 60 F.3d at 1427; *cf. Eastman Kodak*, 504 U.S. at 464 n.9 (stating that "[t]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product" and that "[w]hen such 'forcing' is present,

competition on the merits in the market for the tied item is restrained and the Sherman Act is violated"). Similarly, in a contract of adhesion, where a company, through its unequal bargaining power, coerces the buyer's agreement to terms that are not negotiable, the buyer is not merely acting independently when it acts in accordance with the agreement. Thus, just as the contract itself in a tying arrangement is "evidence of a coerced agreement" that satisfies the concerted-action requirement, *Datagate,* 60 F.3d at 1427, so too does the adhesion contract itself provide evidence of concerted activity.

C. The district court erred in ruling that the DPLA was "unilateral" activity outside the scope of section 1.

Because section 1 prohibits only concerted activity, unilateral or independent action does not violate section 1 of the Sherman Act. *See Am. Needle*, 560 U.S. at 190–91 (distinguishing "concerted" activity under section 1 from "unilateral" or "independent" activity under section 2). Elaborating on independent action, the Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.*, stated that "[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." 465 U.S. at 761. In *Monsanto*, the Court reaffirmed its statement in *United States v. Colgate & Co.*, 250 U.S. 300,

307 (1984), recognizing the "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[] and … [to] announce in advance the circumstances under which he will refuse to sell" without violating the Sherman Act. *See also Monsanto*, 465 U.S. at 761 (citing *Colgate*).

Citing *Monsanto* and two cases from this Court that relied on *Monsanto*—*The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988), and *Toscano v. Pro. Golfers Ass'n*, 258 F.3d 978 (9th Cir. 2001)—the district court ruled that the DPLA does not constitute concerted action because "the DPLA is a unilateral contract" and "the parties agree that a developer must accept its provisions." 1ER145. The district court was wrong.

1. The plaintiff's agreement to an anti-competitive contract is not independent action resulting from a company's refusal to deal.

The district court's reliance on the statement in *Monsanto* that the manufacturer has the right to deal or refuse to deal fails to recognize that a buyer's contractual agreement to the manufacturer's policy, willing or unwilling, is not "independent action" resulting from the manufacturer's

right to deal or refuse to deal. Rather, it is a "contract, combination …, or conspiracy" within the meaning of section 1.

As the Supreme Court explained in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960), "[w]hen the manufacturer's actions … go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, … he has put together a combination in violation of the Sherman Act." In that case, the manufacturer "announced a resale price maintenance policy" that specified resale prices and required wholesalers to refuse to deal with non-compliant retailers. *Id.* at 32. The Court concluded that the manufacturer "created a combination with the retailers and wholesalers" in violation of section 1 because "th[e] entire policy was tainted with the vice of illegality, when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices." *Id.* at 45–46.

Following *Parke, Davis*, courts have held that a plaintiff's agreement to an anti-competitive contract sought by a defendant satisfies section 1's requirement of concerted action. *See Systemcare*, 117 F.3d at

1145 (stating that "a plaintiff can clearly charge a combination between [the defendant] and himself, as of the day he unwillingly complied with the restrictive ... agreement[]" (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 141 (1968)); *see also Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 686 (10th Cir. 1984) (stating that a plaintiff "may establish the requisite combination or conspiracy … by showing that he himself unwillingly complied with the [anti-competitive] practice").

As this Court has recognized in the context of illegal tying arrangements, a *contract* that unreasonably restrains trade is not merely a company's "unilateral refusal to deal" with those who do not accept its terms of sale. *Datagate,* 60 F.3d at 1427. Rather, the illegal, concerted activity in a tying arrangement is the seller's contractually "*condition[ing]* the sale of the tying product upon the purchase of the tied product, thereby expanding its market power into the market for the tied product." *Id.* Similarly, in *Systemcare*, the Tenth Circuit rejected the defendant's "argument that in imposing a tying arrangement, a producer merely acts independently to establish a unilateral term of sale." 117 F.3d at 1143. It explained that "[a] unilateral refusal to deal preserves a

buyer's individual free choice" because "the buyer is free to independently balance the possible inability to obtain a desired product in the future against the competitive disadvantage of sale at or above the manufacturer's suggested price." *Id.* at 1144. By contrast,

> [w]hen a producer requires goods to be resold at a minimum price as a condition of sale, … a buyer's decision to sell the goods at the producer's suggested price is not a matter of independent competitive judgment. … Rather, the buyer's pricing decision is constrained by the terms imposed by the manufacturer as a condition of sale. 'The product ... comes packaged in a competition-free wrapping ... by virtue of concerted action induced by the manufacturer."

Id. at 1144 (quoting *Parke, Davis*, 362 U.S. at 47).

Like an illegal tying arrangement or a resale-price maintenance agreement, an anti-competitive contract of adhesion (like the DPLA) is not merely a unilateral term of sale, but a concerted restraint of trade. Epic's agreement to the DPLA was not simply "a matter of independent competitive judgment." *Systemcare*, 117 F.3d at 1144. Rather, the record reflects that the anti-competitive restrictions in the DPLA were "nonnegotiable," 1ER96, and that when Epic requested modified terms that would increase competitive alternatives, Apple said no, 1ER27. In the "highly concentrated market" occupied by Apple, 1ER145, Epic's access to the iOS app-distribution platform was "packaged in

competition-free wrapping … by virtue of concerted action induced by" Apple. *See Systemcare*, 117 F.3d at 1144 (quoting *Parke, Davis*, 362 U.S. at 47).

2. The cases cited by the district court do not support its view that a contract with anti-competitive provisions fails to satisfy the concerted-action requirement of section 1.

The cases cited by the district court—*Monsanto*, *Jeanery*, and *Toscano*—do not suggest that a written contract whose requirements are alleged to be anticompetitive is insufficient to satisfy section 1's requirement of concerted activity. Rather, those cases concern the different issue of what evidence suffices to prove a *conspiracy* in violation of section 1 in circumstances where there is no contract (*Monsanto*, *Jeanery*) or the contract itself does not reflect an illegal restraint of trade (*Toscano*).

a. In *Monsanto*, the Supreme Court set forth the evidentiary standard for a section 1 conspiracy. The Court explained that "there must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently" and that the plaintiff must present "direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious

commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* at 764 (citation omitted); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (stating that, in *Monsanto*, "we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy").

Applying that evidentiary standard, *Monsanto* held that the concerted-action requirement *was* satisfied. There, a manufacturer of agricultural herbicides alleged a price-fixing conspiracy against a distributor of herbicides. 465 U.S. at 750. The Court found concerted action because the record contained evidence "that Monsanto and some of its distributors were parties to an 'agreement' or 'conspiracy' to maintain resale prices and terminate price-cutters." *Id.* at 765. Although the record did not include a contract, the Court concluded that the concerted-action requirement was satisfied based on direct testimony from a Monsanto district manager and a distributor newsletter. *Id.* at 765–66.

By contrast, *Jeanery* and *Toscano* held that the concerted-action requirement was not satisfied under the evidentiary standard set forth

in *Monsanto*. In *Jeanery*, the plaintiff jeans distributor alleged that the jeans manufacturer and other jeans distributors had conspired to fix resale prices in violation of section 1, resulting in the plaintiff's termination when the plaintiff undercut those prices. 849 F.2d at 1154. This Court concluded that there was no concerted action because the evidence did not show that the alleged co-conspirators had "communicated acquiescence" to the agreement sought by the defendant. *Id.* at 1160. There was no evidence of a written contract among the alleged co-conspirators in *Jeanery*.

In *Toscano*, the plaintiff golfer alleged a section 1 conspiracy among the professional golf association (PGA Tour) and sponsors of golf tournaments. *Toscano v. PGA Tour, Inc.*, 70 F. Supp. 2d 1109, 1110 (E.D. Cal. 1999), *aff'd*, 258 F.3d 978. Applying the evidentiary standard set forth in *Monsanto* and reaffirmed in *Matsushita*, this Court concluded that the contracts between the local sponsors and the PGA Tour did not prove concerted activity in violation of section 1. *Toscano*, 258 F.3d at 985. The Court explained that the contracts "failed to clear the *Matsushita* hurdle," *id.*, because the contractual terms were "as consistent with permissible competition as with illegal conspiracy [and

do] not, standing alone, support an inference of antitrust conspiracy," *id.* (quoting *Matsushita*, 475 U.S. at 588). In so concluding, this Court stated that the "*Matsushita* analysis applies only when an inference of conspiracy must be made from circumstantial evidence." *Id.* at 984–85.

b. Here, Epic's claim is not based on an illegal conspiracy. Rather, Epic contends that the DPLA is an illegal *contract*. Section 1 prohibits "contracts, combinations …, *or* conspiracies." 15 U.S.C. § 1 (emphasis added). The distinction between a contract and a conspiracy is critical because, as this Court has explained, *Colgate* and its line of cases (including *Monsanto* and subsequent decisions) "relate[] only to the problem of *inferring* vertical agreements from conduct." *Barry*, 805 F.2d at 870 (emphasis added); *see also Toscano*, 258 F.3d at 984–85. "[T]here is no such necessity" for an inference where the record includes evidence of express agreements. *Barry*, 805 F.2d at 870; *see also Eskofot*, 872 F. Supp. at 92 (distinguishing *Monsanto* because "there is no allegation of conspiracy; rather, plaintiff alleges that defendants entered into combinations and contracts in restraint of trade").

As the Tenth Circuit put it, "[t]he essence of section 1's contract, combination, or conspiracy requirement" is "the *agreement*" to engage in

an unreasonable restraint of trade. *See Systemcare*, 117 F.3d at 1142–43. Where, as here, there is an express contractual agreement to engage in conduct that has anti-competitive effects, section 1's requirement of concerted action is satisfied. A contrary ruling would read the term "contract" out of the text of section 1. *See id.* at 1143.

Nothing in *Monsanto*, *Jeanery*, or *Toscano* is to the contrary. *Monsanto* and *Jeanery* did not consider whether a contractual agreement would satisfy the concerted-action requirement of section 1 because, in those cases, there was no evidence of any contract at all. Whereas in *Monsanto* there was sufficient evidence of an agreement even in the absence of a contract, in *Jeanery* there was not. And unlike in *Toscano*, where the contracts did not directly reflect anti-competitive activity, there is no need here for a circumstantial inference of a "contract, combination, or conspiracy" because the contract itself—the DPLA—*is* the express agreement that renders the parties' actions concerted. *Cf. Barry*, 805 F.2d at 870 (stating that *Colgate* and its line of cases is applicable only where an inference of conspiracy is needed, not where there are "express agreements" that illegally restrain trade). Indeed, when, two years following *Toscano*, this Court considered a case that *did*

present a contract with allegedly anti-competitive effects, it held that the contract itself satisfied the concerted-action requirement because it was an express agreement to restrain trade. *Paladin Assocs.,* 328 F.3d at 1154 (holding that signed agreements that assigned certain contractual rights were direct evidence of concerted action).

* * * *

In sum, the district court's ruling that contracts of adhesion like the DPLA fail to satisfy the requirement of concerted action was contrary to the text and purpose of section 1, to Supreme Court precedent defining concerted action, and to this Court's precedent holding that the contract itself provides direct evidence of concerted activity.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision.

Respectfully submitted,

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January 27, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), complies with the word limit of Fed. R. App. P. 29(a)(5) because it contains 5,362 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Wendy Liu
Wendy Liu

CERTIFICATE OF SERVICE

I certify that on January 27, 2022, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case, including all parties required to be served.

/s/ Wendy Liu
Wendy Liu