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
The Honorable Yvonne Gonzalez Rogers
No. 4:20-cv-05640-YGR

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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The United States enforces the federal antitrust laws and has a strong interest in their correct interpretation. The United States files this brief, pursuant to Federal Rule of Appellate Procedure 29(a)(2), to address errors in the district court's analysis of the Sherman Act, which, if uncorrected, could significantly harm antitrust enforcement. The United States takes no position on the merits of the parties' claims.

STATEMENT

1. Epic Games challenges Apple's control over the distribution of apps and in-app payments on its popular iPhone and iPad, devices with over one billion users. 3-ER-683. Apple's mobile devices are "walled garden[s]," meaning that a user can acquire apps for her device only through the Apple App Store. 1-ER-5. Apple does not permit competing app stores on its devices, and prohibits the downloading of apps directly from the Web. 1-ER-21.

Apple has "benefited" from third-party apps that "enhance[] the experience for iOS devices and their consumers." 1-ER-6. Developers wanting to distribute their apps through the App Store must execute a standard-form Developer Program License Agreement (DPLA). 1-ER-31-32. The developer pays a $99 annual fee, receives access to certain tools, and can distribute apps through the App Store. *Id*. The developer agrees to abide by Apple's App Guidelines, which prohibit certain features and types of apps (e.g., "storefront" apps). 1-ER-39.

The developer agrees to use Apple's in-app purchasing (IAP) system when a user makes certain in-app purchases (e.g., purchasing "premium" content). 1-ER-33-34. Apple charges a 30 percent commission to the

developer. 1-ER-36. An anti-steering provision prohibits the developer from, *inter alia*, advertising lower prices on other platforms within the app. 1-ER-34-35.

Epic develops and distributes video games. 1-ER-7. Its flagship video game, *Fortnite*, is available on multiple platforms, including (until this dispute) the App Store. 1-ER-16. Epic also operates the Epic Games Store, which is available on multiple platforms, and carries hundreds of games. 1-ER-17-18.

Epic requested that Apple allow it to use an alternative to Apple's IAP system and distribute the Epic Games Store through the App Store. 1-ER-27. When Apple refused, Epic activated an alternative payment method for its *Fortnite* app and filed this lawsuit. 1-ER-28. Apple counterclaimed, alleging contractual claims.

2. Epic alleged that Apple violated Sections 1 and 2 of the Sherman Act, as well as California's Cartwright Act and Unfair Competition Law (UCL). In its primary Sherman Act claims, Epic alleged, *inter alia*, that Apple's prohibition on competing app stores and requirement that developers use only its IAP system harmed competition in global aftermarkets for (1) iOS app distribution and (2) iOS in-app payment

processing. Epic alleged that these aftermarkets followed from a "foremarket" of smartphone operating systems. 1-ER-47. Apple disagreed, contending the relevant product market was "digital games transactions," encompassing all platforms facilitating gaming-app transactions. *Id.*

The district court ruled for Apple on all of Epic's claims except for part of the UCL claim. The court rejected both parties' product markets, instead defining a global market for mobile gaming transactions (encompassing Apple and non-Apple mobile devices). 1-ER-128-29. It reasoned, *inter alia*, that (a) Epic's foremarket for smartphone operating systems was "misconceived" because iOS is not "licensed or sold to anyone" (and the aftermarkets consequently failed), 1-ER-48, and (b) "IAP is not a product for which there is a market," 1-ER-130.

Regarding Epic's Section 1 claims, the court concluded that there was not concerted action 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." 1-ER-145. The court also concluded that Epic had not shown that Apple's restrictions are unreasonable. Epic showed anticompetitive effects

(supracompetitive profits, and reduced choice, innovation, and quality); Apple presented procompetitive justifications, including greater security, user convenience, and vindication of its IP rights; and Epic did not identify less restrictive alternatives. 1-ER-147-53. But the court stopped there, finding Apple's restraints reasonable without determining whether, on balance, they harmed competition. 1-ER-153. The court also rejected Epic's tying claim, finding that Apple's IAP system and app distribution are not separate products. 1-ER-158.

The court concluded that Apple had not violated Section 2 because (a) Epic had not shown that Apple has monopoly power and (b) Apple's restrictions could not constitute anticompetitive conduct under Section 2 because they were not anticompetitive under Section 1 and "proving a [§ 2] violation" is "more exacting." 1-ER-154-55 (internal quotation marks omitted). The court concluded that Apple "is near the precipice of [] monopoly power," but is "saved by the fact that its [market] share [of 52-57%] is not higher, that competitors from related submarkets are making inroads into the mobile gaming submarket, and, perhaps, because plaintiff did not focus on this topic." 1-ER-140-42.

Finally, the court held that Apple's anti-steering provision violated the UCL and enjoined its enforcement. 1-ER-165-71. But this Court stayed the injunction.

ARGUMENT

The district court committed several legal errors that could imperil effective antitrust enforcement, especially in the digital economy. The court read Sections 1 and 2 of the Sherman Act narrowly and wrongly, in ways that would leave many anticompetitive agreements and practices outside their protections.

On Section 1, the court held that the DPLA—Apple's written agreement with developers—is not a "contract" subject to Section 1 because developers must accept its terms. This carve-out—at odds with text and precedent—would insulate numerous potentially harmful agreements from Section 1 scrutiny.

The court also found the challenged restraints "reasonable" without weighing their proven harms and benefits to determine the restraints' overall competitive effects. This failure to confront the rule of reason's ultimate question—"whether a challenged restraint harms competition," *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021)—was erroneous and, if upheld, could significantly harm competition and consumers by allowing a minor benefit to condone a major harm.

On Section 2, the court appeared to miss the significance of pricing evidence when assessing monopoly power. It found that Apple sustained supracompetitive prices for years, without regard to its competitors' prices—a textbook example of monopoly power, *see United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc)—but appeared to treat such evidence as insignificant without accompanying evidence of reduced output. Even if the pricing evidence failed to prove monopoly power directly, the court should have considered it as part of the circumstantial evidence of monopoly power, which it apparently failed to do.

Additionally, the court stated erroneously that conduct found reasonable under Section 1 cannot violate Section 2 as a matter of law. That is incorrect as a general manner, improperly circumscribing the statute's reach, and it led the court to omit erroneously the weighing required under Section 2.

Last, the district court's opinion is ambiguous and could be read as resting on rigid legal rules foreclosing a product market including a product that the defendant does not itself license or sell or comprising just one component of an integrated product that the defendant does sell.

There are no such legal rules, however. The lodestar of market definition is "the commercial realities of the industry," *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2286 (2020) (cleaned up), and, in some cases, the commercial realities may support product markets for products that the defendant does not license or sell or that are components of a bundle. A contrary rule would cause courts to miss many important dimensions of competition—and hinder effective antitrust enforcement, particularly in the digital economy.

I. The District Court Erred in Applying Section 1 of the Sherman Act

Section 1's prohibitions are crucial because "[c]oncerted activity inherently is fraught with anticompetitive risk." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768–69 (1984). It is therefore vital to correct the district court's holdings improperly narrowing its protections.

Section 1 prohibits every "contract, combination . . . , or conspiracy, in restraint of trade." 15 U.S.C. § 1. Thus, a Section 1 plaintiff must prove (1) concerted action (a "contract," "combination," or "conspiracy") that (2) unreasonably restrains trade. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010). The district court misinterpreted both elements.

A. The district court erred in concluding that the DPLA—a written "contract"—is not concerted action

1. Section 1 expressly reaches "contract[s]" restraining trade. Accordingly, a written contract like the DPLA establishes concerted action. *E.g.*, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948) (concerted action "plainly established" by "express agreements"); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010) (written agreement is "independently adequate" to establish concerted action); *see Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137, 1143 (10th Cir. 1997) (en banc) ("To hold otherwise would be to read the words 'contract' and 'combination' out of section 1.").

The district court, however, concluded that the DPLA did not establish concerted action, even though the challenged restraints gave rise to the harm to competition. The court deemed the DPLA "a unilateral contract" because it is "a contract of adhesion" and "a developer must accept its provisions." 1-ER-96, 1-ER-145. That ruling is irreconcilable with this Court's holding that "it is sufficient that [plaintiff] has offered evidence that [defendant] signed agreements." *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1153-54 (9th Cir. 2003). The court "improperly graft[ed] an additional requirement"—

here, the ability to negotiate the challenged terms—"onto the element of [plaintiff's] prima facie case requiring that the defendants acted in concert." *Id.*

It is immaterial that developers "must accept" the provisions of the DPLA. 1-ER-145. A contract of adhesion is still a "contract," *see Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1000-01 (9th Cir. 2021), and "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation or promotion of one," *Paramount Pictures*, 334 U.S. at 161; *see also Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 917 (9th Cir. 2008) (an antitrust conspiracy exists "even though [defendant] participates in the conspiracy only under coercion"). The Supreme Court has found concerted action even where one party "unwillingly complied with the restrictive [] agreement[]" and where acquiescence was "induced" by "the communicated danger of termination." *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 142 (1968), *overruled on other grounds by Copperweld*, 467 U.S. 752.

Indeed, the district court's interpretation would upend Section 1 jurisprudence, including on vertical restraints. As the court acknowledged, in many vertical arrangements, "the buyer passively

accepts conditions set by the vendor." 1-ER-146. The Supreme Court nonetheless has repeatedly decided Section 1 challenges to vertical restraints embodied in express contracts without pausing to consider whether the counterparty embraced those restraints. *E.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2282 (2018) (*Amex*) ("Amex's business model sometimes causes friction with merchants"); *Cont'l TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 40 (1977) (plaintiff challenged a provision in its franchise agreement with defendant). In fact, vertical restraints are especially problematic *when* a party has market power—sometimes defined as the ability "to force a purchaser to do something that [it] would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). Thus, a rule precluding liability if a party imposes a term on its counterparty would remove Section 1 where it is especially needed.

Moreover, the district court's approach would strip the counterparty of a countermeasure to the coercion—a Section 1 suit challenging the restraint and a contractual defense of unenforceability. *See Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 21 (1964) (Section 1

claim challenging "agreement" imposed on plaintiff "coercively"). Finally, the district court's approach would needlessly complicate the analysis, requiring courts to explore the minds of the negotiators to determine the nature of a party's acceptance of the challenged terms.

2. The authorities cited by the district court do not support its holding. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), explains that when a plaintiff relies on *circumstantial* evidence of conspiracy (e.g., defendants charging the same price), plaintiff must present some evidence "that tends to exclude the possibility that the [defendants] were acting independently." *Accord The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1155, 1161 (9th Cir. 1988) (customer complaints did not support an inference of concerted action); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986) (refusing "to infer a vertical combination" from a refusal to deal with certain customers but not others). But this precedent is "inapplicable where, as here, the concerted conduct is not a matter of inference or dispute." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 290 (4th Cir. 2012). Direct evidence—such as a contract—"establishes that the defendants convened

and came to an agreement." *Id.* at 289; *see Paladin Assocs.*, 328 F.3d at 1153 (written agreements are "direct evidence of 'concerted activity'").

The district court's reliance on *Toscano v. Professional Golfers' Association*, 258 F.3d 978 (9th Cir. 2001), was similarly misplaced. There, the plaintiff challenged certain PGA rules incorporated by reference into contracts between the PGA and local sponsors. *Id.* at 982. In relevant part, this Court affirmed summary judgment in favor of the local sponsors because they "merely accepted the PGA Tour's rules and regulations and played no role in creating or enforcing them." *Id.* at 983.

But context is critical. The *Toscano* plaintiff did not challenge the contracts between the PGA and the local sponsors themselves, but rather alleged a broader conspiracy among the PGA and "certain of its officers, [player representatives on the PGA Board], and the sponsors to boycott [plaintiff]." *Toscano v. PGA Tour, Inc.*, 70 F. Supp. 2d 1109, 1114 (E.D. Cal. 1999). This alleged conspiracy was not embodied in the written agreements executed by the sponsors, and thus *Monsanto*'s strictures on the use of circumstantial evidence applied. Here, conversely, the contractual terms themselves are being challenged.

B. The district court failed to assess the restraints' overall competitive effect

The rule of reason requires factfinders to "'weigh[] all of the circumstances'" in order "to assess whether a challenged restraint harms competition." *Alston*, 141 S. Ct. at 2160 (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007)). Accordingly, the "rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects." *Paladin Assocs.*, 328 F.3d at 1156. Weighing is how a factfinder determines a restraint's overall competitive effect when a restraint has both competitive harms and benefits, and there is no less restrictive alternative.

The district court failed to do that weighing here. After finding that the challenged restraints have competitive harms and some justifications, and that Epic had not identified less restrictive means of achieving the benefits, 1-ER-147-53, the court erroneously halted its analysis without making the ultimate assessment of reasonableness at the rule's heart.

1. "What is required" under the rule of reason is "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999). Courts

often apply a burden-shifting framework. The "plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." *Amex*, 138 S. Ct. at 2284. If that is established, "the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* "If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id*. However, "[t]hese three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis." *Alston*, 141 S. Ct. at 2160.

This framework resolves the vast majority of rule-of-reason cases without necessitating a weighing of competitive harms and benefits. *See id.* at 2161. For example, there is nothing to weigh if the plaintiff fails to show an anticompetitive effect or the defendant fails to show a cognizable procompetitive justification. Likewise, "it is unreasonable to justify a restraint of trade based on a purported benefit to competition if that same benefit could be achieved with less damage to competition." *Impax Labs., Inc. v. FTC*, 994 F.3d 484, 497 (5th Cir. 2021).

However, where a restraint has both procompetitive and anticompetitive effects, and there is no less restrictive alternative, "the court must weigh the harms and benefits to determine if the behavior is reasonable on balance." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991); *accord Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1108 (9th Cir. 2021); *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) ("Because plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage."); *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996) (factfinder must decide "whether this is valid justification which also outweighs any restraint on trade").

Without weighing, "an egregious restraint with a minor procompetitive effect would have to be allowed to continue, merely because a qualifying less restrictive alternative was not shown." *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019). But "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition," *Nat'l Soc'y Prof'l Eng'rs v. United*

States, 435 U.S. 679, 691 (1978), not simply whether a defendant has some justification for a restraint that, on balance, harms competition.[1]

2. The district court relied on the Supreme Court's formulation of the burden-shifting framework in *Alston* and *Amex*, which does not expressly reference weighing when describing that framework. 1-ER-143-44. But these brief passages should not be read to rework core antitrust jurisprudence or displace this Court's cases recognizing a weighing requirement. *See Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018) (explicating the "high standard" for overruling precedent).

To the contrary, read in full, *Alston* and *Amex* confirm that the rule of reason entails weighing (in cases not resolved at earlier stages). *Alston* reiterated that the "whole point" of the rule is to condemn any restraint that "unduly harms competition" after a "weigh[ing of] all of the circumstances of a case." 141 S. Ct. at 2160 (quoting *Copperweld*, 467 U.S. at 768). It restated the principle that the relevant analysis "can vary

[1] The form of the weighing depends on the circumstances of the case. *Cal. Dental*, 526 U.S. at 780. A court often will be able to determine the "principal tendency of a restriction" or its "net" effect through a qualitative assessment of whether the harms or benefits predominate. *Id.* at 771, 775, 781.

depending on the circumstances," and avoided enshrining the particular three-step formulation as the entire and sole test. *Id.* (noting that the Court had "*sometimes* spoken of" a three-step, burden-shifting framework (emphasis added)).[2]

Alston and *Amex* were resolved at earlier stages, so weighing was unnecessary. In *Alston*, plaintiffs had successfully proved a less restrictive alternative, and thus the Court had no need to weigh anything. *Id.* at 2163-66. And in *Amex*, plaintiffs failed to carry their initial burden. 138 S. Ct. at 2290. While "the *parties agree[d]* that a three-step, burden-shifting framework applie[d]," *id.* at 2284 (emphasis added), that was because the court below framed weighing as an ultimate determination that follows three burden-shifting steps, rather than as part of the burden shifting itself,[3] *United States v. Am. Express Co.*, 838

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[2] Tellingly, the authorities cited by the Court for its capsule of burden shifting all recognize an ultimate weighing of harms and benefits. *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993); Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 15.04 (4th ed. 2017); Julian O. von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 12.02[5] (2d ed. 2021).

[3] The burden is already back on the plaintiff at step three, so there is no additional burden shift before the weighing stage. In that sense, weighing can be said to *follow* the three-step burden-shifting framework, rather than constituting a separate, fourth step in that framework.

F.3d 179, 195 (2d Cir. 2016) ("Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior." (internal quotation omitted)).

II. The District Court Erred in Applying Section 2 of the Sherman Act

Section 2 is aimed at "achiev[ing] for the Nation the freedom of enterprise from monopoly." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 385-86 (1956). To establish monopolization, a plaintiff must show that the defendant (1) possesses monopoly power and (2) engaged in anticompetitive conduct. *FTC v. Qualcomm Inc.*, 969 F.3d 974, 990 (9th Cir. 2020). The district court appears to have erred on both elements, discounting pricing evidence in the monopoly-power analysis even though monopoly power encompasses "the power to control prices," *du Pont*, 351 U.S. at 391, and wrongly narrowing the range of conduct actionable under Section 2.

A. The district court appears to have improperly evaluated the pricing evidence during the monopoly-power analysis

"Monopoly power is the power to control prices or exclude competition." *Id.* Axiomatically, then, evidence of sustained supracompetitive prices is highly probative of monopoly power. *Cf. FTC*

v. Actavis, Inc., 570 U.S. 136, 157 (2013) ("higher-than-competitive profits [are] a strong indication of market power"). As *Microsoft* noted, "a firm is a monopolist if it can profitably raise prices substantially above the competitive level," so "[w]here evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear." 253 F.3d at 51.

The court found that Apple's pricing is immune from "market forces" and that Apple has "extraordinarily high" operating margins and has long imposed a "supracompetitive" commission. 1-ER-95-97, 1-ER-101, 1-ER-121. Nonetheless, it held that this evidence was not sufficient direct evidence of monopoly power because there was no proof of a "corollary impact on output." 1-ER-140. Then, the court found "a more mixed result" with regard to circumstantial evidence, holding that Apple lacks monopoly power, but "is near the precipice." 1-ER-141-42. In making this determination, the court never addressed the pricing evidence, and its silence suggests that it erroneously failed to consider the pricing evidence when evaluating the circumstantial evidence.

Reviewed as a whole, the district court's analysis could be viewed as suggesting that the pricing evidence was insignificant without

separate proof of reduced output. A combination of output and pricing evidence is one way to prove monopoly power directly, *see Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995), but not the only way. Behavior "difficult to explain unless [the defendant has] a monopoly product"—e.g., pricing "without considering rivals' prices"—establishes monopoly power. *Microsoft*, 253 F.3d at 57-58. Indeed, "set[ting] prices with little concern for its competitors" is "'something a firm without a monopoly would [be] unable to do.'" *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005) (quoting *Microsoft*, 253 F.3d at 58).

Additionally, in most cases, a reduction in output follows from a price increase as a matter of course, *see United States v. AMR Corp.*, 335 F.3d 1109, 1115 n.6 (10th Cir. 2003) ("prices and productive output are two sides of the same coin" (internal quotation marks omitted)), and requiring separate proof of reduced output imposes an unnecessary burden on the plaintiff. Moreover, output can change due to many factors independent of the defendant's conduct, such as the strength of the

economy, making output effects attributable to the challenged restraint difficult to isolate.[4]

Even assuming *arguendo* that the sustained supracompetitive pricing evidence is not direct evidence of monopoly power, the court erred to the extent it ignored the pricing evidence when considering the circumstantial evidence. Indeed, courts regularly rely on such evidence in finding monopoly power via circumstantial evidence (in addition to proof of a significant market share and barriers to entry).[5] *E.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 832 (11th Cir. 2015) (defendant's "continued power over [] prices" among the sufficient evidence of monopoly power); *Dentsply*, 399 F.3d at 191 ("growing" profit margins part of circumstantial evidence of monopoly power); *Greyhound*

[4] The court correctly held that the benchmark for assessing competitive effects was the level of output absent the challenged restraint. 1-ER-102.

[5] "Courts generally require a 65% market share to establish a prima facie case of [monopoly] power." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997). But a market share as low as 45-50% may support a finding of monopoly power "if accompanied by other relevant factors." *Movie 1 & 2 v. United Artist Commc'ns, Inc.*, 909 F.2d 1245, 1254 (9th Cir. 1990); *Rebel Oil*, 51 F.3d at 1438. Indeed, when there is a relatively low market share but otherwise compelling evidence of monopoly power, "[b]lind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980).

Computer Corp., Inc. v. Int'l Business Machs. Corp., 559 F.2d 488, 497 (9th Cir. 1977) ("evidence indicating [defendant's] ability to manage its prices with little regard to competition" supported an inference of monopoly power).

The court's apparent failure to include the pricing evidence among the circumstantial evidence was potentially consequential. It found that Apple has a "considerable" market share (52-57%) and is "near the precipice" of having a monopoly, even without considering this highly probative type of evidence. 1-ER-140-42.

B. The district court erroneously equated the Section 1 and 2 analyses

The district court held that Epic had not shown anticompetitive conduct under Section 2 "for similar reasons as Section 1." 1-ER-155. It reasoned that if "a court finds that the conduct in question is not anticompetitive under § 1, the court need not separately analyze the conduct under § 2" because "proving an antitrust violation under § 2 of the Sherman Act is more exacting than proving a § 1 violation." 1-ER-136 (quoting *Qualcomm*, 969 F.3d at 991-92). The court misstated the law.

1. Section 2 is not categorically "more exacting" on plaintiffs. "Although the standard for a § 2 violation is significantly stricter in its power assessment than for a § 1 claim, it is broader and less categorical in its definition of proscribed conduct." *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 453 (7th Cir. 2020) (cleaned up). "Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting); *cf. Microsoft*, 253 F.3d at 58 ("the means of illicit exclusion . . . are myriad").

For example, "a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation." *Microsoft*, 253 F.3d at 70; *see also Dentsply*, 399 F.3d at 197 (similar). Similarly, conduct that does not satisfy the elements of a Section 1 tying claim nonetheless may constitute anticompetitive conduct under Section 2. *Viamedia*, 951 F.3d at 469; *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1551 (10th Cir. 1995).

Qualcomm, cited by the district court, does not teach differently. There, this Court made the narrow point that Section 2 is "more exacting" "*[i]n this respect*": "a plaintiff may not use indirect evidence to prove unlawful monopoly maintenance via anticompetitive conduct under § 2." 969 F.3d at 991-92 (emphasis added). The Court cautioned that the tests are only "largely similar," and qualified that "[t]he similarity of the burden-shifting tests under §§ 1 and 2 means that courts *often* review claims under each section simultaneously." *Id.* (emphasis added). In some cases, the analyses will overlap. *E.g.*, *Williams v. I.B. Fisher Nev.*, 999 F.2d 445, 448 (9th Cir. 1993) (rejecting a "brief and opaque" Section 2 claim that had as its "sole basis" an "insufficient" Section 1 claim). But "often" is not "always," and this Court should not endorse the district court's hard-and-fast rule.

2. Section 2 requires a court to determine whether "the anticompetitive harm of the conduct outweighs the procompetitive benefit" when both are present. *Qualcomm*, 969 F.3d at 991 (quoting *Microsoft*, 253 F.3d at 59). The court failed to do the weighing required under Section 1, *supra* Section I.B, and compounded that error by rejecting the Section 2 claims "for the same reasons," 1-ER-155. Thus,

the court never did the weighing that it expressly recognized is required under Section 2. 1-ER-150 n.610.

III. The District Court's Opinion Could Be Read as Adopting Inflexible Market-Definition Principles That Would Improperly Limit the Sherman Act's Scope

Market definition is a tool that helps courts ascertain the "locus of competition" in which to judge the challenged conduct, identify market participants, and assess market concentration. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320-21 (1962). But "[t]hat is not to say that market definition will always be crucial," and it "does not exhaust the possible ways to prove" competitive effects. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008).

Parts of the opinion suggest that the district court's market-definition analysis rested on erroneous legal rules that markets cannot be defined around products that (a) Apple does not license or sell or (b) are components of a bundled product or service that Apple does offer. *E.g.*, 1-ER-48, 1-ER-68-69. Such rules would be improper. Antitrust law generally favors "actual market realities," *Kodak*, 504 U.S. at 466-67, and so market definition must not "be used to obscure competition but [should] recognize competition where, in fact, competition exists," *United*

States v. Cont'l Can Co., 378 U.S. 441, 453 (1964) (quoting *Brown Shoe*, 370 U.S. at 326). By potentially obscuring market realities, the rigid rules suggested by the district court could significantly harm antitrust enforcement, especially in the digital economy.

A. Antitrust markets can include products the defendant does not license or sell

The district court rejected Epic's proposed markets, in part, because Apple does not license or sell its products in those markets. 1-ER-48 (rejecting "foremarket" for smartphone operating systems because iOS "is not licensed or sold to anyone"); 1-ER-68 (rejecting aftermarket for IAP processing because Apple's "system is not something that is bought or sold"). In appropriate circumstances, however, markets can be defined around products that the defendant does not license or sell. A contrary legal rule could cause courts to miss important dimensions of competition squarely within the Sherman Act's protections.

1. No rule of law prevents a court from drawing a market around a product that is not sold by the defendant. For example, numerous courts have defined markets to include firms that are vertically integrated and self-provision the product (as Apple does here). *E.g.*, *Brown Shoe*, 370 U.S. at 301-303 (market shares included sales to self-owned retailers);

IT&T v. Gen'l Tel. & Elecs. Corp., 518 F.2d 913, 930-32 (9th Cir. 1975), *overruled on other grounds by California v. Am. Stores Co.*, 495 U.S. 271 (1990) (error to exclude from the market defendant's purchases from its owned affiliate).

Microsoft is directly on point. There, Microsoft licensed its operating system (OS) to hardware manufacturers (OEMs), while Apple did not license its Mac OS to other manufacturers. The court treated Mac OS as a product, finding that "Apple had a not insignificant share of worldwide sales of operating systems." *Microsoft*, 253 F.3d at 73. It affirmed the product market "as the licensing of all Intel-compatible PC operating systems," but only because Mac OS was not a close enough substitute to PC OSs. *Id.* at 52.

2. The district court considered it significant that customers are not charged a price for iOS and Apple's IAP system. 1-ER-68, 1-ER-133 n.583. But, in appropriate circumstances, markets (especially digital markets) can be defined around products for which customers are not directly charged.

First, while sometimes there may be no separate price charged for a component of a product, the price for the whole product reflects (in part)

the component. Thus, for example, customers pay for iPhones *with* an OS. Similarly, developers account for IAP charges when setting their prices.

Second, in some circumstances, customers are not charged a monetary price at all because they provide value in other ways (e.g., through disclosing data). The Sherman Act protects competition in or affecting any part of "trade or commerce," 15 U.S.C. §§ 1-2, and its "broad" terms capture "almost every activity from which the actor anticipates economic gain," whether that gain happens in the market under consideration or a separate market, *O'Bannon v. NCAA*, 802 F.3d 1049, 1065 (9th Cir. 2015). Accordingly, courts have recognized that markets can be defined around "free" products.[6] *E.g.*, *Klein v. Facebook, Inc.*, No. 20-cv-08570-LHK, 2022 WL 141561, at *12-14 (Jan. 14, 2022) (sufficiently alleging markets for "free" social media and social networking services); *FTC v. Facebook, Inc.*, No. 20-3590, 2022 WL

[6] Further, a "free" product can compete in antitrust markets with positively priced alternatives. *E.g.*, *Wallace v. Int'l Business Machs. Corp.*, 467 F.3d 1104, 1107-08 (7th Cir. 2006) (finding that free Linux competed with other OSs); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 50-53 (D.D.C. 2011) (market for "digital do-it-yourself" tax software included products offered "in some instances free").

103308, at *5, *12 (D.D.C. Jan. 12, 2022) (sufficiently alleging a product market for personal social network services even though the services "are all provided free of charge"). In these cases, the Sherman Act continues to protect non-price competition, including on quality, variety, and innovation. *E.g.*, *Amex*, 138 S. Ct. at 2284 ("decreased quality" an anticompetitive effect); *Dentsply*, 399 F.3d at 194 ("limitation of choice" an anticompetitive effect).

B. Product markets can be defined around components of a bundled product

The district court's opinion also could be read as resting on a legal rule that product markets should not be defined around components of a bundled product, even when other firms offer that component separately. It rejected a foremarket including Apple iOS because iPhones "are more than the operating system," notwithstanding Google's licensing of Android OS. 1-ER-48, 1-ER-133 n.583. It likewise concluded that Apple's IAP system is not a "product," noting that "it is integrated into an iOS device," and separate from other payment processors that do not offer all the functionalities of Apple's IAP system, 1-ER-68-70, notwithstanding the court's acknowledgement that "there may be a market for payment processing," 1-ER-158.

No legal rule prevents courts from defining a market around a component of a bundle. Firms commonly bundle various products and services into a single package. For example, Apple includes a variety of functionalities in its iPhone, and health systems contract with insurers for the entire range of healthcare services the systems provide. Where it reflects competitive dynamics, a market can be defined around individual components of such bundles. *See, e.g.*, *Cascade Health Sols.*, 515 F.3d at 891 (a relevant market of primary and secondary acute care hospital services where defendant bundled tertiary acute care hospital services); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 493-94 (3d Cir. 1992) (en banc) (a relevant market of car sound systems where defendant tied such systems with the sale of the car).

1. The district court relied on *Microsoft*'s observation that integration is common in software markets. 1-ER-157. But *Microsoft* does not teach that integration means that competition does not exist for the component or that the market must include the entire integrated product. To the contrary, the *Microsoft* court defined a market for Intel-compatible PC OSs, even though those were integrated into computers sold to consumers. 253 F.3d at 51-54. Likewise, the decision affirmed

the district court's finding that separate product markets existed for Windows and Internet Explorer, even though those were technologically integrated for the consumer. *Id.* at 95.

The district court considered it significant that the products offered by Apple and other firms did not completely replicate each other's functionalities. *See, e.g.*, 1-ER-69-70 (contrasting the additional functionalities of Apple's IAP system with other payment processors). But that is a common feature of differentiated products, and courts frequently include them in the same market when there is sufficient substitution between them. *See Brown Shoe*, 370 U.S. at 326; *DSM Desotech Inc. v. 3D Sys. Corp.*, 749 F.3d 1332, 1339-40 (Fed. Cir. 2014) (products may be "good substitutes" even when differentiated by features).

2. Relatedly, the district court stated that "a single platform [] cannot be broken into pieces to create artificially two products," relying on tying cases and *Amex*. 1-ER-157. But neither supports such a rigid rule.

a. Tying law does not indicate that a market cannot be drawn around a component of a platform. To the contrary, tying cases focus on

"competitive consequences" and not "label[s]," and account for competition involving products comprising only part of a bundle. *Jefferson Parish*, 466 U.S. at 21 n.34. To show that the defendant has tied separate products, the Supreme Court requires evidence of sufficient independent demand such that "it is efficient to offer [the tied product] separately from [the tying product]." *Id.* at 21-22. The Court rejected an alternative test that no tie exists where the defendant is "merely providing a functionally integrated package of services"—instead the Court protected competition for a component even when the component would be "useless" outside the integrated bundle. *Id.* at 18-19 n.30, 21.

The district court deemed it artificial to consider Apple's IAP system and iOS app distribution separate products. 1-ER-158. In making this determination, the court "focused on functionality"—in particular, IAP's "integration" into the "full suite of services offered by iOS and the App Store"—and claimed it was "irrelevant" that there was a potential market for component services. 1-ER-70 n.336, 1-ER-158-59. However, under *Jefferson Parish*, such evidence can support a finding that the component is a separate product. Where there is "competition

on the merits" for a component, tying law, like antitrust law more generally, protects that competition. *Jefferson Parish*, 466 U.S. at 21-22.

b. Nor does *Amex* set forth a broad legal rule requiring that the product market encompass all the component services offered on a defendant's platform. To the contrary, *Amex* reaffirmed that the relevant market "must correspond to the commercial realities of the industry." *Amex*, 138 S. Ct. at 2285 (internal quotation marks omitted). That fact-specific inquiry depends on the nature of the challenged restraint and the platform involved.

i. *Amex* analyzed a challenge to anti-steering rules that American Express imposed on merchants. The district court had held "that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders"—but the Second Circuit reversed, "conclud[ing] that the credit-card market is one market, not two." *Id.* at 2283. The Supreme Court affirmed the court of appeals' holding because "credit-card networks are a special type of two-sided platform known as a 'transaction' platform,'" which "facilitate a single, simultaneous transaction between participants." *Id.* at 2280, 2286. "The key feature of transaction platforms is that they cannot make a sale to one side of the

platform without simultaneously making a sale to the other." *Id.* at 2280. The Court distinguished credit-card networks from other types of two-sided platforms that do not provide simultaneous transactions—which the Court called "nontransaction platforms"—such as newspapers. *Id.* at 2286-87.

ii. When the defendant operates a nontransaction platform, the relevant market frequently will not comprise the entire platform. Nontransaction platforms often "behave[] much like" one-sided markets, with rivals that compete only for some of the services provided by the platform. *Id.* at 2286-87 n.9. In such circumstances, the relevant market would be a one-sided market corresponding to the competition for those services, and thus would comprise less than the defendant's full platform. *Id.* at 2286; *see also id.* ("the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such").

Even in the special case when the defendant operates a transaction platform, the relevant market may well be less than the full platform. First, the defendant's platform may process different types of transactions that involve different competitions. Here, for instance, the district court distinguished gaming transactions on the App Store from

other types of App Store transactions, and held the relevant market includes the former but not the latter. 1-ER-124-27.

Second, the defendant's platform may include both transaction-processing services and other services facilitating the transactions. *See Amex*, 138 S. Ct. at 2286 n.8 (distinguishing transaction-processing services from "[m]erchant services and cardholder services[, which] are both inputs to this single [transaction] product"). In some cases, the competition affected by the challenged restraint may be just for one or more facilitating services. *See* Br. for United States at 28-32, *PLS.com v. Nat'l Ass'n of Realtors*, No. 21-55164 (9th Cir. June 2, 2021).

iii. Epic argues that *Amex* does not require that separate transactions (app downloading and in-app purchases) be in a single market. *See* Epic Br.71. We agree. *Amex* does not set forth a rule of law requiring that different types of transactions on the same platform be analyzed in the same market—an issue that was not presented in *Amex*. For the reasons discussed above, there can be circumstances where there are different relevant markets corresponding to distinct competitions for different sorts of transactions that occur on one platform. We take no

position on the fact-specific questions of the relevant market(s) supported by the record and their proper characterization under *Amex*.

CONCLUSION

The Court should ensure that the Sherman Act is not unduly narrowed through legal error.

Respectfully submitted.

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