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
(Case No. 4:20-cv-5640) (District Judge Yvonne Gonzalez Rogers)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLEE — CROSS-APPELLANT AND AFFIRMANCE IN PART, REVERSAL IN PART

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in important antitrust cases. *See, e.g.*, *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, *reh'g* en banc *granted*, 5 F.4th 950 (9th Cir. 2021).

WLF's Legal Studies Division, its publishing arm, is also active on relevant antitrust issues. *See, e.g.*, Maureen K. Ohlhausen, *Antitrust Law Must Remain Focused on Promoting Competition and Enhancing Consumer Welfare*, WLF LEGAL OPINION LETTER (Sept. 10, 2020); William Kolasky, *"Unfair Methods of Competition": The Legislative Intent Underlying Section 5 of the FTC Act*, WLF WORKING PAPER 189 (Dec. 2014). WLF believes that the District Court's decision on federal antitrust issues promotes competition and should be affirmed.

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[1] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. The parties filed a blanket consent to the filing of *amicus* briefs.

INTRODUCTION

The world was a different place in 2007. At the start of the year, every Speaker of the House in the nation's history had been male and the Dow Jones Industrial Average had never hit 13,000. Netflix subscribers still received and returned DVDs through the mail. During the year, Microsoft bid adieu to XP and introduced the much-maligned Vista, and Barack Obama announced he was running for president. Ridesharing, crowdfunding, and the rest of the "sharing economy" did not yet exist.

It's hard to imagine this was only fifteen years ago. But what is even more remarkable is the change in technology that people carry in their pockets. In 2007, most people still carried flip phones. Few outside Big Law attorneys and Wall Street traders carried smartphones. And those phones weren't all that smart. Research in Motion's BlackBerry controlled most of the market.

The latest BlackBerry was the Curve 8300. It looks antiquated today. It had only a 2G radio—a frequency no longer supported in America. The phone also lacked a GPS antenna and WiFi connectivity. So consumers were stuck with ultraslow connectivity good for responding to angry late-night emails from partners or clients and little else. But then everything changed.

During the Macworld 2007 keynote address, Steve Jobs announced the launch of the iPhone. When the iPhone launched later that year, people lined up outside cellphone stores nationwide to buy their first smartphone. Although the benefits of the phone were yet unknown, people trusted that the new gadget would improve their day-to-day lives. They were right.

For the first time, cellphones could hold entire music collections. So people could stop carrying their iPods along with their cellphones. (This, of course, was before Spotify or other streaming services became available.) But this was not the true power of the iPhone.

Nine months after launching the iPhone, Apple gave developers the tools necessary to make third-party applications that could run on the iPhone. And before the iPhone's one-year anniversary, consumers could download third-party apps on their iPhones. Today, these apps are the heart of most iPhone users' experience. They spend most of their time using these apps.

One reason consumers are spending more time with apps is the increasing capabilities of the iPhone and its software. *See* Trial Tr. 144: 16–21 (In 2008, "the iPhone was not powerful enough to play a game as graphically elaborate as Fortnite."). It was only through Apple's continued investment in the iOS platform that games like Fortnite are now supported on the iPhone.

In short, the iPhone and third-party apps have transformed the way that humans live, work, and play. It is hard to remember how people lived without having these tools at their fingertips. Whether it be searching Westlaw while opposing counsel is arguing in court or passing the time on BART as you commute, the iPhone and its apps make life better.

The explosion in consumer welfare ushered in by the iPhone, apps, and the App Store angers Epic. Both it and its *amici* ask this Court to stifle technological innovation. Although this might help Epic's bank account and those of certain *amici*, it harms consumers and the whole economy. Because consumer welfare is the "principal objective of antitrust policy," *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 457 (9th Cir. 2021), the Court should affirm the District Court's judgment on the federal antitrust claims.

Epic also asks the Court to allow California to legislate for the entire nation. Of course, that violates core federalism principles. California cannot pass laws that govern outside conduct that is not directed at the State. Yet that is what Epic asks this Court to bless by affirming the District Court's injunction regulating Apple's out-of-state conduct directed at individuals outside California. The Court should not permit this action. Rather, if the Court decides that Apple violated California law, it should vacate the injunction and remand for further proceedings.

STATEMENT

Apple created its successful iOS ecosystem by expending over $100 billion. Independent software developers use this ecosystem and create most of the App Store's apps. Although most are free, some apps allow users to make in-app purchases. Apple makes money by charging a 30% commission on most paid transactions. *See* 1-ER-6; 1-ER-35–36.

To ensure the apps are safe and provide consumers with a quality experience, Apple requires that developers distribute iOS apps only in the App Store. 1-ER-32–33. It also forbids developers from directing, inside the apps, users to an outside site for making payments. 1-ER-33.

Epic makes Fortnite, one of the most successful videogames in history. 1-ER-6. It did not like Apple's in-app purchase requirement because it had agreed to share a portion of its revenue. Even post commission, Epic made over $700 million from Fortnite purchases. *See id.* So Epic breached its contract and allowed users to make purchases using Epic's own payment vehicle. 1-ER-28. When Apple removed Fortnite from the App Store, Epic sued. 1-ER-6.

Epic argued that Apple's requirements for apps violated the Sherman Act. After a long bench trial, the District Court held that Apple did not violate the Sherman Act. 1-ER-2. Yet the District Court then held that Apple's anti-steering restrictions violated California's unfair competition law. *Id.* It entered a nationwide injunction barring Apple from enforcing those provisions for any developer. 2-ER-195. Epic appealed, and Apple cross-appealed.

ARGUMENT

After an extensive trial, the District Court entered 180 single-spaced pages of findings of fact and conclusions of law. 1-ER-3–183. It correctly held that Epic failed to prove that Apple violated federal antitrust laws. But it erred in finding that Apple violated California's

UCL. Even if Apple violated that law, the District Court erred in granting a nationwide injunction.

I. APPLE'S APP STORE POLICIES DO NOT VIOLATE FEDERAL ANTITRUST LAWS.

Epic argues that the District Court erred with both its Section 1 and Section 2 analyses. But the District Court reached the right result on both accounts.

A. Apple Lacks A Monopoly.

Section 2 of the Sherman Act bars monopolization, attempt to monopolize, or conspiracy to monopolize a market. 15 U.S.C. § 2. Here, Epic claims (at 55) that "Apple enjoys monopolies in iOS app distribution and in-app payment solutions." According to Epic, this yielded supracompetitive profits and prices. But Epic's argument conflicts with basic economic theory.

A monopoly rent is a supracompetitive charge that normally lowers demand for a product. *See* Joseph Gregory Sidak, *Rethinking Antitrust Damages*, 33 Stan. L. Rev. 329, 332 (1981). The only exceptions to this rule are (1) goods like air, which have perfectly inelastic price demands, and (2) Veblen goods, luxury goods for which demand increases as the price increases, *see* Paul F. Campos, *The Extraordinary Rise and Sudden*

Decline of Law School Tuition: A Case Study of Veblen Effects in Higher Education, 48 Seton Hall L. Rev. 167, 168 (2017). That means if Epic cannot show that demand for apps and in-app purchases is artificially low, it has failed to show that Apple's conduct harmed competition and violated Section 2.

If Apple's 30% commission were supracompetitive, the arrangement between app developers and Apple would be such that (1) apps sell at a monopoly price, (2) Apple collects all resulting monopoly rents, and (3) the monopoly price leads to fewer apps sold by app developers. But that hasn't happened.

The District Court correctly found that "iOS game output has increased over time." 1-ER-99. It relied on evidence "show[ing] that iOS game transactions exploded by 1,200% since 2008." *Id.* (footnote omitted). This factual finding is well-supported by the record. *See, e.g.*, 2-SER-383 (Epic's expert conceding that "output [ha]s increased" "explosively" "[s]ince the opening of the App Store in 2008"); 2-SER-468 (another Epic expert conceding that "App Store's explosive growth over the last decade is extraordinary").

There is good reason for the increased output. None of the policies Epic challenges limits output. And without limited output, supracompetitive prices are not sustainable. As Apple's expert testified, "both developer revenue from game apps and developer revenue from all apps increased at around 50 percent a year from 2010, when [Epic's expert] said the App Store became a monopoly." 2-SER-430. Apple's expert contrasted that with the Supreme Court's *Ohio v. Am. Express*, 138 S. Ct. 2274 (2018) decision, in which the Court held that a 5.4% annual rate of growth was dramatic. *Id.* "If 5.4 percent is dramatic," the growth in App Store transactions "is wildly dramatic." 2-SER-430.

The number of transactions is just one measure of output growth. Another measure is total spending on digital game transactions. The industry-wide growth was about 50% slower than the same growth in the App Store. 2-SER-431. Of course, "you wouldn't expect that" if Apple had become a monopoly in 2010. *Id.*

Another expert phrased it slightly differently but reached the same result. He explained "that the number of game transactions has been increasing over time. And if you do a calculation over the span of this data, you'll find that game transactions have expanded 1200 percent." 2-

SER-441. But "[i]f you look at revenue, revenue has expanded even more at 2600 percent, and it's a very steady increasing amount." *Id.*

The same expert testified that these were "enormous changes" in output. 2-SER-442. It was "about a 50 plus times difference in the rate of growth" from the rest of the economy. *Id.* It was over five times the growth rate of gaming transactions on other platforms. 2-SER-443.

Again, reduced output is necessary to show that a company has monopolized a market. Epic fell woefully short of showing reduced output. Even focusing on the two years before and after 2010, when Apple allegedly obtained market power, does not show decreased output. 2-SER-445. That lack of evidence is why Epic's expert did no "analysis on output restrictions." 2-SER-446.

The experts used 60 billion transactions to reach their conclusions. That large dataset shows how easy it would be to prove any output limitations. If the number of transactions decreased, that would show output restrictions. Even a reduction in the rate of the transaction growth, when compared to the rest of the gaming industry, would be some evidence of output restrictions. Yet Epic presented no such evidence. The lack of evidence was not because of difficulty measuring output. Rather, it was because the data shows that the App Store policies increased output.

Epic and its experts tried to prove Apple violated Section 2 without showing reduced output. This it could not do. Both antitrust law and economic theory demand a showing of output restrictions to prove a Section 2 violation. Epic's failure to show this reduced output doomed its claims.

B. The Procompetitive Effects Of Apple's Policies Outweigh Any Anticompetitive Effects.

1.i. As described in Apple's brief (at 38-49), Epic's failure to prove its proposed markets doomed its Section 1 claims; the Court's analysis can end there. If this Court disagrees, however, and reviews the District Court's rule-of-reason analysis, the result is the same.

"Because the Supreme Court has interpreted § 1 to outlaw only unreasonable restraints on trade, courts must consider whether a restraint falls into the small group of restraints that are unreasonable per se or is otherwise unreasonable under a fact-specific assessment known as the rule of reason." *SmileDirectClub, LLC v. Tippins*, 2022 WL 804146, *5 (9th Cir. Mar. 17, 2022) (cleaned up). Epic does not allege that there is a per se § 1 violation here. Thus, the District Court engaged in an alternative rule-of-reason analysis.

Under the rule of reason, Epic bore "the initial burden to prove that" Apple's App Store policies have "a substantial anticompetitive effect that harms" app developers. *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1111 (9th Cir. 2021) (quotation omitted). Epic failed to satisfy this burden of showing anticompetitive effects. But if Epic satisfied that burden, Apple was then required "to show a procompetitive rationale for the restraint." *Id.* (quotation omitted). After Apple made that showing, Epic had "to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* (quotation omitted).

This brief focuses on the procompetitive rationales for Apple's App Store restrictions, which dwarf any anticompetitive effects. There are many types of procompetitive effects. For example, Apple's "desire to profit from its intellectual property rights" is presumptively procompetitive. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1997). Higher quality goods and increased output are also procompetitive effects. *See FTC v. Qualcomm Inc.*, 969

F.3d 974, 989 (9th Cir. 2020) (citation omitted). Apple proved the App Store's restrictions had these—and other—procompetitive effects.

ii. Apple has been so successful because it recognizes that consumers' app preferences vary. "Some want games, some want business tools, some want to stream music while others want to make music, some want to use social media, some want to use their phones as small scientific instruments, and so on." Andrew McAfee & Erik Brynjolfsson, *Machine, Platform, Crowd: Harnessing Our Digital Future* 157 (2017). An increase in cheap apps "is exactly what Apple wants." *Id.* at 161.

That is why Apple has encouraged continued App Store growth. *See* 1-ER-99; 2-ER-427; 2-SER-454–455; Trial Tr. 2846:6–8. It also explains why, since opening the App Store, Apple has never increased the commission rate. 2-SER-510. In fact, it has lowered the commission for certain app developers. 2-SER-448.

Fleeting monopolies on technological inventions lead to better products at lower prices. *See* Richard A. Posner, *Antitrust Law* 249-50 (2d ed. 2001). Apple invented a massively beneficial new product. Rivals quickly piled into the market. Smartphone apps proliferated and prices fell. Everyone benefited because the market is efficient. The proliferation of app transactions without increasing prices shows that Apple's App Store policies have no meaningful anticompetitive effects.

2.i. The Framers knew how important intellectual property is to innovation. The Constitution grants Congress authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. Without incentives, companies will not innovate.

Patents are one incentive to innovate. "[S]cholars generally agree that when innovation is expensive, risky, and easily copied, inventors are less likely to undertake the guaranteed costs of innovation in order to obtain the mere possibility of an invention that others can copy." *Bilski v. Kappos*, 561 U.S. 593, 650 (2010) (Stevens, J., concurring) (citing William Landes & Richard Posner, *The Economic Structure of Intellectual Property Law* 13-15 (2003)). So there is a tradeoff for a patent. In exchange for publishing technical details about an innovation, a firm receives a monopoly on the invention for twenty years. *See* 35 U.S.C. § 154(a)(2).

ii. Of course, not all innovations are patent eligible. *Cf.* 35 U.S.C. § 101 (defining what is patent eligible). Yet businesses still have incentive to innovate "because the competitive marketplace rewards companies that use more efficient business methods." *Bilski*, 561 U.S. at 651 (Stevens, J., concurring) (quoting Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 Va. L. Rev. 1575, 1618 (2003)).

Apple believed that the benefits of the iOS ecosystem innovations were worth the risk. Thus, over the past decade Apple has spent over $100 billion ensuring an experience that benefits all involved. *See* 2-SER-546; 2-SER-588; *see also* 1-ER-69–70. But if Epic's antitrust theory prevails, it will chill other companies from engaging in similar innovation. This Court would be sending a message that despite large, risky investments in technology, innovative companies cannot use normal contractual provisions to protect their inventions.

iii. Apple's restrictions have procompetitive effects. Begin with consumers. Only fifteen years ago, having turn-by-turn directions on your cellphone with traffic updates and speed-trap alerts belonged in the Jetsons—not reality. Yet today many high school and college students do not go anywhere without Waze directions. The same goes for streaming music from your cellphone. It was also inconceivable that over 82 million tracks could be streamed with a single iOS app. Now, that is reality. *See About Spotify*, Spotify, https://bit.ly/3sIioC4 (last visited Mar. 31, 2022).

These third-party apps make consumers' lives better. Yet consumers would not download or use the apps if the apps posed a security risk. Luckily, when consumers download apps from the App Store they need not worry about viruses or other malware infecting their phones. 1-ER-108–113. They can rest assured that the apps are safe. This is thanks to Apple's significant expenditures to review apps and ensure their safety. Of course, if apps could be installed from outside the App Store, Apple could not guarantee that these apps will be safe, and the consumer would be vulnerable to malware or worse. *See* 1-ER-31.

Apple's "App Review has detected and prevented acts of fraud, attempted theft, and other ill-intentioned conduct." 1-SER-210. In 2020, "Apple rejected more than 48,000 apps because they contained hidden or undocumented features[and] more than 150,000 apps because they were found to be spam, copycats, or misleading to users in ways such as manipulating them into making a purchase." *Id.* In short, Apple's safety review is a major procompetitive benefit of Apple's policy requiring developers to distribute apps only through the App Store. *See, e.g.*, 1-ER-48 & n.250 (citations omitted).

Apple's policy requiring that all in-app purchases use Apple's payment system also benefits consumers. First, Apple can guarantee that the transaction is secure. *E.g,* 1-ER-119 (citations omitted). Again, if the consumer were directed elsewhere, that would pose a security threat. Apple's policy eliminates the threat. Apple's "App Review team reviews every" app that offers in-app purchases "to confirm whether they deliver the good or service that the user pays for and expects." 1-SER-209. This includes "computerized static and dynamic analysis, as well as manual human review, on the compiled software, or 'binary' file, that a developer submits for App Review, along with metadata including screenshots, images, pricing information, and text describing the app." *Id.* This information allows Apple to decide "whether each transaction will actually result in the delivery of the expected content, whether the purchased content is consistent with the overall app, and whether the transaction may have other characteristics that could mark it as a scam or mislead users." *Id.*

Second, Apple can track which in-app purchases consumers make and ensure that they get what they pay for. *See* 1-ER-120. If consumers were directed elsewhere for payment, there would be no central repository of their digital purchases.

When Apple created the market, there was no way for third-party developers to broadly distribute apps to consumers. Apple spent billions of dollars developing a secure way to get safe apps to consumers and ensuring that consumers get what they pay for. A ruling for Epic would send a strong message to businesses: Don't invest in protecting your customers from potential threats. You'll be exposing yourself to massive antitrust liability.

Next are the app developers. Apple gives them a license to use a suite of tools that allow their apps to work seamlessly in iOS. 1-ER-31. Apple provides developers with these tools despite no obligation to do so. This is procompetitive because it allows competition in the App Store. (Of course, this also benefits consumers. Without some permissions, many apps that consumers rely on would be unavailable because of the threat of lawsuits.)

There are other benefits to the app developers. Distributing all apps through the App Store helps eliminate counterfeit and copycat apps. This ensures that firms do not suffer a damaged reputation from a counterfeit or copycat app and ensures that profits go to the rightful developer. Requiring consumers to use Apple's in-app purchase system also ensures that developers receive their funds. Although it may not be the method that every app developer prefers, that does not mean it isn't a benefit to them. Creating the tools that developers use was not cheap. Nor is maintaining the tools to improve performance and track changes to iOS. Again, a ruling for Epic would decrease incentives for companies to invest in their products.

Finally, the App Store's policies benefit Apple. It can protect the brand image by ensuring that its devices are secure and that apps are useful to consumers. It also can recoup some of its large investment in the iOS ecosystem by collecting a commission on all app sales and in-app purchases. But just because Apple benefits from the App Store policies does not mean it is anticompetitive. Otherwise, all successful innovation would violate antitrust laws.

The App Store's policies are procompetitive because they benefit all parties. This includes consumers who buy apps and the developers that make them. All this is possible because of the immense investment that Apple has made in the iOS ecosystem. If Apple cannot recover those costs, and pay for failed research and development projects, it—and other companies—will quit investing in products that make our lives better.

3. Apple is an attractive target for rent-seeking rivals. It invested over $100 billion in the iOS ecosystem to create a thriving business that many people lean on for their day-to-day lives. Epic relied on this ecosystem for part of its business. But rather than play by the rules, Epic wants to free ride on Apple's large investment by using antitrust law as a sword. This unprincipled view of antitrust law won't stop with Apple. Under Epic's view, Apple became a monopolist as soon as it opened the App Store; it was the only way for consumers to download apps and pay for in-app purchases. In other words, Epic believes that any company that innovates with a new product or service is acting anticompetitively unless it is willing to license its intellectual property on someone else's terms—for free.

*   *   *

There are major procompetitive effects for the App Store's policies that outweigh any minor anticompetitive effects. Under the rule of reason, that is the end of the analysis for Epic's Section 1 claim—the District Court correctly entered judgment for Apple.

II. The Nationwide Injunction Violates Core Federalism Principles.

As described in Apple's brief (at 104-109), the District Court erred in finding that its actions violated California's UCL. But if this Court disagrees, it should still vacate the nationwide injunction. That remedy violates horizontal federalism principles key to the United States's continued viability as a nation comprised of fifty sovereigns.

A. States' Exercising Legislative Power Outside Their Borders Violates Horizontal Federalism Principles.

When people invoke federalism, they usually mean vertical federalism—the relationship between the federal government and States. Horizontal federalism is the other side of the federalism coin. It involves how the States interact with each other. When adopting the Articles of Confederation after the Revolutionary War, the thirteen States included no safeguards against burdening interstate commerce. *See* Merrill Jensen, *The New Nation: A History of the United States*

During the Confederation, 1781-1789, 245-57 (1950). The Founders quickly recognized that the structure was broken and needed reform. Thus one reason that the Constitutional Convention happened was the "Balkanization that [] plagued" the States "under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (citing *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949)); *see* The Federalist No. 7, 62-63 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

To solve that problem, States gave Congress authority to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3; *see* The Federalist No. 42 at 267-68 (James Madison). The Commerce Clause was so critical to a functioning federal government that it was the first substantive power the new Constitution delegated to Congress. States disclaimed any ability to regulate interstate commerce. They ceded this power so commerce could flourish.

The Framers also thought all States were disposed "to aggrandize themselves at the expense of their neighbors." The Federalist No. 6 at 60 (Alexander Hamilton) (quotation omitted). They feared this would lead to factions—the ultimate poison for the Union; the "most common and durable source" of factions is economic inequality. The Federalist No. 10 at 79 (James Madison).

Maintaining States' sovereignty was the solution to the problem. Each State retained its "ordinary course of affairs, concern[ing] the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45 at 293 (James Madison); *see Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 543 (2013). Sovereignty necessarily includes prohibiting encroachment of state power across borders. Otherwise, state sovereignty disappears.

Factions quickly form if state borders are merely nominal. So the Court has zealously guarded them: "Laws have no force of themselves beyond the jurisdiction of the State which enacts them." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892); *see also New York Life Ins. Co. v. Head*, 234 U.S. 149, 160-61 (1914). The new Constitution thus built on the premise that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.G. Seelig*, 294 U.S. 511, 523 (1935). The solution included unity in interstate trade while respecting the States' sovereignty within their own borders.

The dormant Commerce Clause prevents States from legislating extraterritorially. It strikes a balance between limiting actions that discriminate against fellow States and maintaining "the autonomy of the individual States within their respective spheres" on the other. *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989). Properly limiting States' jurisdiction "confin[es] each state to its proper sphere of authority[ ]in a federalist system." Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1093 (2009). When "the burden of state regulation falls on" other States, typical "political restraints" are ineffective. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68 n.2 (1945) (collecting cases).

At bottom, States must "recognize, and sometimes defer to, the laws, judgments, or interests of another." Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 Notre Dame L. Rev. 1309, 1309 (2015). Policy judgments must be respected even if the people or leaders of another State vehemently disagree. The Constitution requires that "while an individual state may make policy choices for its own state, a state may not impose those policy choices on the other states." Margaret

Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 Ore. L. Rev. 275, 292 (1999) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-73 (1996)). But here, California is imposing its UCL views on app developers throughout the nation. This violates the principles of horizontal federalism key to maintaining our federal form of government.

B. Other States Reject California's Policy Views On What Constitutes Unfair Competition.

Nor is there "no harm, no foul" with the District Court's nationwide injunction. Many States have rejected California's broad definition of unfair competition and the law's broad remedies provision. But even if every State's UCL statute mirrored California's law, that would not excuse the District Court's decision to issue a nationwide injunction for a violation of California law.

Fourteen States' UCLs do not apply to anticompetitive conduct.[2] In these States, unfair competition is generally defined as deceiving

[2] The States are Alabama, Delaware, Georgia, Indiana, Kansas, Maryland, New Jersey, New York, Ohio, Oklahoma, Oregon, South Dakota, Virginia, and Wyoming. *See* ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* (5th ed. 2014) at 2-48, 9-15, 12-1, -19, -20, 17-31, 19-27, 23-40, 35-1, 39-21 to -22, 40-1, -37 to -38, 45-1, -12, 50-32,

customers, not harming competition. *E.g.*, Ala. Code § 8-19-5. The District Court, of course, did not find that Apple deceived Epic or other app developers. The relevant contract was clear about prohibited conduct. Enjoining Apple's conduct in these fourteen States means that those state legislatures' policy choices are being overridden by California's legislature. This is a quintessential violation of horizontal federalism.

Another eight States do not permit injunctive relief in private suits for UCL violations.[3] In many of these States, only the sovereign may seek an injunction. *E.g.*, Ariz. Rev. Stat. § 44-1528(A). But this is a suit brought by a single private party—not a government. The political capital necessary for a sovereign to sue dwarfs the political capital required to file an *amicus* brief. And this political accountability is one

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and 55-23; *see also State v. Daicel Chem. Indus.*, 840 N.Y.S.2d 8, 12 (N.Y. App. Div. 2007); *Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 802 (Ohio 2005); *Island Mortg. of N.J., Inc. v. 3M*, 860 A.2d 1013, 1016 (N.J. Super. Law 2004).

[3] These States are Arizona, Iowa, Louisiana, Montana, New Mexico, South Carolina, Tennessee, and Wisconsin. *See* Ariz. Rev. Stat. § 44-1528; La. Rev. Stat. § 51:1409; Mont. Code §§ 30-14-103, 30-14-133; N.M. Stat. § 57-12-15; S.C. Code Ann. §§ 39-5-50, 39-5-140; Tenn. Code §§ 47-18-106, 47-18-109; Wis. Stat. § 100.20; *Molo Oil v. River City Ford Truck Sales*, 578 N.W.2d 222 (Iowa 1998).

reason that many legislatures bar private plaintiffs from seeking injunctive relief for UCL violations. They want the party seeking an injunction to face the voters. But the District Court's order disregards these state-level policy choices. The injunction permits California to dictate the remedies available in other States. This is another afront to horizontal federalism principles.

Although other States permit private parties to seek injunctive relief for UCL violations based on anticompetitive conduct, many of those States severely limit the claim. For example, Arkansas provides that only four types of anticompetitive behavior are actionable under its UCL. *See* Ark. Code §§ 4-75-206 to -209. So several States do not allow for a claim for injunctive relief like California does. Again, enjoining Apple's conduct in these States violates horizontal federalism principles.

Combined, twenty-two States unequivocally bar an injunction for an anticompetitive-conduct claim brought by a private party. Although many of these States' attorneys general support Epic here, that is for political reasons. The States themselves are in fact injured by California's legislating outside its borders. One State that joined an *amicus* brief here, Texas, recently sought leave to file a bill of complaint against

California for similar behavior. *See* Mot. for Leave to File a Bill of Compl., *Texas v. California*, 141 S. Ct. 1469 (2021) (*per curiam*) (No. 153 Original). The Court should look to Texas's arguments there for how the District Court's injunction here hurts the States; it tracks the arguments above.

The District Court's nationwide injunction thus violates horizontal federalism principles. If the Court affirms the liability finding, it should vacate the injunction as violating the Constitution. *See Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1074 (9th Cir. 2021) (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012)).

* * *

The District Court undertook a painstakingly detailed analysis of Epic's antitrust claims. It correctly held that Apple did not violate federal antitrust laws. This decision ensures that companies like Apple have ample incentive to invest and innovate, which benefits all Americans. The only place that the District Court went astray was in finding that Apple violated California's UCL. But even if that decision were right, this Court should vacate the nationwide injunction for violating core federalism principles.

CONCLUSION

This Court should affirm in part and reverse in part. Alternatively, it should affirm in part and vacate in part.

Respectfully submitted,

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March 31, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,422 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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March 31, 2022

APPENDIX OF RECORD CITATIONS

Trial Transcript Pages 143-145

Trial Transcript Pages 2845-2847

A. It's 30 percent.
Q. And prior to August 2020, did Epic pay Apple a commission in connection with the distribution of *Fortnite*?
A. Yes.
Q. In Epic's view is there a difference between the 30-percent commission that it pays to console makers and the 30-percent commission it paid to Apple prior to August 2020?
MR. DOREN: Objection, Your Honor. First of all, foundation. The question was as to Epic as opposed to Mr. Sweeney.
And second of all, it calls for a narrative.
MS. FORREST: Calls for, I'm sorry?
THE COURT: He said calls for a narrative.
I don't think it calls for a narrative. That is overruled.
But you can rephrase with respect to the other.
BY MS. FORREST:
Q. All right. Mr. Sweeney, in your view as the CEO of Epic, is there any difference between the 30-percent commission that is paid to console makers by Epic and the 30-percent commission that is paid by Epic to Apple?
A. Yes.
Q. Can you please describe that for the Court.
A. Yes. The general bargain in the console industry has long been the idea that console hardware is often sold at or below

its manufacturing cost in order to bring in the larger user base. And then the cost is offset by contributions by the software developers to the hardware.

And so the intended effect of this is quite different than the smartphone model where the user buys a device by a business that is typically in the profit. And then the public shares are forced to pay a commission to the platform maker outside of any -- negotiated Epic -- sorry, negotiated economic bargain which is aimed at making hardware more widely available to customers in the general --

THE COURT: Can I ask you, *Fortnite*, is there a version of *Fortnite* that you are using right now? Or is it just *Fortnite*? Is it *Fortnite* 10, 2.0?

THE WITNESS: Well, *Fortnite* is just evolving. We have never made a sequel.

THE COURT: Okay. So in 2007 or 2008 was *Fortnite*, the technology required to play *Fortnite*, could that have been played on an iPhone?

THE WITNESS: No, Your Honor. In that time frame the iPhone was not powerful enough to play a game as graphically elaborate as *Fortnite*.

THE COURT: So even though you've mentioned that this -- something about the console hardware, Apple did have to do something to the iPhone itself; right, in terms of the technology of the iPhone in order for it to be sophisticated enough to play your software?

THE WITNESS: Yes.

THE COURT: So how is that any different from consoles, not so much about the payment fees but about the development of the technology that allows your product to be played?

THE WITNESS: I think the development of the hardware technology and the operating system is very similar. My comparison is only the differences between the business models underlying the different platforms.

THE COURT: Okay. Continue.

MS. FORREST: Let me see, Your Honor, if I can ask a few questions in that area.

BY MS. FORREST:

Q. Mr. Sweeney, are there any graphical performance differences between the iPhone as it exists in August 2020 and the consoles as they existed in August 2020?

A. Yes. Consoles have considerably more graphics performance; therefore, the capability of displaying more realistic images.

Q. And are there any other differences between the speed at which the consoles were able to execute the *Fortnite* application on consoles versus on a smartphone?

A. Consoles generally have more computing performance similar to run more realistic simulations, such as particle systems.

presenters, correct?

A. I am.

Q. And you're third from the top in the -- in the key up at the top?

A. Yes.

Q. And on that first page in the comments attributed to Mr. Jobs, do you have that in front of you?

A. I do.

Q. And in the fifth paragraph, the third from the bottom, Mr. Jobs says, "It's thrilling to report to you today that in a letter over two years, we have sold 30 million iPhones."

Do you see that?

A. I do.

Q. Followed by cheers and applause, correct?

A. Yes.

Q. 30 million. And during the last year, one of the reasons for that has been the remarkable App Store. The App Store is just a little over a year old, and we now have over 75,000 apps.

Was that an accurate figure as of September 2009?

A. Yes, it was.

Q. And users have downloaded over 1.8 billion apps.

Is that number also accurate as of September 2009?

A. Yes, it was.

MR. DOREN: Your Honor, I'd move to enter DX4608 in evidence.

MS. FORREST: No objection.

THE COURT: Admitted.

(Defendant's Exhibit 4608 received in evidence)

BY MR. DOREN:

Q. Sir, how many App Store customers are there worldwide today?

A. Over a billion.

Q. And how many weekly visitors are there to the App Store?

A. Over 500 million.

Q. And how many apps are in the App Store today?

A. Approximately 2 million.

Q. And how many of those are games?

A. The last number I saw was approximately 280,000.

Q. About 75 percent of which, give or take, are free, correct?

A. Correct, as we said earlier.

Q. And 17 percent of which use the freemium model, correct?

A. That's right.

Q. And are you familiar with an initiative called the App Store Cleanup?

A. Yes.

Q. What is that?

A. Well, it's an idea I came up with a number of years ago that after so many years, there were a growing number of apps that had not been updated. They were getting old. They didn't use the latest tools or operating systems or run on the latest products.

And I asked our App Store team to come up with a methodology to start finding those things and clean them up out of the store.

Q. And do you recall when that was?

A. I'm thinking 2017, but I'm not a hundred percent positive.

Q. And what were the criteria that were applied to that cleanup process?

A. Well, the ones we started with were, as I said, developer -- apps that hadn't been updated for years that didn't run properly on the latest hardware.

We also looked at if they had extremely low download numbers, like less than five. And -- and there were other criteria the team also came up with that were recommended, but those were the key ones to me.

Q. And has -- was the App Store cleanup a one-time initiative?

A. No. Once we did it the first time, the team worked to create it as a repeatable process.

Q. And approximately how many apps have been removed through this initiative?

A. I believe cumulatively it's been over 2 million.

Q. And are you familiar -- switching topics, sir. Are you