Nos. 21-16506 & 21-16695

United States Court of Appeals
For the Ninth Circuit

Epic Games, Inc.,

Plaintiff-Appellant,

v.

Apple, Inc.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 4:20-cv-05640-YGR

BRIEF FOR THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1, the Committee to Support the Antitrust Laws states that it is a nonprofit corporation and no entity has any ownership interest in it.

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Interest of Amicus Curiae[1]

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The Supreme Court and this Court have long recognized the key role private litigants play in enforcing federal antitrust laws. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *Memorex Corp. v. Int'l Bus. Machines Corp.*, 555 F.2d 1379, 1383 (9th Cir. 1977) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.") (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968)).

[1] The Parties have agreed to a blanket consent to the filing of amicus briefs by interested parties.

The Committee to Support the Antitrust Laws ("COSAL") is an independent, nonprofit corporation devoted to preventing, remediating, and deterring anticompetitive conduct through the enactment, preservation, and enforcement of a strong body of antitrust laws.[2] COSAL submits this amicus brief because the goals of U.S. competition policy would be undermined if this Court does not clarify the proper scope of §§ 1 and 2 of the Sherman Act. To ensure that the Sherman Act remains a vital force in promoting competition in technology and other markets, this Court should clarify that (1) all contracts—even "contracts of adhesion" imposed on reluctant participants—are subject to scrutiny under § 1, and (2) anticompetitive product design that enables the acquisition or maintenance of monopoly power in a properly defined relevant market can violate § 2.

[2] Amicus states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity—other than COSAL—has contributed money that was intended to fund its preparation or submission. In addition, no COSAL member whose firm is counsel for a party had any involvement in the organization's decision to file this amicus brief.

Summary of Argument

In the court below, the district court adopted Defendant Apple, Inc.'s argument that the express contracts it signs with developers are excluded from regulation under § 1 of the Sherman Act because they were contracts of adhesion and no "meeting of the minds" existed. The district court properly explained that "a business may set conditions for dealing unilaterally and refuse to deal with anyone who does not meet those conditions. However, where the conduct extends beyond announcing a policy and refusing to deal with noncompliant partners to coercing an agreement, the conduct falls under Section 1." *Epic Games, Inc. v. Apple, Inc.*, Rule 52 Order After Trial on the Merits, No. 4:20-cv-05640-YGR, Dkt. 812, at 142 (Sept. 10, 2021) ("Op.") (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). In the face of that clear standard, the court then ruled that the contract Apple forced game developers to sign did not fall under § 1 explicitly because Apple coerced the agreement. (Op. 142 (citation omitted).)

The holding that a *contract* is outside the reach of the Sherman Act whenever one party has the power to unilaterally impose

contractual terms contradicts more than a century of jurisprudence. The relevant inquiry to determine the existence of a contract, combination, or conspiracy under § 1 is not whether the contractual terms were dictated by a more powerful party. Rather, the critical determinant is the existence of a meeting of the minds. If it were otherwise, firms with market power would be able to leverage that power into a shield against Sherman Act liability. Thus, one entity's independent adherence to another entity's unilaterally imposed *policy* terms is not necessarily concerted action under § 1. *See Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987). But mutual *agreement* to those same terms, a necessary element of an enforceable contract, *is* a prohibited meeting of the minds, even if that meeting was coerced. *See id.*

If Apple argues, as an alternative ground for affirmance of the ruling in Apple's favor on Epic's Sherman Act § 2 claim, that its iOS product design is categorically immune from antitrust scrutiny and cannot constitute exclusionary conduct as a matter of law, this Court should reject that argument. Apple COL ¶ 249. Though Apple's

arguments on this point were not accepted by the district court, this Court should clarify the law by squarely ruling that § 2 of the Sherman Act applies to product design.

Exclusionary design can cause the same type of antitrust harm as any other type of anticompetitive conduct. Any blanket rule immunizing that conduct would create perverse incentives, encouraging monopolists to make design decisions calculated to maximize competitive limitations. Such a rule also cannot be squared with Congress's intent to promote competition and its condemnation of anticompetitive restraints, regardless of their form. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 760 (1984).

The Court should clarify the law on both grounds to safeguard the Sherman Act's role in regulating competitive restraints.

Argument

I. The district court's holding that § 1 of the Sherman Act does not apply to contracts with non-negotiable terms conflicts with established precedent.

Section 1 of the Sherman Act is explicit: "Every 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. Although this language, by its terms, applies to every agreement "in restraint of trade," the Sherman Act prohibits only "unreasonable" restraints. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Thus, to prove a violation of § 1, a plaintiff must establish first an agreement, and second that the agreement unreasonably restrained trade.

The agreement at issue here is the Developer Product Licensing Agreement ("DPLA") that Apple requires all iOS app developers to sign. It requires game developers to distribute exclusively through Apple's "App Store," where Apple extracts a 30% commission. The DPLA also prohibits developers from distributing their iOS apps via a competing app store, or even communicating to consumers the availability of lower prices on other platforms. The DPLA operates as an exclusive distribution agreement extending throughout the entire game-distribution market. Epic sought to prove that the DPLA unreasonably restrained trade by foreclosing competition, increasing consumer prices, and reducing output and innovation. The district court largely agreed that the DPLA harms consumer

welfare by reducing competition. (*See, e.g.*, Op. 99 ("In light of Apple's high profit margins on the App Store, a third-party store could likely provide game distribution at a lower commission and thereby either drive down prices or increase developer profits.").)

But the district court nevertheless rejected Epic's theory of harm as a basis for liability, concluding that the DPLA was not an agreement under the meaning of the Sherman Act. It reasoned that § 1 of the Sherman Act applies only to concerted, rather than unilateral conduct. The court found that Apple's actions fell within the latter category because "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." (Op. 141–42.) In the district court's view, Epic and other distributors' inability to negotiate the terms prevented the DPLA from constituting a "contract" for purposes of § 1. This conclusion conflicts with § 1's plain language and nearly a century of binding precedent, and effectively immunizes a wide range of anticompetitive agreements.

A. An express agreement is always a contract under § 1 of the Sherman Act.

Section 1 of the Sherman Act requires proof of "an agreement among two or more entities." *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1154 (9th Cir. 2003) (cleaned up). This requirement limits the application of § 1 to "concerted action," which has the potential to "deprive[] the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010) (cleaned up).

Because an express contract, by definition, represents a meeting of the minds, under this Court's binding precedent, "every commercial agreement . . . is an agreement among two or more entities." *Paladin*, 328 F.3d at 1154 n.7 (cleaned up). This principle finds support in longstanding Supreme Court precedent. For example, in *Perma Life Mufflers v. Int'l Parts Corp.*, a supplier of car exhaust system parts entered into franchise agreements with dealers. 392 U.S. 134, 135 (1968), *overruled on other grounds by*

Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984). Several dealers sued the supplier, alleging that the franchise agreements violated § 1 because, among other things, they barred the dealers from purchasing from other suppliers and required them to sell at fixed prices. *Id.* at 137. The Supreme Court held that each dealer could "*clearly charge a combination* between [the supplier] and himself, as of the day he unwillingly complied with the restrictive franchise agreements or between [the supplier] and other franchise dealers, whose acquiescence in [the supplier's] firmly enforced restraints was induced by the communicated danger of termination." *Id.* at 142 (cleaned up) (emphasis added); *see also Paladin*, 328 F.3d at 1156 (holding that signed contracts were, standing alone, sufficient to prove agreement).

As one influential treatise summarizes, "[t]he precedents are numerous that a § 1 conspiracy arises when an unwilling dealer, to avoid termination by its supplier, *promises* to buy a second commodity, to deal exclusively, or to restrict resales. . . . . [T]he legal convention of treating *express promises* in the vertical context as § 1

contracts or conspiracies is well established, notwithstanding an unwilling dealer." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1408d (4th and 5th Eds. 2015–2021) (emphasis added). A contract is a contract.

B. The district court erred in holding that non-negotiable restraints contained in express contracts constitute unilateral conduct outside the reach of § 1.

In the proceedings below, neither party questioned whether the DPLA was a contract. Indeed, Apple prevailed on breach-of-contract and declaratory judgment counterclaims to uphold and enforce the DPLA (Op. 173)—claims that depend on the DPLA constituting a meeting of the minds. *See, e.g.*, *Moritz v. Universal Studios LLC*, 54 Cal. App. 5th 238, 246 (Cal. Ct. App. 2020) ("To form a valid contract there must be a meeting of the minds, i.e., mutual assent."). The district court's analysis of the DPLA, however, centered on the principle that "a business may set conditions for dealing unilaterally and refuse to deal with anyone who does not meet those conditions." (Op. 141 (citing *Monsanto*, 465 U.S. at 761).)

Under the *Colgate* doctrine, expressed in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), an entity may unilaterally "announce in advance the circumstances under which [it] will refuse" to deal with others. *Id.* Other entities are then free to comply with those demands in order to avoid the termination of the business relationship. *See Monsanto*, 465 U.S. at 761 (1984). An announcement and subsequent imposition of a policy does not demonstrate a meeting of the minds, i.e., an agreement, because there is no evidence that the "distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id.* at 764 n.9. In other words, one entity's independent adherence to another entity's unilaterally imposed terms is not concerted action under § 1, unlike a mutual *agreement* to those same terms. *Isaksen*, 825 F.2d at 1164; *see also* Areeda *supra* ¶ 1408 (*Colgate* applies when "a manufacturer neither seeks nor obtains a *promise* of any kind from a dealer but supplies the product only as long as the dealer resells at a specified price or in a specified territory or buys a second product or refrains from handling a rival product") (emphasis added).

In *Colgate*, a manufacturer was indicted for violating § 1 because it had provided its distributors with lists of uniform prices to be charged and refused to sell to distributors who did not adhere to those prices. *Colgate*, 250 U.S. at 303. The Court held that § 1 did not apply, because the manufacturer was acting independently, not pursuant to any agreement with its distributors. *Id.* at 307.

But the century-old *Colgate* privilege, permitting a manufacturer to unilaterally impose vertical policies without creating an agreement subject to § 1, has never applied to express contracts. When a restraint is contained in an express contract—even when one of the contracting parties had the power to unilaterally impose it—there unquestionably is proof that the "distributor communicated its acquiescence or agreement [to the restraint], and that this was sought by the manufacturer." *Monsanto*, 465 U.S. at 764 n.9. *Colgate* itself recognized that distinction, differentiating the case before it from *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), where "the unlawful combination was effected through contracts" rather than through a

unilateral policy. In other words, *Colgate* draws a distinction between cases in which non-compliance with the counterparty's demands will merely "incur the displeasure" of the counterparty, 250 U.S. at 306, and cases in which non-compliance would result in *legal liability* for breach of contract, as in *Dr. Miles* and this case. Although a dealer's compliance with a unilateral policy is not an agreement subject to § 1, "[i]f (but only if) [the dealer] agrees to adhere (having been asked to), there is an agreement, no matter how unwilling [the dealer] is." *Isaksen*, 825 F.2d at 1164. On that score, the district court's reliance on *Monsanto* and *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988), eliminates the vitally important divide between unilateral policies, which do not implicate § 1, and express contracts, which do.

In *Monsanto*, a manufacturer of herbicide told distributors that if they did not adhere to certain resale prices, they would not receive adequate supplies of a new herbicide. *Monsanto*, 465 U.S. at 765. When one distributor still failed to charge the suggested prices, the manufacturer approached the distributor's parent company, which

instructed the distributor to comply. *Id.* The distributor then informed the manufacturer that it would adhere to the suggested pricing. *Id.* The *Monsanto* Court reaffirmed the *Colgate* principle that no agreement is formed when a manufacturer unilaterally announces a policy and distributors comply with it to avoid termination, but found that the demand and agreement there sufficiently evidenced a "meeting of the minds" between the manufacturer and distributor for a reasonable jury to find an agreement under § 1. *Id.* Had there been an express contract, like the DPLA, it would have been an easy case for an agreement under § 1. Nor is *Jeanery* of any help to Apple. *Jeanery* did not involve an express contract like the DPLA; instead, the court applied *Colgate* to find that a unilateral policy and threat of termination was not an agreement subject to § 1 and found no evidence that the manufacturer and dealers agreed to the restraint at issue. 849 F.2d at 1158.

The district court's conclusion that Apple did not engage in concerted action because it "unilaterally impose[d]" the DPLA on

developers, who were required to sign it in order to distribute games on iOS, (Op. 142–43) nullifies this century-old distinction and turns the *Colgate* doctrine on its head. But, as explained above, the key distinction between concerted and unilateral conduct is whether there was a meeting of the minds between two or more entities—not whether they had equal negotiating power. In this case, Apple did not merely require developers to adhere to its terms as a condition of doing business, as in *Colgate*; instead, Apple required developers to *agree* to adhere to its terms, as in *Perma Life*.

As an express contract, the DPLA fits squarely within the scope of § 1. The district court erred in holding otherwise.

C. To hold that the DPLA is not an agreement under § 1 would legalize a broad swath of anticompetitive conduct.

The district court's exclusion of non-negotiable contracts from § 1 scrutiny effectively immunizes a wide range of vertical agreements from antitrust scrutiny, e.g., exclusive-dealing agreements, tying agreements, and resale-price-maintenance agreements—as well as the type of exclusivity and anti-steering provisions at issue here—which are often imposed on unwilling

dealers as take-it-or-leave-it propositions. Endorsing this interpretation of § 1 would drastically alter the scope of acceptable business practice and undermine the goals of the Sherman Act.

For example, manufacturers have attempted to comply with § 1 and mitigate their risk of liability by crafting so-called "*Colgate* policies," i.e., unilateral policies announcing that a manufacturer will not do business with dealers who fail to maintain certain prices or who sell competing goods. *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 902-03 (2007) (describing the *Colgate* policy as one of the "legitimate options to achieve benefits similar to those provided by vertical price restraints"). Under the district court's view, such policies would be unnecessary to completely avoid any scrutiny under § 1; a manufacturer could simply require dealers to expressly agree to its terms, using its leverage to extract an express promise to adhere to the restraint. Manufacturers would not only be free to enforce these restraints through termination, but they could also enforce those restraints with the courts' assistance by alleging a breach of contract, as Apple has done here.

Such a result would do little to serve the purposes of § 1. As the Supreme Court has explained, § 1 distinguishes between concerted and unilateral activity because businesses pose a greater anticompetitive threat when they work together:

> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.

Copperweld, 467 U.S. at 768–69. Regardless of whether participants were coerced, a threat to competition exists any time two or more entities contract to establish potentially long-term anticompetitive restraints because that contract could be judicially enforced.

Meanwhile, as the district court itself recognized, immunizing so-called "contracts of adhesion" from scrutiny under § 1 would dramatically undercut competition policy and create a loophole for vertical agreements imposed by dominant firms. A century of

Supreme Court jurisprudence on the § 1 analysis of vertical agreements—from resale-price-maintenance contracts in *Dr. Miles*, to the franchise provisions in *Perma Life*, to its more recent analysis of the anti-steering provisions in American Express's standard contracts with merchants (*see Ohio v. American Express*, 138 S. Ct. 2274 (2018))—has been premised on § 1's applicability to these contracts without regard to whether the provisions at issue were negotiated or imposed. Adopting a view that non-negotiated vertical agreement terms are outside the reach of § 1 would radically transform antitrust law, and not for the better. Accordingly, this Court should reject the district court's interpretation and reaffirm that an express contract is an agreement under § 1.

II. Product design is not immune from antitrust scrutiny.

Courts are clear that product design is "not immune from antitrust scrutiny and in certain cases may constitute an unlawful means of maintaining a monopoly under Section 2." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 998 (9th Cir. 2010). Apple's suggestion that the technical design of its own intellectual property could never, as a matter of law, be a

basis for finding illegal exclusionary conduct under § 2 is incorrect and would damage both competition and consumer welfare.[3]

Instead, the proper analytical approach for exclusionary product design depends heavily on market realities and context. As the district court noted, Apple "created an ecosystem with interlocking rules and regulations, [where] it is difficult to evaluate any specific restriction in isolation or in a vacuum." Therefore, the district court properly concluded that based on "the combination of the challenged restrictions and Apple's justifications, and lack thereof, the Court finds that common threads run through Apple's practices which unreasonably restrains competition and harm consumers." (*See* Op. 118.)

Product design as a category of potentially anticompetitive conduct does not warrant the extreme deference under the antitrust laws that Apple suggests.[4] Exclusionary design can lead to harms

[3] *See* Apple COL ¶ 249 (asserting Apple's "design and implementation of its own intellectual property" could not constitute exclusionary conduct).

[4] Apple suggests that any demonstrable anticompetitive effect or anticompetitive motivation of its product design choices should be

identical to those courts generally recognize as actionably anticompetitive. Making product design a liability-free mechanism to carry out otherwise illegal anticompetitive schemes would provide an attractive safe harbor for future monopolists. Furthermore, exclusionary product designs could be adopted in conjunction with contractual provisions that by themselves would be insufficient to successfully implement a monopolization strategy.

Categorically exempting product design from antitrust liability is counter to the aims of the antitrust laws. The Sherman Act "is aimed at substance rather than form." *Copperweld*, 467 U.S. at 760; *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992) ("[F]ormalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record.") (quotations and citation

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canceled out by the faintest possibility of a potential business justification. *See* Apple COL ¶ 271 ("Absent affirmative evidence from Epic *excluding* the possibility of any procompetitive justifications for the design of the App Store, Epic's refusal-to-deal claim fails.").

omitted); *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 550 (1st Cir. 2016) (antitrust law "consistently prioritize[s] substance over form").

A. Courts properly use a fact-specific inquiry in assessing anticompetitive product design.

Courts differentiate between technical design changes that could plausibly constitute anticompetitive conduct under § 2 and those that are clearly implemented with the intent to benefit consumers. "The metes and bounds of when such behavior impermissibly crosses the line from competitive to violative of the Sherman Act is a highly contextual analysis." *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 239 (S.D.N.Y. 2019) (citing *Caribbean Broad Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998)). But even a "design change that improves a product by providing a new benefit to consumers" may still violate § 2 when accompanied with "some associated anticompetitive conduct." *Allied Orthopedic*, 592 F.3d at 998–99; *see also id.* at 999 (explaining that "introduction of a new and improved product design could constitute a violation of Section 2

where 'some associated conduct . . . supplies the violation'" (quoting *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983))).

While courts have sometimes been hesitant to scrutinize product design choices, "[a] firm's product design choice will call for antitrust scrutiny when the design choice discourages the distribution of competitor's products, while not making the product more attractive to consumers." *Nespresso United States v. Ethical Coffee Co.*, No. 16-194-GMS, 2016 WL 11697058 (D. Del. Sept. 7, 2016) (refusing to dismiss § 2 claim based on design of espresso machine capsule housing to exclude competing capsules); *see also Abbott Labs v. Teva Pharm. USA, Inc.*, 432 F. Supp. 2d 408, 422 (D. Del. 2006) (design changes that remove free consumer choice in the market are subject to antitrust scrutiny); *United States v. Microsoft Corp.*, 253 F.3d 34, 65 (D.C. Cir. 2001) (holding that Microsoft's design choice to integrate its web browser and operating system was subject to antitrust scrutiny because the integration did not make the web

browser more attractive to costumers, it just discouraged rival products).

One recent case found that a product design change implemented to prevent repair of the product was an actionable claim under § 2, even without a previous course of dealing between the plaintiff and defendant. In *Surgical Instrument Service Company, Inc. v. Intuitive Surgical, Inc.*, No. 21-cv-03496-VC, 2021 WL 5474898, at *5 (N.D. Cal. Nov. 23, 2021) ("*Intuitive Surgical*"), the plaintiff alleged that the defendant redesigned its product "for the sole purpose of preventing the emergence of competitors" like itself. As in the immediate case, the defendant in *Intuitive Surgical* attempted to characterize this argument as a "refusal to deal," but the court rejected this reading and instead found that exclusionary technical designs may be an ingredient in a scheme to monopolize or maintain a monopoly. *Id.* "Under the theory of monopoly broth, there are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently

anticompetitive tendency, are unlawful under Section 2 if done by a monopolist." *Free Freehand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1180 (N.D. Cal. 2012) (citations omitted). "The Ninth Circuit has likewise stated that it is not 'proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect.'" *Id.* (citing *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376, 1378 (9th Cir. 1992)); *Tele Atlas N.V. v. NAVTEQ Corp.*, No. 05-CV-1673-RS, 2008 WL4911230, at *1 (N.D. Cal. Nov. 13, 2008) ("[C]ourts must consider all of an alleged monopolist's related conduct in the aggregate.")). In *Intuitive Surgical*, Plaintiff's allegations of exclusionary technical design plausibly supported a broader scheme to monopolize, even when no prior course of dealing existed between the parties. 2021 WL 5474898, at *5. In *City of Anaheim*, the Ninth Circuit stated that in order to avoid an "untoward invasion" of antitrust challenges under the monopoly broth theory, in addition to the "unsavory flavor" of the aggregate conduct, plaintiffs alleging monopolization under this theory must allege specific intent, which does not require a direct

admission of wrongdoing and can be evaluated by looking at the actions of a party, taken as a whole. 955 F.2d at 1378.

B. This Court should reject Apple's suggested framework for analyzing allegations of anticompetitive product design.

This Court should unambiguously reject Apple's broad pronouncements that its product designs and intellectual property are immune from antitrust scrutiny.[5] Adopting this approach would extend a shocking level of deference for an actor's product design choices, regardless of whether these choices were implemented for the sole purpose of locking out competitors. Apple's approach relies on a disfavored, formalistic distinction "rather than actual market realities." *Eastman Kodak*, 504 U.S. at 466–67. Adopting that approach would undercut a primary objective of the Sherman Act.

Moreover, even where a party can point to *some* procompetitive rationale for a product design with anticompetitive effects, the mere suggestion of hypothetical or minor benefits achieved by the design

[5] *See* Apple COL ¶ 249 (arguing that, as a matter of law, Apple's "design and implementation of its own intellectual property" could not constitute exclusionary conduct.").

is insufficient to show that it is not part of an illegal scheme to monopolize. *See Xerox Corp. v. Media Scis. Int'l, Inc.*, 511 F. Supp. 2d 372, 388-89 (S.D.N.Y. 2007) ("To the contrary, several courts have found that product redesign, when it suppresses competition and is without other justification, can be violative of the antitrust laws."). Indeed, as the district court noted, many of Apple's business justifications were supported by minimal or suspect evidence.

Apple contends that the exclusion of payment solutions capable of competing with its IAP system resulted from a "process of invention and innovation" that made the product "more attractive to buyers whether by reason of lower … price or improved performance." Apple COL ¶ 251. On this point, the district court recognized that Apple's ostensible rationale for the technical restrictions preventing Epic's ability to use their payment systems was supported by weak evidence.[6] And while the court considered

[6] "First, [Apple] disputes that the Enterprise Program provides a comparable model because it is used primarily for employers, who rarely want to hack their own employees. That is factually true, but provides little insight as to why a modified model could not work. Apple points to unspecified evidence that the Enterprise Program has been used to distribute malware. As with Epic Games' evidence

Apple's statements that the design of the platform was beneficial because of potential malware concerns, the court noted that this justification, while superficially plausible, "appear[s] to have emerged for the first time at trial which suggests [Apple's expert] is stretching the truth for the sake of the argument." (Op. 113.)

Nor is Apple's contention that it can use its intellectual property rights to make blatantly anticompetitive product design choices[7] supported by case law. Intellectual property rights are not an absolute shield for antitrust liability. *See, e.g., United States v. Microsoft*, 253 F.3d at 64 (holding that OEM license restrictions represented the use of Microsoft's market power to protect its monopoly, and was unsupported by any legitimate justification, and therefore violated § 2 of the Sherman Act.).

As Epic alleges, the design of the iOS ecosystem restricts in-app payment processing, a restriction which functions in one way as an exclusive dealing arrangement, i.e., an obligation of a firm to obtain

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of fraud on the App Store, this does not show that the program is unsecure as a general matter." (Op. 112.)

[7] *See* Apple COL ¶ 249.

its inputs from a single source.[8] "The objection to exclusive-dealing agreements is that they deny outlets to a competitor during the term of the agreement." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 393 (7th Cir. 1984). When such arrangements substantially foreclose competition, courts have consistently recognized they cause cognizable antitrust injury.[9] By forcing developers and users to use a payment processor designated by Apple, competing processors are frozen out of the market. The district court recognized that Apple failed to show how its chosen processor was "any different than other payment processors" and also failed to show any evidence of how its ostensible business justification—

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[8] *Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 46 (7th Cir. 1996); *see also* Areeda *supra* ¶ 1800a.

[9] Courts have consistently held that competitors frozen out by exclusive dealing arrangements have suffered an antitrust injury and possess antitrust standing to sue for redress of this injury. *E.g. Minnesota Min. and Mfg. Co. v. Appleton Papers, Inc.*, 35 F. Supp. 2d 1138, 1147 (D. Minn. 1999); *see also* Areeda *supra* ¶ 348d ("Standing is clear and seldom challenged when the plaintiff alleges that its rival engaged in an exclusionary practice designed to rid the market of the plaintiff…so that the defendant could maintain or create a monopoly"); *Amarel v. Connell*, 102 F. 3d 1494, 1509 (9th Cir. 1996) ("[W]hen defendants engage in…anticompetitive acts in an attempt to gain a monopoly, the competitor who is being driven out of the market is the party with standing.").

fraud prevention—was actually put into practice. (*See* Op. 116–17.) *Accord In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d 931, 957–58 (N.D. Ill. 2018) (plaintiffs alleged plausible exclusive dealing claim where dealer management companies required vendors to also purchase data integration services from defendants, thereby excluding third-party data integrators and hiking integration costs).

While issues surrounding anticompetitive product design are rife in technology companies operating in virtual spaces, the tangible harms of exclusionary design are perhaps best exemplified by *Intuitive Surgical*. In that case, the defendant implemented specific design changes to lock the plaintiff out of the market for surgical-tool refurbishment for its surgical robots. *Intuitive Surgical*, at *2. The plaintiff alleged that the availability of third-party refurbishment services would have lowered costs for hospitals, and that the defendant's "aggressive and ever-changing tactics for extracting an exorbitant per-surgery fee for [the surgical robots] is financially damaging for hospitals and results in excessive costs for

patients." *Surgical Instrument Serv. Co. v. Intuitive Surgical, Inc.*, 3:21-cv-03495-VC, Complaint, at ¶ 36. (N.D. Cal. May 10, 2021) (Dkt. 1).

If Apple raises this issue as an alternative basis for affirmance, the Court should clarify that product design remains an area subject to the Sherman Act.

Conclusion

In critical respects, the district court's legal conclusions deviate from long-accepted antitrust principles and would shield substantial anticompetitive conduct from scrutiny under the Sherman Act. *Amicus curiae* requests that this Court clarify that (1) non-negotiable restraints contained in express contracts may form the basis for liability under § 1 of the Sherman Act, and (2) monopolists cannot categorically shield themselves from scrutiny under § 2 of the Sherman Act by excluding competition through their product design.

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,532 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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January 27, 2022 /s/*Geoffrey H. Kozen*

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I hereby certify that on January 27, 2022, I electronically filed the foregoing with the Clerk of 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.

January 27, 2022 /s/ *Geoffrey H. Kozen*