Nos. 21-16506 & 21-16695

# United States Court of Appeals for the Ninth Circuit

EPIC GAMES, INC.,
*Plaintiff, Counter-defendant – Appellant, Cross-Appellee,*

v.

APPLE INC.,
*Defendant, Counterclaimant – Appellee, Cross-Appellant.*

Appeal from the U.S. District Court
for the Northern District of California
The Honorable Yvonne Gonzalez Rogers (No. 4:20-cv-05640-YGR-TSH)

## REPLY BRIEF ON APPEAL AND RESPONSE BRIEF ON CROSS-APPEAL OF APPELLANT, CROSS-APPELLEE EPIC GAMES, INC.

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## STATUTORY PROVISIONS

The pertinent statutes are set forth verbatim in the addenda to the Opening Brief of Epic Games, Inc. ("Epic") and the Principal and Response Brief of Apple Inc. ("Apple").

## INTRODUCTION

Through its restraints on the distribution of iPhone apps and in-app purchases of digital content, Apple controls the relationship between more than a billion consumers and millions of app developers. The district court made extensive factual findings regarding the substantial anticompetitive effects of these restraints: increased prices, reduced innovation, reduced quality, and foreclosed competition. Epic's opening brief explained why these findings cannot be squared with the court's legal conclusion that Apple's conduct comports with the Sherman Act. Unable to defend this fundamental inconsistency, Apple waves away the findings as "out-of-context" and seeks cover behind the "clear error" standard of review for factual findings. This is a red herring: as Epic made clear in its opening brief, while it does not agree with all of the district court's factual findings, Epic's appeal raises only questions of law.

These legal questions include whether contracts of adhesion are subject to Section 1; whether conduct regarding products that are not separately licensed or sold is subject to scrutiny under the antitrust laws; whether single-brand markets are appropriate where consumers are locked in by their purchase of an initial product; whether a tying claim may be brought against technologically integrated products that have separate demand; and whether balancing anticompetitive effects against procompetitive benefits is necessary.

The district court, led astray on many points by Apple, reached the wrong answer to all of these questions, and Epic, along with the United States, the Attorneys General of 34 States and the District of Columbia, leading antitrust scholars, and other *amici curiae*, explained the multiple legal errors plaguing the decision below. But Apple barely engages with any of these legal issues in its response, instead employing diversion.

Apple claims the challenged restraints are merely the result of technical design decisions necessary for the iPhone to function. But the restraints are contractually imposed and enforced—and the district court's findings, buttressed by the record, demonstrate that technical design was in service of Apple's policy choices, not the other way around.

Apple also asserts that the relief Epic seeks will compromise the security of the iPhone. But that is untrue. The operating system Apple uses in its Mac computers ("macOS") does not include the challenged restraints found in the iPhone operating system ("iOS"), and Apple publicly touts the Mac's security. Apple also permits multiple alternative payment solutions in the App Store for apps selling physical goods, confirming that the requirement to use Apple's in-app payment solution, IAP, for digital goods serves no procompetitive goal.

If Epic prevails, the App Store would not be dismantled. No customer would ever be required to use any of the things Apple complains about—an alternative app store, direct downloads for app distribution, or an alternative payment solution. The difference is that Apple would have to *compete* for its customers.

Apple resorts to inflammatory rhetoric about Epic's motivations. Project Liberty was the name for Epic's effort to hold Apple accountable for its conduct, and Epic confronted Apple and its policies in full public view. Neither that, nor what Epic earned on *Fortnite*, nor where its investors are located, bears on whether Apple engaged in anticompetitive conduct.

Apple's cross-appeal fares no better. The district court found Apple engaged in unfair conduct under California's Unfair Competition Law ("UCL") by employing "practices which unreasonably restrain[] competition and harm consumers . . . so that it can extract supracompetitive commissions from this highly lucrative gaming industry." 1-ER-121. These practices include a "lack of information and transparency about policies" that impacts "consumers' ability to find cheaper prices, increased customer service, and options regarding their purchases," 1-ER-121, all of which result in "increased prices," "reduce[d] innovation," "reduce[d] quality," and "foreclose[d] competition," 1-ER-95; 1-ER-98–99; 1-ER-102; 1-ER-105; 1-ER-148 n.606.

Given these findings, the only question on Apple's cross-appeal is whether UCL liability can be based on conduct that is unfair, but which the district court held did not violate the Sherman Act. California Supreme Court precedent leaves no doubt that it can. (*See* Cal. AG Br. 1-27.) And the scope of the district court's injunction is appropriately tailored to require that a company headquartered and operating in California abides by California law.

For the reasons set forth in Epic's opening brief and below, the district court's dismissal of Epic's Sherman Act claims should be reversed and judgment entered for Epic; the court's ruling on Epic's UCL claim should be affirmed.

## SUMMARY OF ARGUMENT

As Epic explained in its opening brief, the district court committed multiple legal errors in rejecting Epic's Sherman Act claims. Accepting Apple's defense of these errors would require changing settled law.

With respect to Epic's Section 1 claims, Apple wrongly asserts that rejection of Epic's proposed product markets is "fatal" to Epic's appeal. Not so: Epic proved its Section 1 claims under *both* the district court's market *and* its own. (§ I.A.) Apple admits the Developer Program License Agreement ("DPLA") is a "contract" but characterizes its restraints as unilateral conduct not reached by Section 1. That is wrong: Apple's contracts with millions of third-party developers are not unilateral single-firm conduct; intellectual property ("IP") agreements are not exempt from Section 1; and the challenged restraints cannot be excused as "technical requirements." If not reversed, the district court's holding would upend well-established antitrust principles. (§ I.B.)

The district court also erred in sustaining Apple's restrictions under the rule of reason. The court found substantial anticompetitive effects but erroneously credited justifications that do not advance competition and ignored its own factual findings establishing less restrictive alternatives. In trying to defend the court's multiple legal errors, Apple seeks to change the law and erase the rule of reason's balancing requirement. But allowing a scant procompetitive justification to immunize restraints with major anticompetitive effects would flout decades of antitrust jurisprudence. (§ I.C.)

With respect to Epic's Section 2 claims, the district court committed legal error by rejecting Epic's proposed foremarket for smartphone operating systems because iOS is "not licensed or sold." Apple cannot defend this rationale. Whether the foremarket is smartphone operating systems or the smartphone itself, the ultimate point is the same: consumers are locked into the iOS ecosystem when they buy an iOS device. (§ II.A.) Apple repeats the district court's legal errors in arguing lock-in requires proof of a policy change, and ignores or disputes the district court's factual findings that confirm the validity of Epic's proposed aftermarkets. (§ II.B.) Apple recycles the district court's misreading of *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("*Amex*") (§ II.C) and its singular focus on games rather than all apps (§ II.D). Once Epic's proposed markets are sustained, Apple's restrictions fail rule of reason scrutiny under Section 2 given the district court's factual findings. (§ II.E.)

Apple tries to rescue the district court's legally flawed determination that iOS app distribution and in-app payment solutions are not separate products by inventing a test for tying claims that asks only whether the products are "integrated." It is well-settled that functionally integrated products can still be separate for tying purposes, and the governing "separate demand" test is satisfied here. (§ III.)

Finally, if this Court reverses on Epic's Sherman Act appeal, Apple's breach of contract counterclaim fails, as illegality under the antitrust laws renders the contract provisions Apple relies on unenforceable. (§ IV.)

On its cross-appeal, Apple's arguments against UCL liability fail. Apple confuses standing with mootness, and its post-judgment gamesmanship cannot deprive Epic of standing. (§ I.) Apple's statutory arguments are meritless: the UCL condemns unfair practices even if they do not violate the Sherman Act; the UCL does not require the same antitrust relevant market analysis that the Sherman Act requires; and the Supreme Court in *Amex* did not hold that all anti-steering restraints are, as a matter of law, procompetitive. (§ II.) Apple argues the district court's injunction improperly benefits third parties, but both federal and California law expressly authorize such relief, and Apple ignores that an injunction applying only to Epic would not remedy Epic's injuries as a foreclosed competitor. (§ III.)

Finally, Apple's argument that the DPLA's third-party indemnification provision requires Epic to pay Apple's attorneys' fees for breach of contract is incorrect under California law and disingenuous, given Apple's assertion that its restraints are unilateral conduct. (§ IV.)

## ARGUMENT ON EPIC'S APPEAL

## I. THE DISTRICT COURT ERRED IN REJECTING EPIC'S SECTION 1 CLAIMS.

Epic proved its Sherman Act Section 1 claims regardless of market definition. The district court's ruling should be reversed (§§ I.B-C), whether under the district court's market (§ I.A) or Epic's proposed markets, which the district court erroneously rejected (§§ II.A-B).

### A. Epic Proved Its Section 1 Claims Under the District Court's Market.

Epic's opening brief detailed why the district court erred in rejecting its proposed markets. (Epic Br. 55-67; *see also* §§ II.A-B below.) Despite this error, Epic should prevail on its Section 1 claims using the district court's market for "digital mobile gaming transactions." 1-ER-4. The court concluded that "Apple exercises market power" at a level "near the precipice of substantial market power, or monopoly power, with its considerable market share" in that market. 1-ER-142. That finding is sufficient to hold Apple liable under Section 1 for its anticompetitive conduct.

In an effort to sidestep those findings, Apple contends that rejection of Epic's proposed markets defeats Epic's Sherman Act claims, regardless of whether Epic proved a Section 1 violation in the market adopted by the district court. (Apple Br. 38-40.) That is not the law, and Apple does not cite a single case so holding. Apple's cases reflect only the proposition that an antitrust plaintiff must prove harm to competition in *a* relevant market, not, as Apple claims, that "[a] plaintiff's failure to prove *its* proposed market is fatal." (Apple Br. 40 (emphasis added).)

A Sherman Act plaintiff prevails by showing harm to competition in whatever market the court finds. It is "not necessary for the [factfinder] to accept absolutely either the [defendant's] or the plaintiff's market definitions"; rather, "the critical question" is whether the record shows that the anticompetitive harms "outweighed" procompetitive justifications. *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1394 (9th Cir. 1984). Thus, appellate courts have affirmed where a district court rejected the plaintiff's market and found liability based on its own market. *See, e.g.*, *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1283-85 (7th Cir. 1990) (Posner, J.); *see also, e.g.*, *Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 201-09 (3d Cir. 1994) (remanding to district court to consider a market the plaintiff had not proposed). Indeed, the Supreme Court has done what Apple claims is proscribed. In *United States v. Continental Can Co.*, 378 U.S. 441 (1964), the Court found a "relevant product market . . . not pressed upon the District Court," concluded the government proved anticompetitive effects in that market, and allowed the case to proceed on remand. *Id.* at 443-44, 457, 465-66.

Apple has not meaningfully challenged the market defined by the district court. (*See* Apple Br. 44 n.5.) Having elected not to do so, it must explain why Epic should not prevail under the market the court defined. It cannot.

### B. Epic Has Challenged a Contract in Restraint of Trade.

The DPLA is a "contract of adhesion." 1-ER-96. At Apple's urging, FER-28–29, the district court equated that with a "unilateral contract," and held that they are not "contracts" within the meaning of Section 1. 1-ER-145. Epic and various *amici*, including the United States, have explained why contracts of adhesion *are* subject to Section 1. (Epic Br. 34-37; DOJ Br. 10-14; States Br. 5-17; Kirkwood Br. 20-23; COSAL Br. 5-18; Pub. Citizen Br. 5-27.) On appeal, Apple abandons this theory and raises new—and meritless—arguments, Apple Br. 56-66; *cf.* FER-28–31, in an effort to salvage the district court's legal conclusion that the DPLAs between Apple and developers are not subject to Section 1.[1] Apple concedes "the DPLA *is* a contract" (Apple Br. 58), and Section 1 is intended to address precisely the conduct that gave rise to this lawsuit, where Epic is a "competitor of Apple," 1-ER-20, and is foreclosed from opening a competing app store through agreements between Apple and "over 30 million registered iOS developers" not to distribute their iOS apps outside the App Store, 1-ER-32.[2]

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[1] Apple's argument that this is a factual question reviewed deferentially is baseless. Whether an agreement counts as a "contract" under the Sherman Act is a question of law reviewed *de novo*. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

[2] Apple invokes laches in a threadbare footnote (Apple Br. 61 n.8), but "[a]rguments made in passing and inadequately briefed are waived," *Maldonado v. Morales*, 556 F.3d 1037, 1048 (9th Cir. 2009). Moreover, laches is inapplicable: "[E]ach time a plaintiff is injured by an act of the

1. *Apple's Contractual Restraints Are Not Unilateral Conduct.*

Apple's contention, repeated by its *amici*, that its DPLAs with developers represent "unilateral conduct" (Apple Br. 56-58) is wrong. For starters, Apple and its *amici* cannot seriously contend that license agreements are both bilateral contracts subject to enforcement (*see, e.g.*, Apple Br. 30 (seeking "to enforce its contractual rights under the DPLA")) and unilateral acts that are not contracts at all. Contracts either reflect two-party agreement or are not contracts. *See, e.g.*, *The Frances*, 12 U.S. (8 Cranch) 354, 357 (1814) (Marshall, C.J.).

The statute is unambiguous: "*Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . [is] illegal." 15 U.S.C. § 1 (emphasis added). Case law is equally clear that "*every* commercial agreement . . . among two or more entities" is an "agreement" under Section 1. *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1154 n.7 (9th Cir. 2003) (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284,

defendant[,] a cause of action accrues." *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014) (alteration and internal quotation marks omitted).

289 (1985)). Accordingly, a plaintiff who signed a restrictive agreement may "clearly charge a combination" in violation of Section 1, even where its own "acquiescence in [another's] firmly enforced restraints was induced by" coercion, *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 142 (1968), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

*Copperweld* and Apple's other cases offer no support. (Apple Br. 56-62.) Epic does not dispute that "[t]he conduct of a single firm" is reviewable under Section 2, not Section 1. *Copperweld*, 467 U.S. at 767. But Epic's Section 1 claim challenges restraints in contracts between independent firms, not, as in *Copperweld*, an alleged conspiracy between companies under common ownership. Apple's other citations are likewise inapposite: *Jack Russell Terrier Network of Northern California v. American Kennel Club, Inc.*, 407 F.3d 1027, 1036 (9th Cir. 2005), concerned whether a national organization and its local affiliates were "a single enterprise," and *American Needle, Inc. v. NFL*, 560 U.S. 183, 186 (2010), involved entities in a joint venture. This case presents no such affiliation questions. Moreover, for entities to be considered a "single firm" under *Copperweld*, they must be "neither actual nor *potential* competitors." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003). Apple concedes that "Epic seeks to compete with Apple" (Apple Br. 104), as the district court's findings confirm, 1-ER-98.

2. *IP Agreements Are Not Carved Out of Section 1.*

Apple and its *amici* spend 60 pages asserting the DPLA is not actionable under Section 1 because it contains IP licensing terms.[3] According to Apple, because an IP owner need not license, when it does so, it can choose any terms it wants—no matter how anticompetitive—and they are unreviewable under Section 1. Not so: Congress and the Supreme Court have been clear that any contract that unreasonably restrains trade is reviewable under Section 1—there is no carveout for IP contracts. (Epic Br. 33-37.)

Apple's authority (Apple Br. 60-62) confirms that licensing agreements are subject to antitrust scrutiny. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1215 (9th Cir. 1997) ("[N]either patent nor copyright holders are immune from antitrust liability."); *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 647

[3] The DPLA confers a limited license to distribute iOS apps, 1-ER-96 n.462—not, as Apple claims, a "license to develop" apps (Apple Br. 59).

(9th Cir. 1981) ("Of course, a patent holder may run afoul of the antitrust laws."). The mere fact that an agreement implicates IP rights does not "immunize [it] from antitrust attack." *FTC v. Actavis, Inc.*, 570 U.S. 136, 147 (2013); *see id.* at 147-48 ("[I]t would be incongruous to determine antitrust legality by measuring . . . anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well."); *see also, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 136 (1969); *Interstate Cir. v. United States*, 306 U.S. 208, 230 (1939).

Moreover, none of the DPLA terms that Epic is challenging are IP licensing terms, and Apple cannot shield those anticompetitive terms from Section 1 scrutiny by pointing to IP licensing terms elsewhere in the agreement. Apple does not contest the district court's factual finding that the DPLA covers more than just IP rights, 1-ER-32, including "contractual" provisions that "restrict app distribution," 1-ER-95, along with other provisions requiring developers to take certain affirmative steps (*e.g.*, submitting apps for app review and configuring them to use IAP if they sell digital goods), setting Apple's 30% commission, and giving Apple control over customer relations, 1-ER-32–36; 1-ER-38; 1-ER-43–44. The court also found "Apple employs these policies so that it can extract supracompetitive commissions," 1-ER-121; the policies "increase[] prices," 1-ER-102, and "harm . . . consumers' ability to find cheaper prices, increased customer service and options," 1-ER-121; and "competition" could result in improvements, 1-ER-103–04. While Apple claims the DPLA's restraints do "not eliminat[e] competition that would otherwise exist" (Apple Br. 59 (internal quotation marks omitted)), the district court found the opposite: they "foreclose competition for large game developers" like Epic who could otherwise open competing app stores, 1-ER-99; 1-ER-104.

Apple asserts the DPLA is simply a unilateral refusal to deal (Apple Br. 62-66), but that doctrine is inapplicable because Apple does not refuse to deal. Apple *agreed* to license its IP to millions of developers (and profited handsomely), but imposed anticompetitive conditions in its agreements.[4] The Supreme Court explicitly rejected the argument Apple makes here in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S.

[4] Apple asserts Epic wants it "to license (apparently for free) its technology and intellectual property while changing the design of iOS and the App Store itself." (Apple Br. 61.) Apple identifies no portion of Epic's proposed injunction that supports this assertion, and there is none. *See* 1-SER-241–46.

451, 463 n.8 (1992): "Assuming . . . that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not." *See also Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 514-17 (1917) (patentees may not use IP rights to impose anticompetitive conditions via contract).

Moreover, the refusal-to-deal doctrine arises under Section 2, not Section 1, precisely because the "refusal" means that no "contract" or "combination" is involved. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 587 (1985); *Kodak*, 125 F.3d at 1215; *United States v. Microsoft Corp.*, 253 F.3d 34, 71 (D.C. Cir. 2001) (en banc). Here, Apple has affirmative agreements with restrictions on counterparties, so all Epic needed to prove under Section 1 is that "Apple's restrictions foreclose competition." It did so. 1-ER-99.

Nor do the *Antitrust Guidelines for the Licensing of Intellectual Property* (Apple Br. 63-64) support Apple. They confirm that "antitrust concerns may arise when a licensing arrangement harms competition among entities that would have been actual or potential competitors in a relevant market in the absence of the license." Dep't of Just. & Fed.

Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 3.1 (2017). This is exactly what Epic alleged and proved: But for the DPLA's anticompetitive restraints, Epic could and would offer a competing app store and in-app payment solution. 1-ER-98.

### 3. *The Challenged Contractual Restraints Are Not "Technical Requirements" of iOS.*

Apple's assertion that the DPLA is not concerted action because it merely reflects unilateral "technical requirements that Apple engineered into iOS" (Apple Br. 13, 58) contradicts the district court's factual findings and is legally erroneous.

In laying out the facts, the district court extensively cited the relevant contractual restrictions. 1-ER-32–36. Under DPLA Sections 3.2, 3.3.2, and 3.3.3, developers *agree* they will not use "distribution mechanisms other than the App Store," and that apps will not themselves download and install other apps. 1-ER-32–33 & nn.186, 188, 189. Apple enforces these policies through human app review. FER-130. It does not matter that Apple backstops these contractual requirements with a technical restraint "by granting certificates" to apps that are needed for the code to run. 1-ER-95–96. The "certificate" simply documents Apple's conclusion from its human app review that the developer complied with the DPLA—it is one way Apple *enforces* the restraint Epic challenges, not the restraint itself. FER-68–69. And some of Apple's app distribution restrictions are *solely* contractual, for example, those imposed on game streaming services. 1-ER-83–85; *see also* FER-74–75; FER-78–79; FER-118–21.[5]

Nor is there a "technical requirement" for developers to use IAP for in-app purchases of digital content. As the district court found, this requirement is imposed by the App Store Review Guidelines, which "[a]ll developers agree to abide by" in DPLA Section 6.1. 1-ER-33–36; *see* 3-ER-635. Apple's assertion that sale of digital content "depend[s] on Apple's proprietary IAP technology" (Apple Br. 58 (citing 2-SER-526)) is false and unsupported by the record citation, which is testimony from an Apple executive that IAP gives developers this capability, not that iOS's technical design prevents developers from using competing in-app payment solutions. That developers of physical-goods apps (*e.g.*, Amazon

[5] The one truly technical restraint is Apple's restriction on "sideloading" (direct app distribution from the web), which Apple prevents "using technical measures," 1-ER-111, and through DPLA Section 3.2(g), 1-ER-96. Epic challenges the technical restriction on sideloading under Section 2 (§ II below); Epic's Section 1 challenge is limited to Apple's contractual restraints.

and Uber) do not use IAP confirms that Apple's contrary decision to require IAP for digital content is a policy choice implemented by contract, not a technical requirement. 1-ER-34; *see* 3-ER-692; 3-ER-694. Epic's implementation of its competing payment solution in August 2020 and its processing of payments for digital goods within *Fortnite* on iOS without any technical obstacles further demonstrate the point. 1-ER-28; 1-ER-171.

Apple's contractual restraints in the DPLA give Apple benefits it could not achieve by technical means—its 30% commission and control over customer relations. (§§ I.B.2-3 above.) Unless enjoined under Section 1, Apple can enforce its contractual restraints in court, which is impossible with technical restraints or other unilateral conduct. Apple's counterclaims against Epic for breach of the DPLA underscore the independent significance of the contractual restraints.

Apple's argument that Section 1 gives way if a defendant can duplicate its contractual restraints through unilateral conduct (Apple Br. 58) gets it exactly wrong. "Congress treated concerted behavior more strictly than unilateral behavior [because it] deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld*, 467 U.S. at 768-69. Thus, courts have held that a defendant's ability to impose the restraint unilaterally is "irrelevant; the Sherman Act prohibits parties from combining or agreeing to actions which result in a restraint of trade, even if one or both of the parties *could* have taken these actions unilaterally." *Garot Anderson Mktg., Inc. v. Blue Cross & Blue Shield United of Wisc.*, 772 F. Supp. 1054, 1061 (N.D. Ill. 1990); *see also In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 915 & n.19 (6th Cir. 2003) (that defendant "could have" taken action unilaterally "has no relevance").

Accordingly, Apple's contractual restraints are properly subject to Section 1 liability.

* * *

Affirming the district court's ruling that the DPLA is exempt from Section 1, under its reasoning or Apple's, would be disastrous. Even the district court recognized its holding "potential[ly] conflicts with the goals of antitrust law." 1-ER-145. That far understates the stakes: As the United States explains, "the district court's interpretation would upend Section 1 jurisprudence." (DOJ Br. 10-15.) The Attorneys General of 34 States and the District of Columbia describe it as "bad antitrust public policy" that "blows a hole through Section 1" (States Br. 4-17), a view shared by over a dozen prominent scholars (Kirkwood Br. 20-23 ("frustrate[s] the purpose of Section 1")) and public interest groups (COSAL Br. 5-18 ("dramatically undercut[s] competition policy"); Public Citizen Br. 5-27 ("significantly undermine[s] antitrust enforcement")). The ruling should be reversed.

### C. Apple's Restrictions Do Not Survive Rule of Reason Scrutiny.

#### 1. *The District Court Found Substantial Anticompetitive Effects.*

While conceding the district court found anticompetitive effects (Apple Br. 27, 67), Apple argues they were insufficient. It points to language from *Amex* requiring a plaintiff to prove "substantial anticompetitive effects," and claims the district court's statement that Epic proved "*some* anticompetitive effects" means Epic did not satisfy this standard. (Apple Br. 67 (quoting 1-ER-147).) In suggesting this turn of phrase is dispositive, Apple mischaracterizes the district court's analysis.

The district court recognized that Epic needed to prove "a substantial anticompetitive effect," applied the correct legal standard, and concluded that Epic did so. 1-ER-143–44; 1-ER-146–48. The court recognized that "the burden shifts to the defendant to show a procompetitive rationale for the restraint" only "[i]f the plaintiff carries its burden" at step one of the rule of reason. 1-ER-144 (quoting *Amex*, 138 S. Ct. at 2284). The court's analysis squarely tracked this Court's instruction that "[a] plaintiff can establish a substantial anticompetitive effect for purposes of the first step of the rule of reason analysis either 'directly or indirectly.'" *PLS.com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 834 (9th Cir. 2022) (quoting *Amex*, 138 S. Ct. at 2284). "To prove a substantial anticompetitive effect directly, the plaintiff must provide 'proof of actual detrimental effects [on competition] such as reduced output, increased prices, or decreased quality in the relevant market.'" *Id.* (quoting *Amex*, 138 S. Ct. at 2284). To prove it "indirectly, a plaintiff must show that the defendants have market power in the relevant market and that 'the challenged restraint harms competition.'" *Id.* (quoting *Amex*, 138 S. Ct. at 2284).

Epic proved both, through "direct and indirect evidence of anticompetitive effects." 1-ER-148. The court's findings of direct evidence included "artificially high prices" and supracompetitive profits, low investment in App Store improvements, stifled innovation, and foreclosure of competing app stores and in-app payment solutions. 1-ER-102; 1-ER-105; 1-ER-147; 1-ER-148; 1-ER-152. Such "proof of actual detrimental effects on competition" is exactly what courts require at step one. *See PLS.com*, 32 F.4th at 839 (recognizing harms to competition from "prevent[ing] innovative competitors from entering the market," leaving consumers "with fewer choices, supra-competitive prices, and lower quality products"); *Freeman*, 322 F.3d at 1147 ("higher prices" due to "supracompetitive" fees are "precisely the type of injury the antitrust laws are designed to prevent"). Similarly, the court's finding that Apple has "considerable market power" in the market for "mobile gaming transactions," 1-ER-140, combined with its findings of harm to competition in that market, 1-ER-98–107, satisfy the legal standard for indirect evidence of anticompetitive effects, *see PLS.com*, 32 F.4th at 834. Apple has shown no clear error in these findings.

The court then proceeded to the second step, and evaluated Apple's procompetitive justifications. 1-ER-148–50. It surely would not have done so without first determining that Epic met its burden at step one, as the court's findings confirm. *See, e.g.*, 1-ER-165 ("Epic Games has demonstrated real anticompetitive effects . . . ."); 1-ER-166 ("[T]he evidence presented showed anticompetitive effects and excessive operating margins under any normative measure."); 1-ER-168 ("This trial has exposed numerous anticompetitive effects . . . .").[6]

Apple tries to dismiss the anticompetitive effects found by the district court as insufficient by attributing them to "indisputably *unilateral*" restrictions, and arguing that harm to competition "stemmed at least in large part" from Apple's "technical design feature[s]" preventing "sideloading." (Apple Br. 67-68.) But the court distinguished between the restrictions Apple imposes contractually in the DPLA and the technical restrictions it writes into iOS. 1-ER-95 ("Apple uses both technical and contractual means to restrict app distribution."). Far from failing to "isolate" the DPLA's effects (Apple Br. 67-68), the court's Section 1 analysis "consider[ed] only the DPLA restrictions on distribution," 1-ER-144 n.599, and concluded they caused anticompetitive harms. 1-ER-146–48; *see* 1-ER-152 (same for DPLA's in-app payment restrictions).

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[6] Apple claims that *FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020) raised the bar for establishing anticompetitive effects for technology companies (Apple Br. 67), but *Qualcomm* merely discussed the specific markets at issue there and "decline[d] to ascribe antitrust liability in these dynamic and rapidly changing technology markets without clearer proof of anticompetitive effect." 969 F.3d at 1003.

Ignoring findings of foreclosed competition and reduced quality and innovation, Apple argues Epic did not show a price increase because its supracompetitive commission has "barely budged" over time. (Apple Br. 68-69 (citing *MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 184 (2d Cir. 2016)).) The relevant inquiry is not whether prices increased over time, but whether there is "some evidence that tends to prove that . . . prices were above a competitive level." *Amex*, 138 S. Ct. at 2288 (quoting *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993)); *see also NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 106 (1984) ("anticompetitive consequences" "apparent" where prices are "unrelated to the prices that would prevail in a competitive market"). In the case Apple cites, the absence of a price increase was important because there was a competitive market before imposition of the restraint (unlike here, where the challenged restraints are as old as the market itself, 1-ER-27), and the plaintiff offered "little more than speculation" about whether prices "would have decreased . . . but for the conspiracy." *MacDermid*, 833 F.3d at 184. Here, by contrast, the district court's finding that Apple's restrictions have "increased prices for developers," 1-ER-102, was firmly grounded in evidence showing that "[t]he costs to developer[s] are higher because competition is not driving the commission rate," 1-ER-166; 1-ER-100.

While Apple asserts its 30% commission is not "supracompetitive" but "in line with competition" (Apple Br. 68-72), the district court found that it "has allowed [Apple] to reap supracompetitive operating margins," 1-ER-95, and deemed Apple's evidence that its supposed competitors charge the same fee "suspect" and "not useful." 1-ER-100–01; *see also* 1-ER-95 n.460. It criticized Apple for relying on "'headline' rates" that the parties' experts "agree[d] are frequently negotiated down"—unlike Apple's rate, which "has barely budged in over a decade despite developer complaints and regulatory pressure." 1-ER-100–01; 1-ER-147; 1-ER-77. For example, "the Amazon App Store has a headline rate of 30%, but its effective commission is only 18.1%." 1-ER-101. And while Apple's graph depicts the rate for Steam (a PC game store) as 30% "[a]t the time of trial" (Apple Br. 71), the court found Steam "lowered its commission" to "as low as . . . 20%" when the Epic Games Store entered the PC market in 2018 "with a 12% commission," 1-ER-100; 1-ER-78. Indeed, the court found the PC market provides a "vivid illustration" of price competition that "would happen if Apple allowed third-party app stores on iOS." 1-ER-100.

Apple asserts its commission was not supracompetitive "when set" (Apple Br. 69), but the district court found that contemporaneous documents proved "Apple did not consider the rate to be sustainable at that time and questioned whether 'enough challenge from another platform or web based solutions' will cause it to adjust," 1-ER-100 n.483 (quoting FER-251); 1-ER-95 n.459. Apple "set the rate . . . without considering costs" or "the value of its intellectual property rights," and "was at least partly protected by the iPhone's 'newness.'" 1-ER-100 n.483; 1-ER-117. Setting rates "with little regard to competition" supports the inference of supracompetitive pricing. *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488, 497 (9th Cir. 1977).

Apple's claim that "there was no finding that Apple's conduct caused *developers* to raise prices to users" (Apple Br. 73) ignores the court's finding that Apple's "[h]igh commission rates certainly impact developers, and some evidence exists that it impacts consumers when those costs are passed on." 1-ER-147. Apple also asserts that Epic focuses only on the developer side of the App Store's two-sided market, but the court's finding of higher prices flowed from Epic's proof on *both* the consumer and developer sides of the market. 1-ER-147; *see* 1-ER-102 n.487 (citing FER-108–09; FER-99; FER-91; FER-83–84; FER-242). Contrary to Apple's contention (Apple Br. 73), this Court has held that "*Amex* does not require a plaintiff to allege harm to participants on both sides of the market. All *Amex* held is that to establish that a practice is anticompetitive in certain two-sided markets, the plaintiff must establish an anticompetitive impact on the 'market as a whole.'" *PLS.com*, 32 F.4th at 839.

Apple argues the district court's finding of anticompetitive effects cannot be squared with the growth of in-app purchases, which Apple characterizes as an increase in output. (Apple Br. 69-70.) Where there are additional indicators of anticompetitive effects, the "contention that the plaintiffs' claim fails because they did not show a *decrease* in output" is "simply incorrect." *O'Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (emphasis added) (citing 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1503b(1) (5th ed. 2020)). The court's findings of increased prices, as well as reduced choice, innovation, and quality, more than suffice.[7] This is particularly true here: The district court found that "growth in iOS game transactions corresponds to both strong growth in the gaming industry and strong growth in iPhone and iPad sales" and, thus, "the high output may have been even higher without Apple's restrictions." 1-ER-102 & n.488. As the court recognized, accepting Apple's argument that growth in transactions precludes a finding of anticompetitive effects "would be essentially a free pass for high-tech companies" given that "high-technology industries often grow extraordinarily rapidly." 1-ER-102.

By proving both "direct and indirect evidence of anticompetitive effects," 1-ER-148, Epic did what most antitrust plaintiffs cannot: get past the first step of the rule of reason analysis. *See NCAA v. Alston*, 141 S. Ct. 2141, 2160-61 (2021); Carrier Br. 2-3 & n.2.

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[7] Apple incorrectly contends that "Epic's evidence on price and output is vastly weaker than what the Supreme Court rejected in *Amex*." (Apple Br. 70.) In *Amex*, "the plaintiffs failed to offer any reliable measure of Amex's transaction price or profit margins." 138 S. Ct. at 2288. Here, the court found that Apple "collect[s] extraordinary profits" and the App Store's "operating margins have exceeded 75% for years." 1-ER-147.

### 2. *The District Court Used the Wrong Legal Framework To Evaluate Apple's Procompetitive Justifications.*

Apple asserts that Epic "ignores" certain purported justifications for its challenged restraints (Apple Br. 76), implying waiver. But as Apple concedes, the district court "group[ed] [Apple's] justifications into three categories" (Apple Br. 75), and Epic addressed each of these categories in its opening brief (Epic Br. 15-18, 40-47). The court found that "Apple asserts two business justifications for its app distribution restrictions" (security and protecting its IP investment), 1-ER-107,[8] and three justifications for its in-app payment solution restraints (security and IP compensation, plus centralization), 1-ER-119. Despite what Apple says, Epic is not challenging these findings, but instead argues that the court committed legal error in "credit[ing] purported business justifications that are not cognizable under antitrust law." (Epic Br. 51.)

[8] The court elsewhere referenced "three procompetitive justifications" offered by Apple for its app distribution restrictions: "security, intrabrand competition, and protecting intellectual property investment." 1-ER-148. It further explained that "promot[ing] interbrand competition" (by limiting intrabrand competition) was a "corollary of the security justification." 1-ER-148–49.

a. Apple's App Distribution Restrictions.

*Security and Privacy*. The district court concluded Apple's "security justification" was a valid "business reason for restricting app distribution." 1-ER-148. "As a corollary," the court concluded, Apple's "walled garden" approach "increases consumer choice by allowing users who value open distribution to purchase Android devices, while those who value security" can "purchase iOS devices." 1-ER-149. These conclusions rest on two separate legal errors.

First, as Epic and its *amici* explained, objectives that do not advance competition, such as certain security and privacy justifications, are not cognizable. (Epic Br. 51-54; Carrier Br. 8.)[9] While Apple tries to defend the district court's contrary view (Apple Br. 79 (quoting 1-ER-149 n.608)), established Supreme Court precedent forecloses it. Any argument that "competition . . . had to be restrained to ensure quality work and protect public safety" is "nothing less than a frontal assault on the basic policy of the Sherman Act." *Alston*, 141 S. Ct. at 2159 (quoting *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978)). That

[9] Contrary to Apple's contention (Apple Br. 78), Epic preserved this argument at trial. 3-ER-503–04; 2-ER-475–78; FER-61.

is because "[t]he antitrust laws assume that 'competition will produce not only lower prices, but also better goods and services.'" *PLS.com*, 32 F.4th at 836 (quoting *Pro. Eng'rs*, 435 U.S. at 695); *Freeman*, 322 F.3d at 1152. Thus, competition, not Apple's restrictions, will ensure the highest quality app stores. (*See* EFF Br. 14-20 (noting potential risks created by a "security monoculture").)[10]

Second, the district court's conclusion that Apple's restrictions "promote interbrand competition" is flawed because the court (along with Apple) is mixing and matching anticompetitive effects in one market (for app transactions) with procompetitive justifications in a distinct market (the market for users deciding whether to buy "Android devices" or "iOS devices"). Apple Br. 79; 1-ER-148–49. That is legally erroneous: procompetitive justifications must be in the same market as the anticompetitive effects. Competition "cannot be foreclosed with respect

[10] Apple's *amici* argue that removing Apple's restrictions could risk national security. (*See* Former Nat'l Sec. Officials Br.) This fearmongering is based almost entirely on alleged facts outside the trial record and disconnected from the issues presented here. If true, the United States would have surely noted this risk in its *amicus* brief. The district court found that most protections against cyberattacks and malware "are performed by the operating system or middleware independent of app distribution." 1-ER-108.

to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); *see Sullivan v. NFL*, 34 F.3d 1091, 1112 (1st Cir. 1994) (finding it "improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market"); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186-89 (D.C. Cir. 1978) (same); *see also In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1268-71 (9th Cir. 2020) (M. Smith, J., concurring).

Nor does *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) support the court's conclusion that Apple's restrictions promote interbrand competition. 1-ER-148–49; Apple Br. 79. *Leegin* held only that "reducing intrabrand competition"—in a vertical relationship, where a manufacturer refused to supply retailers who charged less than specified retail prices—could increase interbrand competition among manufacturers of different brands of the same type of product. 551 U.S. at 890. Apple's restraints do not involve intrabrand competition (between different retailers of the same iOS products), but interbrand competition between Apple and potentially competing iOS app store providers, such as Epic. As the Supreme Court noted in *Kodak*, interbrand competition cannot justify horizontal restraints on competitors. 504 U.S. at 471 n.18 ("repeating the mantra 'interbrand competition' does not transform this case into one" involving justified vertical restraints).[11]

*IP Compensation*. The district court did not explain how Apple's purported justifications based on IP compensation advance competition for app distribution. (Epic Br. 51.) This was error; in crediting an asserted procompetitive justification, the court must "explain how the [restraint] enhances *competition*." *PLS.com*, 32 F.4th at 836. Apple tries to excuse this omission by arguing its restrictions "incentivize [Apple] to innovate." (Apple Br. 77.) But although Apple is entitled to some compensation for use of its intellectual property to incent innovation, it may not impose anticompetitive restraints to achieve that end; "[a]ntitrust law presumes that *competitive* markets offer sufficient

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[11] Even if *Leegin* applied, "[t]he finder of fact must still balance the gain to interbrand competition against the loss of intrabrand competition." *L.A. Mem'l Coliseum*, 726 F.2d at 1397. No such balancing was conducted here. (Epic Br. 51-55; § I.C.4 below.)

incentives and resources for innovation." *Freeman*, 322 F.3d at 1152 (emphasis added).

Moreover, any innovation in iOS and the iPhone, which is what Apple references, says nothing about the relevant products here—app distribution and in-app payment solutions. *Cf. United States v. Apple, Inc.*, 791 F.3d 290, 335 (2d Cir. 2015) (opinion of Livingston, J.) (district court "was correct not to score" the "technological innovations embedded in the iPad" as procompetitive benefits because such innovations were "unrelated" to Apple's anticompetitive agreements). Indeed, the district court found that Apple's restrictions *reduced* innovation for its App Store, 1-ER-104–05, and Apple's IAP provides developers no "unique features," 1-ER-119; *see also* 1-ER-107 n.510. As courts have recognized, "[t]here is a hollow ring to a claim of justification by appeal to the need to promote innovation, where the result of the conduct was . . . a clear loss to consumers." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 302 (2d Cir. 1979).

b. Apple's In-App Payment Restrictions.

Apple offered three justifications—security, IP compensation, and centralization—for its in-app payment solution restraints. 1-ER-119.

The first two echo Apple's justifications for its app distribution requirements and fail for the reasons discussed above.

*Centralization*. Apple argues its in-app payment restrictions are procompetitive because they allow for "a centralized payment solution." (Apple Br. 97.) The district court credited the centralization feature as a valid justification in its conclusions of law despite its conflicting factual findings, and without explaining how that feature enhances competition for in-app payment solutions. 1-ER-153; *see PLS.com*, 32 F.4th at 836. The court's findings show that Apple is not the only company that offers a centralized payment solution. Indeed, "multi-platform payment processors," such as PayPal and Stripe, can "enabl[e] the same migration, control, and sharing *across platforms*." 1-ER-118 (emphasis added). While some iOS users may choose IAP because they like managing a single account on Apple's platforms through IAP, others will choose the cross-platform centralization features and/or lower prices provided by Apple's competitors. 1-ER-122; *see PLS.com*, 32 F.4th at 836. The court's factual findings confirm Apple's restrictions prevent interbrand competition for in-app payment solutions. Thus, based on its own factual findings, the district court erred in crediting this justification.

3. *The District Court's Findings Establish Less Restrictive Alternatives.*

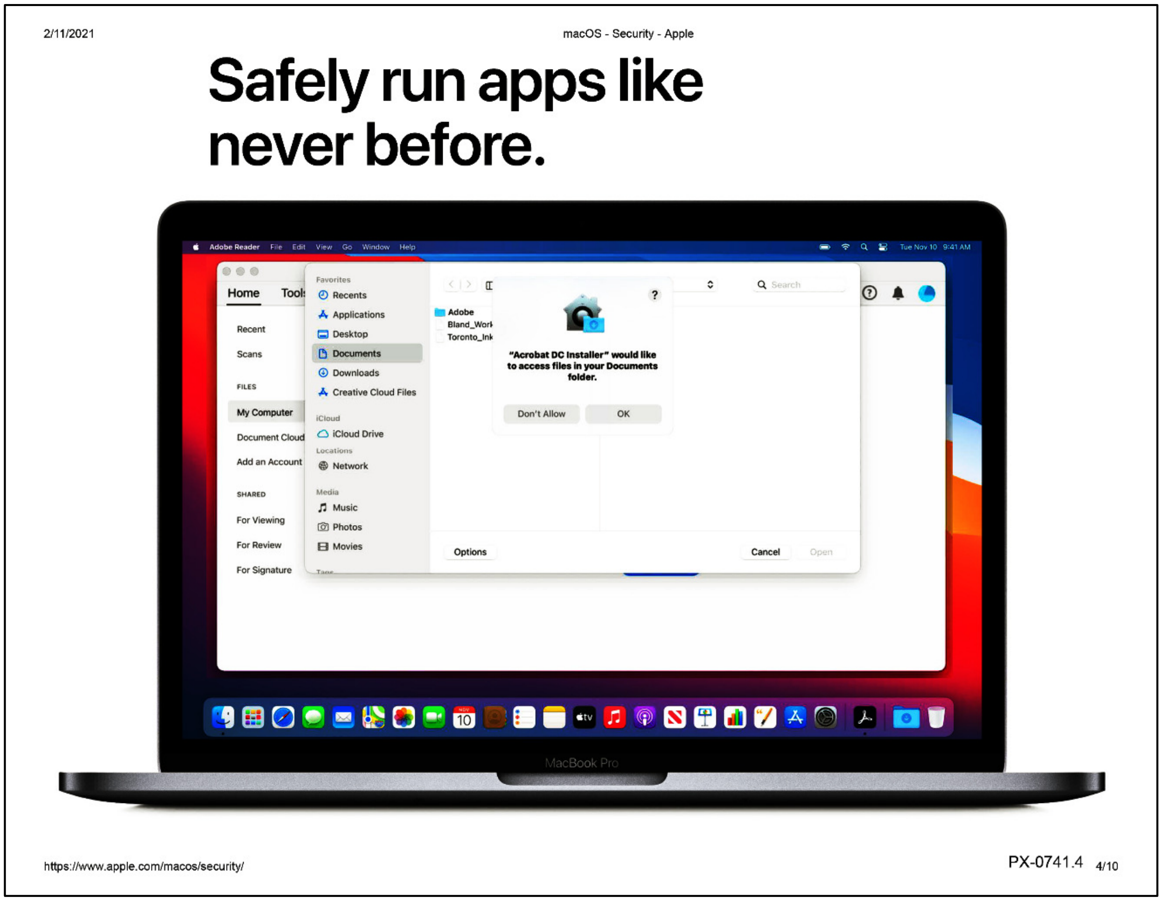
As Epic and its *amici* explained, the district court's factual findings establish less restrictive alternatives to each challenged restraint, independently requiring reversal. (Epic Br. 40-47; Carrier Br. 14-18; EFF Br. 23-24.) Apple ignores these findings and tries to repackage the court's erroneous legal conclusions as facts. (Apple Br. 80-85.)

a. Apple's App Distribution Restrictions.

The district court credited Apple's security and IP compensation justifications for Apple's app distribution restrictions. 1-ER-107. As Epic's opening brief explained, the court's factual findings establish the existence of less restrictive alternatives for each. Its legal conclusion about those alternatives, which cannot be reconciled with its factual findings, is error. (Epic Br. 40-44; *see* Carrier Br. 14-18; EFF Br. 23-24.)

*Security*. The district court recognized that app review, which Apple argues is essential to security (Apple Br. 82), "can be relatively independent of app distribution." 1-ER-116. It also found that Apple could meet its security needs without restricting app distribution, by using the approach Apple employs on its operating system for Mac computers (macOS). The district court found that "iOS is based on macOS" and the two operating systems share the same central component. 1-ER-115. For macOS Apple relies on (i) security measures imposed by the operating system rather than the app store, and (ii) a "notarization" program that scans apps and then returns them to the developer for distribution. (Epic Br. 41-42.) The district court's recognition of these less restrictive alternatives cannot be squared with its later legal conclusion that Epic did not prove any. (Apple Br. 81-82.)

First, Apple ignores the district court's factual findings on the security of the Mac notarization model (Epic's proposed less restrictive alternative to Apple's iOS restraints), 1-ER-114–16, citing only to the court's legal conclusions, mislabeling them "factual findings," and relying on uncredited testimony from its own witnesses. (Apple Br. 81.) Apple claims the court "credited Apple's 'compelling explanation' that 'Mac computers have more malware'" (Apple Br. 82 (quoting 1-ER-149)), but the court actually found that Apple's witness on this subject was "stretching the truth for the sake of the argument" when he disparaged macOS as having a "malware problem." 1-ER-116 (finding this claim "appear[s] to have emerged for the first time at trial"). Indeed, Apple itself proudly touts the macOS notarization model as allowing "apps from both the App Store and the internet [to] be installed worry-free":




2/11/2021 macOS - Security - Apple

Protection starts at the core.

The technically sophisticated runtime protections in macOS work at the very core of your Mac to keep your system safe from malware. This starts with state-of-the-art antivirus software built in to block and remove malware. Technologies like XD (execute disable), ASLR (address space layout randomization), and SIP (system integrity protection) make it difficult for malware to do harm, and they ensure that processes with root permission cannot change critical system files.

Download apps safely from the Mac App Store. And the internet.

Now apps from both the App Store and the internet can be installed worry-free. App Review makes sure each app in the App Store is reviewed before it's accepted. Gatekeeper on your Mac ensures that all apps from the internet have already been checked by Apple for known malicious code — before you run them the first time. If there's ever a problem with an app, Apple can quickly stop new installations and even block the app from launching again.

3-ER-562–63 (cited at 1-ER-116 n.546); *see macOS-Security*, Apple Inc., https://www.apple.com/qa/macos/security (last visited May 25, 2022), [https://perma.cc/UD3P-3EDF]. "[O]ther parties' 'actual experience in analogous situations' can help establish the feasibility or practicality of a less restrictive alternative." *Impax Labs., Inc. v. FTC*, 994 F.3d 484, 499 (5th Cir. 2021) (quoting 11 Areeda & Hovenkamp ¶ 1913b). Apple's *own* experience is worth even more.

Second, Apple asserts that it "intentionally designed iOS to be different, and more secure" than macOS (Apple Br. 82), but the district court rejected this argument, too. It found notarization a "particularly compelling" alternative "because Apple contemplated a similar model when developing iOS." 1-ER-115. As Apple acknowledged internally, adopting this model on iOS would "not imply a specific distribution method," and choosing between Apple's iOS app distribution restrictions and allowing third-party distribution was "a policy decision." 1-ER-115; FER-245–50. Further, the district court recognized that "Apple could continue performing app review even if distribution restrictions were loosened," 1-ER-115, and Epic's proposed remedy would change nothing about app review (Epic Br. 38).

Third, while Apple claims its macOS notarization model lacks "human app review" and is thus less secure (Apple Br. 82), the district court found that deploying app review along with notarization is "readily achievable." 1-ER-116. Apple disputes this factual finding, insisting "Epic never explained how [it] would work in practice." (Apple Br. 83.) But the district court found that Apple's Senior Vice President of Software Engineering did just that: "[O]nce an app has been reviewed, Apple can send it back to the developer to be distributed directly or in another store." 1-ER-116. Courts would not, as Apple claims, need to operate as "central planners"; Apple itself has already shown this model works with macOS. (Apple Br. 83-84.)

Fourth, Apple admits the court found that "scaling" notarization on iOS would be "possible," but misleadingly represents that the court found such scaling "would entail significantly increased cost" to Apple. (Apple Br. 84.) The court did *not* find that notarization would impose any additional costs on Apple, only that "Apple executives *suggested*" notarization "would not scale well." 1-ER-151 (emphasis added). That argument never made sense; as the court found, "app review is [already] required for all apps in the App Store" and the Mac model would not require any *additional* review; accordingly, "the scale itself does not appear to be a problem." 1-ER-116. Moreover, a defendant's own speculative testimony that it will face "additional infrastructure and expense" as a result of ceasing its anticompetitive conduct is no excuse. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1091 & n.34 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021).

*IP Compensation.* Apple does not deny it could continue to profit from its IP investments in the iOS ecosystem if there is competition in app distribution.[12] It argues merely that the other options identified by the district court—a "tiered licensing scheme" correlated to IP use, 1-ER-117, or "a contractual right to audit developers," 1-ER-153 n.617—"would be a less effective means of doing so." (Apple Br. 84-85.)[13] Apple

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[12] Apple's *amici* recognize that "[a]s an alternative to its current business model, Apple could simply charge developers a flat fee for access to the APIs and digital certifications needed to produce operable iOS apps but then allow them to use whatever app distribution and in-app payment services they preferred." (Law & Econ. Scholars Br. 26.) Alternatively, Apple could "charge app developers a revenue-based fee for the amenities required to produce operable iOS apps." (*Id.* at 34.) Under either alternative, Apple "could still earn substantial app-related revenues, while permitting competition among app stores and in-app payment service providers." (*Id.* at 26, 34.)

[13] Apple claims that Epic "failed to propose any tiered licensing scheme below" (Apple Br. 85), but that ignores Epic's position at trial that under its requested remedy, "Apple could choose to . . . charge certain

points to language from the district court noting that "any alternatives to IAP" would "seemingly" impose increased monetary costs. 1-ER-153 n.617 (cited at Apple Br. 85). But this generalized observation does not support the court's conclusion that Epic failed to show alternatives could be implemented "without *significantly* increased cost," 1-ER-152 (quoting *O'Bannon*, 802 F.3d at 1074) (emphasis added). This is especially so where "over 80% of apps in the App Store are free" and Apple currently "does not collect commissions" from the developers of those apps, 1-ER-126.

If Apple is concerned about not receiving the *same level* of supracompetitive profits if its IAP requirement is removed, that is no defense. *See Impax*, 994 F.3d at 500. All that is required for a less restrictive alternative is that Apple recoup its IP investment costs. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 619 (9th Cir. 1990) ("[I]t is a less restrictive alternative for Kodak to structure its prices . . . [to] reflect[] Kodak's investment costs . . . ."); *Digidyne Corp.*

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developers more than others based on the advantage that they take of the platform." FER-214; *see* Epic Br. 16-17, 43-44.

*v. Data Gen. Corp.*, 734 F.2d 1336, 1344 (9th Cir. 1984); *see also* 1-ER-121 (Apple's IP "only justifies a commission, not the rate itself").

b. Apple's In-App Payment Restrictions.

The district court's factual findings also establish less restrictive alternatives to Apple's three justifications for in-app payment restrictions. (Epic Br. 44-47.)

*Security*. The district court found that, but for Apple's restraints, competing payment providers would provide security that is as effective, if not better, than Apple's IAP, and rejected Apple's contrary claims. 1-ER-119 ("[T]o the extent that scale allows Apple to better detect fraud, other companies could do it better because they process more transactions."). While Apple touts a "competitive advantage on security" (Apple Br. 97 (quoting a legal conclusion on 1-ER-153)), the district court found "there is no evidence that IAP provides developers with any unique features," including "security," 1-ER-119–20. This is partly because "IAP does nothing technically aside from returning payment information" and "is not a payment processor; Apple delegates actual payment processing to third-parties, such as Visa," that could directly compete with Apple absent its restraints. 1-ER-118–19. In fact, the district court found that

IAP *creates* security risks because Apple's forced centralization "could expose all Apple users who use IAP" in a single data breach. 1-ER-120; *see* EFF Br. 16-17. Moreover, "any potential for fraud prevention is not put into practice," as Apple does not itself verify any digital purchases made through IAP. 1-ER-120.

Apple does not challenge these findings, and merely claims "Epic takes [them] out of context." (Apple Br. 97.) The context is clear—as the opinion's subheadings "Business Justifications" and "Security" demonstrate, 1-ER-119–20—and these findings cannot be reconciled with the district court's legal conclusions.

*IP Compensation*. Apple's arguments for why the district court's findings fail to support the existence of less restrictive alternatives to its IAP restrictions mirror its IP compensation arguments in the context of app distribution restrictions (*compare* Apple Br. 98, *with* Apple Br. 84-85), and fail for the reasons detailed above.

*Centralization*. Apple argues "some users would have a degraded experience if they could no longer choose the convenient, 'centralized option of managing a single account through IAP.'" (Apple Br. 98 (quoting 1-ER-153).) That is not Epic's position: Under Epic's requested remedy, Apple could still require that developers include IAP as an *option* within their apps, 2-ER-258–59, and thus consumers could continue to use IAP if they value it. (Epic Br. 47.) As the district court recognized, "loosening the restrictions will increase competition as it will force Apple to compete on the benefits of its centralized model." 1-ER-122.

4. *The District Court's Failure To Balance Was Error.*

As explained in Epic's opening brief (Epic Br. 47-55), as well as *amicus* briefs from the United States, 34 States and the District of Columbia, and over three dozen scholars[14] (including one whom Apple's own *amici* dub "the nation's leading antitrust scholar"[15]), the district court also erred in failing to balance anticompetitive effects against procompetitive benefits. In the absence of a less restrictive alternative for a challenged restraint, weighing the good against the bad is exactly what the antitrust laws require. Apple's contrary argument (Apple Br. 85-90) has no support in precedent—unsurprisingly, since it would mean significant anticompetitive effects would be tolerated, so long as

[14] DOJ Br. 15-20; States Br. 18-25; Carrier Br. 19-21.

[15] Former Fed. Antitrust Enforcers Br. 14.

there was a modest procompetitive benefit and no less restrictive way to achieve it.

Epic was clear at trial that balancing is required if the court did not credit its proffered less restrictive alternatives, and thus Apple's argument that Epic invited the district court's error (Apple Br. 85-86) is meritless. At trial, Apple argued Section 2 does not require consideration of either less restrictive alternatives or balancing. FER-25. In exploring this issue, the court asked Epic about the role of less restrictive alternatives in a Section 2 claim. Epic responded that less restrictive alternatives must be addressed, FER-204–05, and more broadly, that Apple's "focusing on the specific words 'less restrictive alternative' is avoiding the more important . . . issue, which is whether the Court in a Section 2 case does any kind of balancing or assessment of the procompetitive justification and how it is achieved." FER-205. The court then asked whether Epic was "equating" less restrictive alternatives and balancing, and Epic explained that the existence of a less restrictive alternative will often be dispositive in balancing anticompetitive harms and procompetitive benefits. *See* FER-207. Epic repeatedly stated that balancing is required under this Court's precedent. *See* FER-205 (stating

*Qualcomm* "adopt[s] the reasoning [of *Microsoft*] that there is a balancing that is supposed to be done"); FER-207 (*Qualcomm* "was quite clear that there is a balancing test or a balancing step"); 2-ER-229 ("To the extent that there is any residual procompetitive benefit to Apple's conduct that cannot be captured by less restrictive alternatives, the anti-competitive effects of Apple's conduct clearly outweigh those benefits."); *see also* 2-ER-226–30; 3-SER-665–66; 3-SER-706–07.

Apple wrongly claims *Amex* and *Alston* support its position that balancing is not required in a rule of reason analysis (Apple Br. 86-87). *Alston* noted that while the Court "has sometimes spoken of a three-step, burden-shifting [rule of reason] framework," "[t]hese three steps do not represent a rote checklist." 141 S. Ct. at 2160 (internal quotation marks omitted). It concluded the plaintiffs had shown anticompetitive effects, the defendant had shown some procompetitive justifications, and the plaintiffs had proved a less restrictive alternative, which ended the inquiry in plaintiffs' favor—the Court had no need to balance. *Id.* at 2160-66. Likewise, in *Amex*, the Court had no need to proceed past the first step after concluding the plaintiffs had not shown anticompetitive effects. 138 S. Ct. at 2287-90.

But where challenged restraints are found to have competitive harms and some justifications, and the plaintiff does not identify less restrictive means to achieve the claimed benefits, balancing is required—as antitrust jurisprudence has recognized for more than a century. "From the time of its announcement in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and the elaboration of the rule by Mr. Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), to its . . . articulation in *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977), . . . the rule of reason has been primarily directed to a balancing of the competitive evils of the restraint against the competitive benefits asserted on its behalf." *Gough v. Rossmoor Corp.*, 585 F.2d 381, 388-89 (9th Cir. 1978); *see SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1120 (9th Cir. 2022) (under the rule of reason, "we ask whether the alleged restraint's harm to competition outweighs its procompetitive effects" (internal quotation marks omitted)); (Epic Br. 48-49 (collecting cases)).

*Alston* and *Amex* are consistent with longstanding authority that a court must weigh harms and benefits to assess the reasonableness of a challenged restraint if the plaintiff cannot show a less restrictive alternative.[16] *Amex* cites three sources in describing the rule of reason framework, and each explicitly includes a balancing analysis. *See* 138 S. Ct. at 2284.[17] *Alston* expressly approves of the district court's opinion in that case, which twice confirmed the need for balancing if a plaintiff fails to show less restrictive alternatives. *See* 141 S. Ct. at 2160 (district court's opinion reflected "thoughtful legal analysis consistent with established antitrust principles"); *id.* at 2166 (district court "followed circuit precedent to apply a multistep [rule of reason] framework closely akin to [*Amex*'s]"); *NCAA Athletic Grant-in-Aid Cap*, 375 F. Supp. 3d 1058, 1096 (N.D. Cal. 2019) (if plaintiffs fail to show less restrictive alternatives, the court "will reach the balancing stage,

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[16] In all events, this Court "should not assume that the Supreme Court has implicitly overruled its precedent." *United States v. Obaid*, 971 F.3d 1095, 1102 (9th Cir. 2020).

[17] *See Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993) ("Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior."); 1 Julian O. von Kalinowski, *Antitrust Laws and Trade Regulation* § 12.02 (2d ed. 2017) (final component of rule of reason is "determin[ing] whether the anticompetitive effects of the agreement actually outweigh those procompetitive effects"); 7 Areeda & Hovenkamp ¶ 1502 (if the plaintiff cannot show a less restrictive alternative, "the harms and benefits must be compared to reach a net judgment whether the challenged behavior is, on balance, reasonable").

wherein the court must balance the harms and benefits of the challenged conduct to determine whether it is reasonable" (internal quotation marks omitted)); *id.* at 1108-09 (rejecting contention "that the mention of a three-step test by the Supreme Court in [*Amex*] means that the Rule of Reason analysis can end without balancing if a viable less restrictive alternative is not shown"). *Alston* and *Amex* provide no support for the district court's truncated rule of reason analysis.[18]

Under Apple's approach, courts would never balance, and a restraint with very substantial anticompetitive effects but only the scantest procompetitive benefit would survive scrutiny in the absence of a less restrictive alternative. Apple's approach ignores consumer welfare, which is the touchstone of the antitrust laws. As the Supreme Court reiterated last year, in determining "whether a restraint is undue

[18] Apple selectively quotes an article by Herbert Hovenkamp explaining that balancing is unnecessary when less restrictive alternatives are found. (Apple Br. 88 (citing Herbert Hovenkamp, *The NCAA and the Rule of Reason*, 52 Rev. Indus. Org. 323, 327 (2016)).) Apple ignores Professor Hovenkamp's position that balancing *is* necessary when alternatives are *not* found, 52 Rev. Indus. Org. at 328, and his *amicus* brief submitted here, which argues that the district court's failure to "engag[e] in any balancing" is "contrary to the case law" and requires reversal. (Carrier Br. 19-22 (citing 7 Areeda & Hovenkamp ¶ 1507a).)

for purposes of the Sherman Act," the goal is "[a]lways . . . to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Alston*, 141 S. Ct. at 2151 (internal quotation marks omitted); *see also id.* at 2160; Carrier Br. 19-22; States Br. 18-25; DOJ Br. 15-20. That distinction is impossible absent balancing.

Not only does Apple claim that no balancing is ever required, it also argues both that such balancing is an "unadministrable" task (Apple Br. 87) and, conversely, that the court actually did the requisite balancing (Apple Br. 89-90). Judges apply balancing tests in various contexts every day, *see, e.g.*, *Herbert v. Lando*, 441 U.S. 153, 180 (1979) (Powell, J., concurring) ("Although the process of weighing these interests is hardly an exact science, it is a function customarily carried out by judges in this and other areas of the law."), and balancing anticompetitive effects and procompetitive benefits is no different, *see, e.g.*, *Sullivan*, 34 F.3d at 1112 ("[A]lthough balancing harms and benefits . . . may be unwieldy and confusing, such is the case with a number of balancing tests that a court or jury is expected to apply all the time."). The two cases Apple cites (Apple Br. 87) do not hold otherwise.

In fact, *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group*, 592 F.3d 991 (9th Cir. 2010), makes Epic's point precisely: antitrust balancing concerns only harms and benefits to *competition*, excluding any "weigh[ing] [of] the benefits of an improved product design." *Id.* at 1000. And *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), involved no anticompetitive effects, and thus "there [was] nothing to place on that side of the scale," *id.* at 229 n.11. Nothing in these cases suggests courts should not balance when necessary to assess the reasonableness of a restraint.

Nor does the record bear out Apple's contention that the district court performed the requisite balancing. (Apple Br. 89-90.) Apple points to three snippets from the court's opinion,[19] the first of which is merely the legal conclusion that Epic did not show a less restrictive alternative to Apple's app distribution restrictions. 1-ER-152. The second is a statement in the court's analysis of Epic's state law claims that the challenged DPLA terms "have procompetitive effects that offset their anticompetitive effects." 1-ER-160. Whatever this means is left to the

[19] Apple also cites a footnote that contains no balancing but includes the court's recognition that the rule of reason analysis under Section 1 and Section 2 is "essentially the same." 1-ER-150 n.610.

imagination: the court did not explain what (if anything) was balanced, how much weight was deserved, or why. Moreover, "offset" does not mean "outweigh"; an offset can be partial or complete. Thus, even if the court engaged in some balancing *sub silentio*, it is impossible to review it and assess whether the court erroneously credited Apple's asserted justifications that do not advance competition (§ I.C.2 above), or erroneously viewed any procompetitive benefit, however small, as "offset[ting]" significant anticompetitive effects. (Epic Br. 51-55.) The third statement Apple cites is simply a recognition that Apple's conduct has "real anticompetitive effects" and "mostly valid and non-pretextual justifications." 1-ER-165. Once again, no actual balancing was performed.

Finally, though Apple criticizes Epic and its *amici* for not detailing what proper balancing would entail (Apple Br. 88), Epic's opening brief does just that (Epic Br. 54-55). Indeed, the district court's factual findings suggest the court understood how to balance: the court "look[ed] at the combination of the challenged restrictions and Apple's justifications, and lack thereof," weighed them, and concluded that "common threads run through Apple's practices which unreasonably restrain[] competition and harm consumers." "Thus," the court found, "loosening the restrictions will increase competition as it will force Apple to compete on the benefits of its centralized model or . . . change [it]." 1-ER-121–22.

But the court inexplicably ignored this balancing approach in its conclusions of law. The court concluded that Epic "proffered both direct and indirect evidence of anticompetitive effects" from Apple's app distribution and in-app payment solution restrictions, 1-ER-148; 1-ER-152; that "Apple has shown procompetitive justifications," 1-ER-150; 1-ER-152–53; and that Epic did not show less restrictive alternatives that are "virtually as effective" and not significantly more costly, 1-ER-152; 1-ER-153. But then the court announced, with nothing more, that "Apple's app distribution restrictions do not violate Section 1." 1-ER-152; 1-ER-153 (same for Apple's in-app payment solutions restrictions); 1-ER-155 (concluding Epic's Section 2 claims "fail to satisfy the substantively similar rule of reason analysis for similar reasons as Section 1"). The failure to balance was legal error.

## II. THE DISTRICT COURT ERRED IN REJECTING EPIC'S SECTION 2 CLAIMS.

Epic's Section 2 claims are paradigmatic *Kodak* claims. As Apple's principal economic expert admitted—and Apple does not dispute—if Epic proved either of its single-brand *Kodak* aftermarkets, "then by dictionary definition, [Apple is] a monopolist." 2-SER-423–24. Epic did just that, and the district court's rejection of Epic's foremarket and aftermarkets rested on significant legal errors that warrant reversal and entry of judgment for Epic. Apple does not provide a justification for these errors, and instead repeats and relies on the court's flawed analysis in devising its own market for digital mobile gaming transactions, in contravention of *Amex* and core antitrust market definition principles.

### A. The District Court Erred in Rejecting Epic's Foremarket.

Apple claims Epic went astray by proposing a foremarket for smartphone operating systems rather than smartphones. (Apple Br. 45-46.) But as Epic has explained (Epic Br. 59-60)—with no response from Apple—that is a distinction without a difference because there is a one-to-one correspondence between the iOS operating system and Apple's smartphone: every smartphone Apple makes is an iOS device, and every iOS device is made by Apple. (Epic Br. 59-60.) Under *Kodak* and *Newcal Industries, Inc. v. IKON Office Solution*, 513 F.3d 1038 (9th Cir. 2008), the relevant inquiry is whether competition in an initial product market constrains Apple's control of the iOS aftermarkets. *See Newcal*, 513 F.3d at 1049-50. Whether the initial product is conceived as smartphones or smartphone operating systems, the ultimate point is the same: consumers become locked in when they buy Apple's devices, such that foremarket competition does not constrain Apple's anticompetitive practices in the aftermarkets.

Apple contends Epic's foremarket was "gerrymandered" for litigation purposes because Apple has a "modest" share of the smartphone market. (Apple Br. 46.) But the defendant's share of the foremarket is legally irrelevant; *Kodak* does not demand that the defendant have market power in the foremarket. Indeed, Kodak itself did not have such power. *Kodak*, 504 U.S. at 454-55. Moreover, Apple's share of the smartphone market is identical to its share of the smartphone operating system market.

The district court misunderstood Epic's foremarket theory. It did not consider, as *Kodak* and *Newcal* require, whether iOS and Android compete in a relevant foremarket, or whether Android constrains Apple's conduct in the aftermarkets. The court instead rejected Epic's foremarket in a scant paragraph by erroneously holding iOS cannot be a "product" because it is "not licensed or sold to anyone," but is instead integrated into the iPhone. 1-ER-48. That is wrong, and would lead to the nonsensical result that Android is a "product" (because Google licenses it to smartphone manufacturers, 2-ER-416) but iOS is not, and the two therefore would not compete with each other.[20]

Selling an operating system within a device is a form of bundling—and there is nothing novel about subjecting products that are part of a bundle to antitrust scrutiny. *See, e.g.*, *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 493-94 (3d Cir. 1992) (en banc) (defining market for "autosound systems" where defendant's systems were bundled with its cars); *Multistate Legal Stud., Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publ'ns, Inc.*, 63 F.3d 1540, 1545-48 (10th Cir. 1995) (finding defendant's two types of bar review courses could be separate products, even though defendant only sold them

[20] Apple elsewhere concedes—as did the district court—that iOS competes with Google's Android. (*See* Apple Br. 79 (quoting 1-ER-149).)

bundled); DOJ Br. 31-38. Were that not so, a monopolist could sidestep Section 2 simply through creative bundling.

Even products given away for free can be part of a relevant market. *See, e.g.*, *Klein v. Facebook, Inc.*, No. 20-cv-08570-LHK, __ F. Supp. 3d __, 2022 WL 141561, at *12 (N.D. Cal. Jan. 14, 2022) (finding Facebook's free social network could be part of a social network market); *LiveUniverse, Inc. v. MySpace, Inc.*, 2007 WL 6865852, at *7 (C.D. Cal. June 4, 2007) ("MySpace offers no basis in antitrust law, much less logic" for the conclusion that "a company offering a free product . . . could never acquire market power"), *aff'd*, 304 F. App'x 554 (9th Cir. 2008). Of course, Apple does not give away iOS for free: it is a product bundled with the iPhone. (Epic Br. 21-22; DOJ Br. 28-38.)

As Epic explained, the D.C. Circuit in *Microsoft* found a market for the licensing of computer operating systems and concluded that Microsoft's web browser was a separate product integrated into Microsoft's operating system, even though the browser was not sold separately from that operating system. (Epic Br. 59 (citing *Microsoft*, 253 F.3d at 45, 52, 60).) Apple tries to distinguish *Microsoft* because, "unlike Apple, Microsoft *did* license and sell its operating system."

(Apple Br. 45.) But Apple sells iOS in a bundle with the iPhone, just as Microsoft sold its web browser in a bundle with its operating system. The manufacturer's choice of what to sell or license does not determine whether something constitutes a product. *Microsoft*, 253 F.3d at 64, 84-89; *see also Digidyne*, 734 F.2d at 1339 (separate markets for operating systems and hardware, even when bundled).

Epic proved Apple's iOS and Google's Android compete for consumers and developers. (Epic Br. 58.) The district court itself recognized that "consumer choice" exists between Android and iOS. 1-ER-149. Even Apple finally admits the obvious: iOS's "'main competitor' in the relevant market [is] Android." (Apple Br. 82 (quoting 1-ER-147).) These concessions confirm Epic's foremarket.

### B. The District Court Erred in Rejecting Epic's Aftermarkets.

The district court erred in requiring more than Epic's proof of information barriers and switching costs to show lock-in under the fourth *Newcal* factor. Moreover, the court's finding of direct evidence of monopoly power confirms that Epic properly defined its aftermarkets.

1. *The District Court and Apple Use the Wrong Framework for Aftermarket Lock-In.*

The district court rejected Epic's aftermarkets based solely on the fourth *Newcal* factor—whether foremarket competition disciplines anticompetitive practices in the aftermarkets. 1-ER-133. As Epic showed in its opening brief, information barriers when selecting a smartphone and smartphone operating system, combined with the high costs of switching between iOS and Android, result in persistent lock-in to iOS, even beyond the lifespan of a single iPhone device. (Epic Br. 60-67.) That exceeds the lock-in found in *Kodak*, which ran only for the life of a single device and not into subsequent purchases. *See* 504 U.S. at 476-77. Accordingly, this is a classic single-brand product aftermarket case. *Kodak* and *Newcal* are good law, and Epic has proved all facts required for such a determination.

Apple repeats the district court's legal error in arguing lock-in requires proof of a policy change. (Apple Br. 46.) It does not. Apple fails to grapple with the Third Circuit's explanation of why a policy change is merely *one* way to show foremarket competition does not discipline the defendant in the aftermarket. (Epic Br. 63-64 (discussing *Avaya Inc., RP* *v. Telecom Labs, Inc.*, 838 F.3d 354, 404 (3d Cir. 2016)).)[21] A policy change is simply one fact pattern through which the fourth *Newcal* factor can be proved. As a legal matter, it is sufficient that a market imperfection locks a consumer into a durable product. *Avaya*, 838 F.3d at 402. The information barriers found here were sufficient, and it was error for the district court to determine otherwise. (Epic Br. 61-64; Kirkwood Br. 16-20.)

Relatedly, Apple does not dispute that consumers lack information to determine lifecycle costs, 2-ER-272, but reiterates the district court's erroneous belief that Epic must show consumers are unaware that the App Store is the sole way to distribute apps, Apple Br. 46-47; 1-ER-134. *Kodak* does not require that consumers lack *all* knowledge of an alleged aftermarket monopolist's conduct, just that they lack sufficient knowledge to adequately assess the full consequences of their actions when making purchasing decisions in the foremarket. (Epic Br. 62.)

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[21] While Apple cites *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811 (6th Cir. 1997), that decision has been roundly—and fairly—criticized as unsupported by *Kodak*. *See Red Lion Med. Safety, Inc. v. Ohmeda, Inc.*, 63 F. Supp. 2d 1218, 1230-32 (E.D. Cal. 1999).

On switching costs, Apple clings to the district court's conclusion that Epic "failed to prove lock-in, even absent a policy shift." (Apple Br. 48 (quoting 1-ER-134).) But that ignores the court's extensive factual findings and undisputed record evidence, which establish lock-in. 1-ER-50–54; 3-ER-570; 2-ER-390–93. The court found that "the evidence shows that very few consumers own both Android and iOS devices" at any given time; indeed, "only about 2% of iPhone users switch[] to Android each year," or 7% per phone purchasing cycle, 1-ER-54–55. The district court committed legal error by setting the bar for lock-in too high, requiring Epic to prove "that iOS users are . . . per se 'closed off' to considering Android." 1-ER-54. That legal standard, which would be impossible to meet, is inconsistent with *Kodak*, 504 U.S. at 476-77, and *Newcal*, 513 F.3d at 1048-50.

Apple also challenges lock-in by arguing that "users stick with Apple because they *like* the products." (Apple Br. 49 (citing 1-ER-54).) But that proves nothing. The district court stated that "the features that create lock-in *also* make Apple's products more attractive," 1-ER-51 (emphasis added); it was not suggesting that attractiveness legally excuses lock-in. It is entirely possible consumers would like iOS less if they had more information about the higher fees they are forced to pay due to Apple's conduct, or the barriers Apple erects to switching to Android. Moreover, no case holds that users cannot be locked into *aftermarket* products merely because they like the foremarket product. Nor would that make sense, as even a firm with legitimately earned market power may not abuse it through anticompetitive means. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 609 n.26 (1953) ("[T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." (internal quotation marks omitted)). The single case Apple cites did not even involve a foremarket/aftermarket theory, let alone articulate such a rule. It found merely that a particular airline's tickets for specific routes did not constitute a separate single-brand market because the tickets were "reasonably interchangeable" with other tickets for the same routes. *Glob. Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 705-06 (S.D.N.Y. 1997).

2. *Direct Evidence of Apple's Monopoly Power Confirms Epic's Aftermarkets.*

Another way of understanding how the district court misapplied *Kodak* and *Newcal* is through direct evidence of Apple's monopoly power.

As Epic and the United States explain, the evidence detailed by the district court in its factual findings is overwhelming. (*Compare* Epic Br. 57-58; DOJ Br. 20-24, *with* Apple Br. 50-54.) But the district court failed to recognize the legal significance of these findings, namely that Epic proved Apple's "possession of monopoly power," a necessary precondition for a Section 2 claim. *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

The legal standard is clear: "[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level." *Microsoft*, 253 F.3d at 51. "Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear." *Id.* The district court found that for over a decade, Apple has "extract[ed] supracompetitive commissions" from millions of developers, 1-ER-121, and "hid[den] information" from consumers, 1-ER-53, allowing "it to reap supracompetitive operating margins." 1-ER-95. Indeed, the district court concluded Apple is so impervious to competitive pressures that "nothing other than legal action seems to motivate Apple to reconsider pricing and reduce rates." 1-ER-39. There is only one name for a firm that collects billions of dollars in supracompetitive charges for over a decade, forecloses all potential competitors, 1-ER-98–99, and reduces marketwide innovation, 1-ER-103–05, and quality, 1-ER-148 n.606, without any threat of competition: monopolist.

Apple's primary response to these factual findings is to dispute them. (Apple Br. 50-56.) The district court expressly found that Apple's fee is "supracompetitive," 1-ER-121, and its restrictions "have increased prices for developers," 1-ER-102. Apple disputes these factual findings by claiming it "never *raised* prices," referring to the fact that its 30% fee has not budged for over a decade. (Apple Br. 52 (emphasis modified).) Apple confuses an increase in its nominal price over time with an increase in the price that developers would pay in a world with competition. A price increase exists where a defendant's price "was higher than the price one would expect to find in a competitive market." *Amex*, 138 S. Ct. at 2288.[22]

Apple also spends pages contesting the district court's finding that the App Store's "operating margins have exceeded 75% for years,"

[22] Even Apple's lead economic expert disputed Apple's claim that Apple has never raised its fee, conceding that "when Apple introduced IAP, it effectively imposed a price increase" because developers were suddenly required to pay Apple a 30% fee for in-app purchases. FER-137–38; *see also* FER-140.

1-ER-147. (Apple Br. 52-54.) Apple asserts these operating margins are "not probative of anything." (Apple Br. 53.) But both the district court and Apple's lead economic expert "agree[d] that 'persistently high economic profit is suggestive of market power.'" 1-ER-96; 1-ER-97 n.465 (recognizing that "in a competitive market, high profits decline because companies would reduce prices and invest in quality to stave off competition"); *see also Actavis*, 570 U.S. at 157 ("[H]igher-than-competitive profits [are] a strong indication of market power."). And the court was definitive in its conclusion that "under any normative measure," the App Store's operating margins "are extraordinarily high"; moreover, "Apple did nothing to suggest operating margins over 70% would not be viewed as such." 1-ER-46.

While in Apple's retelling, the district court relied on only "a handful of unaudited documents" to reach its conclusions about Apple's operating margins (Apple Br. 52), that mischaracterizes the evidence. The district court first identified operating margins in "App Store P&L statement[s]" "put together specifically for Apple's CEO" by "Apple's financial planning and analysis team." 1-ER-45; 1-ER-105. The court then compared Apple's own calculations in those P&L statements to estimates independently generated by Epic's forensic accounting expert, which the district court found "credibly show[] that the operating margins have exceeded 75% for years." 1-ER-44–45; 1-ER-147. The court concluded that, because the witness lacked access to the Apple internal documents when he generated his estimates, "the consistency between [the witness's] analysis and Apple's own internal documents suggest[s] that [Epic's] analysis is a reasonable assessment of the App Store's operating margin." 1-ER-45; FER-148–51.

There is no merit to Apple's claim that its operating margins did not reflect "all joint costs" attributable to the App Store. (Apple Br. 53.) Apple attempted this ploy at trial, FER-167; FER-170; FER-173–86, but the court rejected it and found that "the evidence[] shows that Apple has calculated a fully burdened operating margin," which means that it reflects all costs attributable to a business unit, such as the App Store. 1-ER-45; FER-160–61. Apple's financial planning documents and testimony from Epic's expert confirm that the App Store operating margins on which the district court relied were fully burdened—and "extraordinary." 1-ER-45; 1-ER-105; 1-ER-147; FER-152–53.

Finally, Apple and its *amici* argue the overwhelming evidence of its monopoly power is irrelevant because the district court concluded Epic failed to prove reduced output. (Apple Br. 50-51.) But the court did not find Apple's restraints had no effect on output; it instead held that the evidence was "insufficient to determine that Apple's restrictions had either a negative or a positive impact" on the volume of app downloads or in-app purchases. 1-ER-103. As discussed above (§ I.C.1), Apple ignores the district court's recognition that "the high output may have been even higher without Apple's restrictions." 1-ER-102 & n.488. The district court also expressly found foreclosed competition, reduced innovation and reduced quality, all of which establish reduced qualitative output. Epic Br. 57-58; *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1018 (6th Cir. 1999); *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1101 (D. Colo. 2004); *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 341 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003). Moreover, the district court's finding that Apple's prices are "supracompetitive," 1-ER-121, means that Apple's conduct reduced output since supracompetitive prices are, by definition, evidence of reduced output. *Ill. Bell Tel. Co. v. FCC*, 740 F.2d 465, 472

(7th Cir. 1984) (Posner, J.) ("[P]rice and output are inversely correlated."); *MacDermid*, 833 F.3d at 185 n.49; *United States v. AMR Corp.*, 335 F.3d 1109, 1115 n.6 (10th Cir. 2003); DOJ Br. 22 ("[I]n most cases, a reduction in output follows from a price increase as a matter of course.").

### C. Epic Correctly Analyzed the Markets Under *Amex*.

In an alternative attempt to undermine Epic's aftermarkets, Apple argues that they are "untenable under *Amex*" (Apple Br. 41-44). Apple's argument fails for two separate reasons: Apple misreads *Amex*, which holds that two-sided platforms supply a single product, in attempting to defend the district court's decision to collapse two separate *markets* into one; and Apple wrongly states that Epic failed to examine both sides of the two-sided App Store platform, when Epic did so.

First, throughout its opinion, the district court, at Apple's urging, 1-SER-234, collapsed two separate markets—a two-sided platform for app distribution/download and a single-sided market for payment solutions for in-app purchases of digital content—into a single "transactions" market. *See, e.g.*, 1-ER-4; 1-ER-46–47; 1-ER-66; 1-ER-89–92; 1-ER-124–25; 1-ER-130. Despite describing the App Store (used for "initial downloads" of apps) and IAP (used for in-app purchases, which occur after downloading an app) as involving different market participants and happening at different times (Apple Br. 7-9), Apple embraces the district court's conclusion that the sole "relevant App Store product is transactions." (Apple Br. 41 (quoting 1-ER-125); *see id.* at 14-18.)

As explained in Epic's opening brief and by the United States (Epic Br. 24-25, 71; DOJ Br. 33-38), the court's collapse of the two aftermarkets reflects fundamental confusion about *Amex*. *Amex* "held that, for at least certain subsets of two-sided platforms, courts must define the relevant market to 'include both sides of the platform.'" *PLS.com*, 32 F.4th at 838 (quoting *Amex*, 138 S. Ct. at 2286-87). A "transaction" on a two-sided platform is "a single, simultaneous transaction between participants." *Amex*, 138 S. Ct. at 2286. The district court here appeared to focus on *financial* transactions, perhaps because credit card networks (which facilitate financial transactions) were at issue in *Amex*. 1-ER-124–25; *see* 1-ER-4 (characterizing the App Store's revenue, which comes largely from in-app purchases, as driven by mobile gaming "transactions"), 1-ER-125 (describing the App Store's core "matchmaking" function as a "facilitating service[]" for "transactions"). But the "transaction" on a two-sided transaction platform need not be an exchange of money.

Economists David Evans and Richard Schmalensee, on whose work the Supreme Court relied in *Amex*, *id.* at 2280-81, and who served in this case as experts for Epic and Apple, respectively, illustrate this concept with the example of OpenTable, a restaurant reservation app. David S. Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* 7-17 (2016). The "transaction" on the OpenTable platform (analogous to the App Store) is the reservation. Diners pay for their dinner separately, in a later financial transaction with the restaurant (analogous to in-app purchases). Unlike Apple, OpenTable does not require restaurants to use a particular payment solution (such as IAP).

Here, the two-sided platform is the App Store, which is a distribution platform that lets developers distribute apps and consumers download them. *See Amex*, 138 S. Ct. at 2280. Just as restaurants and diners connect on OpenTable, developers and consumers connect on the App Store (and would connect on other app distribution platforms if they were not foreclosed by Apple's conduct). The App Store "transaction" occurs when a consumer downloads a developer's app to their phone, whether the app is free or involves payment. Payment solutions like IAP are separate. They are a regular (one-sided) product: app developers "procure" payment solutions from other companies (or supply their own) and integrate them into their app before the app is distributed, and then use them to facilitate in-app transactions after the app has been downloaded. 1-ER-37. Apple repeats the district court's error by collapsing app distribution and in-app payment solutions into a single "transaction" product—a mistake that led the court improperly to adopt a single "game transactions" market, rather than two separate markets.

Second, Apple claims Epic addressed only the "user side" of the app distribution market (*i.e.*, consumers who download apps), not the developer side. (Apple Br. 41-42 (citing *Amex*, 138 S. Ct. at 2280-81 & n.1).) Not so: Epic discussed both sides, including the dynamics of developer competition to reach users. Epic Br. 9 (quoting 1-ER-55), *id.* at 58 (iOS and Android "compete for consumers and developers"); *cf.* 1-ER-97 ("[D]evelopers do not develop for new platforms unless they have a healthy user base, but users only go to platforms that already have a developed ecosystem.").

Ignoring these findings and claiming "the App Store faces robust competition on the developer side," Apple tries to suggest that the market is broader than iOS app distribution by wrongly contending that "the district court devoted an entire section to" the question of substitutability among *app stores*. (Apple Br. 42 (citing 1-ER-85–88).) But that discussion concerns substitutability across *computing platforms*—desktop PCs, dedicated gaming consoles, and smartphones. The district court actually rejected Apple's argument that "it faces intense pressure as it competes for developers and users across these [computing] platforms." 1-ER-86. Instead, the court found that stores for non-mobile computing platforms do not compete with Apple and therefore are not in the same market as the App Store. 1-ER-86–88. In short, *Amex* provides no support for rejecting Epic's markets.

### D. Epic's Aftermarkets Should Not Be Limited to Game Transactions.

In defining its own market, the district court improperly restricted the market to "digital mobile game transactions." 1-ER-135. On appeal, Apple repeats the district court's error—which Apple itself had invited, 1-SER-234—that any market for app distribution (or in-app purchases) must be limited to distribution of gaming apps (or in-app purchases).

(Apple Br. 44 (citing 1-ER-64–67).) This argument rests on distinctions between gaming apps and non-gaming apps, combined with a mistaken view that apps themselves were the relevant product—as opposed to the product being the transaction platform for distribution/download of apps. The App Store's function is to connect developers and users, and that function is the same for all apps. Likewise, OpenTable provides the same reservation service to both vegetarian restaurants and restaurants that serve other cuisines, without regard to the kind of food a restaurant serves. Epic is challenging the restrictions the App Store imposes on the distribution of *all* apps, not just gaming apps.

The district court ignored the touchstone for market definition, which is whether there are "[e]conomic substitutes [that] have a 'reasonable interchangeability of use' or sufficient 'cross-elasticity of demand' with the relevant product." *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018) (internal quotation marks omitted). The court never performed such an analysis—its focus on the "nine indicia indicating a submarket for gaming apps," 1-ER-125, was erroneous because it centered on the wrong product and the factors (*e.g.*, gaming apps' proportion of App Store revenue) were therefore unrelated to cross-elasticity of demand among different app stores. Apple does not defend the district court's failure in this regard.

### E. Apple's Restrictions Do Not Survive Rule of Reason Scrutiny.

The rule of reason analysis is, in relevant part, the same under Sections 1 and 2. (Epic Br. 56-57 & n.4.) Accordingly, under Epic's proposed aftermarkets, the district court's factual findings compel judgment for Epic on its Section 2 claims. (*See* § I.C above.)

Citing *Qualcomm*, Apple asserts the rule of reason is "more exacting" under Section 2 than Section 1. (Apple Br. 90-91.) *Qualcomm* held the standard is "essentially the same" and "more exacting" in one respect only—"a plaintiff may not use *indirect* evidence to prove unlawful monopoly maintenance via anticompetitive conduct under § 2." 969 F.3d at 991. While Apple baldly asserts any "indirect evidence" Epic presented is "inapplicable to its Section 2 claims," Apple neither identifies such evidence nor claims Epic or the district court improperly relied on it. (Apple Br. 90-91.) The district court correctly declined to distinguish between the standards applicable to Epic's claims under Sections 1 and 2. 1-ER-155.

Contrary to Apple's assertion that Epic's Section 2 claims concern technical "product improvement[s]" (Apple Br. 90-91), Epic challenged both Apple's technical *and* contractual restraints under Section 2.[23] 1-ER-95–96; FER-48; FER-54. Therefore, all of the anticompetitive effects found by the district court and described above and in Epic's opening brief are relevant to Epic's Section 2 claims. Moreover, while Apple asserts liability is "barr[ed] . . . under Section 2" because it "has no duty to deal with Epic on its preferred terms" (Apple Br. 91), Epic did not bring a refusal-to-deal claim, as described above, and the district court found that Apple has done more than refuse to deal. (*See* § I.B.2 above.)

Apple's argument that Section 2 has no less restrictive alternative step (Apple Br. 91) is meritless: Section 2 has the same less restrictive alternative step as Section 1. *See Qualcomm*, 969 F.3d at 991. The district court's factual findings establish less restrictive alternatives to all of Apple's restraints—contractual and technical. (§ I.C.3 above.)

Finally, if "the monopolist's conduct on balance harms competition," it is "condemned as exclusionary for purposes of § 2." *Microsoft*, 253 F.3d

[23] As explained above (§ I.B.3), Epic's Section 1 claims are directed only to Apple's contractual restraints.

at 59; *see Qualcomm*, 969 F.3d at 991 (quoting *Microsoft*). The district court's failure to conduct balancing was legal error under both Section 1 and Section 2. § I.C.4 above; *Qualcomm*, 969 F.3d at 991 (explaining that "the rule of reason is essentially the same" under Sections 1 and 2).

## III. THE DISTRICT COURT ERRED IN REJECTING EPIC'S TYING CLAIM.

As Epic explained in its opening brief (Epic Br. 67-73), the district court erred in holding that app distribution and in-app payment solutions cannot form the basis of a tying claim because they are a single "integrated" product. 1-ER-157–58. Contrary to Apple's contention (Apple Br. 92), the court's mistaken determination rests on a misapprehension of the applicable legal standard, which is reviewed *de novo*. *United States v. Gen. Motors Corp.*, 384 U.S. 127, 141 n.16, 142 (1966).

The legal error made by Apple and the district court is straightforward: the Supreme Court held nearly 40 years ago that functionally integrated products can still be separate for tying purposes. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19 (1984) ("[T]he answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items."), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

While the district court recited *Jefferson Parish*'s separate demand test, 1-ER-156–57, it effectively applied a different one by "focus[ing] on functionality" and IAP's "integration" into "iOS and the App Store," 1-ER-70 n.336; 1-ER-157–58. The court erred by assuming that the mere fact that two items are "functionally linked," or that one is "useless without the other," makes them a single product for tying purposes. *Jefferson Parish*, 466 U.S. at 19 n.30. As the United States explains, *Jefferson Parish* "rejected an alternative test that no tie exists where the defendant is 'merely providing a functionally integrated package of services.'" DOJ Br. 33-35 (quoting *Jefferson Parish*, 466 U.S. at 18-19); Epic Br. 68-69; *accord Kodak*, 504 U.S. at 463. Common sense underscores the district court's mistake: engineering gimmicks cannot provide an end-run around antitrust law.

Apple relies on *Rick-Mik Enterprises, Inc. v. Equilon Enterprises, LLC*, 532 F.3d 963, 974 (9th Cir. 2008), for its conclusion that "there is but a single product." (Apple Br. 93.) *Rick-Mik* is inapposite for a number of reasons. First, the relevant tying market in *Rick-Mik* was "gasoline franchises," and this Court recognized that franchises consist "almost by definition" of "'bundled' and related products and services" particular to that form of business relationship. 532 F.3d at 974, 977; *see Surgical Instrument Serv. Co. v. Intuitive Surgical, Inc.*, __ F. Supp. 3d __, No. 21-cv-03496-VC, 2021 WL 5474898, at *4 (N.D. Cal. Nov. 23, 2021) (noting *Rick-Mik* is a "franchise case[]" that is "not analogous" outside the "context of franchise agreements"). There is no franchise here. Second, the Court in *Rick-Mik* held that the complaint lacked sufficient allegations to support *Jefferson Parish*'s separate demand test. 532 F.3d at 975. Here, Epic alleged and proved significant separate demand for alternative in-app payment solutions. (Epic Br. 68-72.)

Apple asserts that various developers' attempts to bypass its supracompetitive commission do not show separate demand, but "only that some developers would prefer not to pay" Apple's commission. (Apple Br. 95 (citing 1-ER-158 n.621).) This argument is nonsensical; that developers want to use the App Store for distribution, but not use IAP because of price (or any other reason), proves they are separate products. *Microsoft*, 253 F.3d at 87 (separate demand test requires considering whether consumers will "likely be unwilling to buy a competitor's version of the tied product even if, making his own price/quality assessment, that is what he would prefer"); *see also Jefferson Parish*, 466 U.S. at 15 (unlawful tying arrangements deny consumers "the freedom to select the best bargain in the second market"). Moreover, Epic showed that Microsoft and other major developers sought to use their own payment solutions for reasons *other* than price. Epic Br. 71-72; FER-41; 3-ER-533 n.26; 3-ER-751–52; *see* Microsoft Br. 28-29. The district court itself found demand for payment solutions with better customer service, security, and cross-platform convenience. 1-ER-43; 1-ER-118–20.[24]

Apple also argues—unmoored to the district court's opinion—that there is no tie because "the majority of developers distribute apps without ever using IAP." (Apple Br. 95.) But that does nothing to disprove Epic's point that there is demand for alternative in-app payment solutions from developers who *do* want to sell digital content for use in their apps (but not physical goods). Forcing those developers to use Apple's IAP if they

[24] Equally irrelevant is whether IAP is "a comprehensive system to collect commission and manage in-app payments." 1-ER-157; Apple Br. 95. It is improper to consider purported justifications for a tie in the separate products phase of the analysis. (Epic Br. 72.)

want access to the App Store is a paradigmatic tie. *Kodak*, 504 U.S. at 461-62 ("A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, *or at least agrees that he will not purchase that product from any other supplier*." (emphasis added) (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958))).

As Epic explained in its opening brief, the remaining elements of *per se* tying are indisputably met. (Epic Br. 67-73.) The district court's decision must be reversed, whether reviewed under the rule of reason (*see* § I.C above) or *per se* analysis.

## IV. THE CONTRACTUAL RESTRICTIONS AT ISSUE ARE UNLAWFUL, VOID AS AGAINST PUBLIC POLICY, AND UNCONSCIONABLE.

Epic explained in its opening brief that the DPLA provisions the district court found Epic breached were unlawful under the Sherman Act, void as against public policy, and unconscionable; accordingly, if Epic prevails on its Sherman Act appeal, the judgment on Apple's counterclaims must be vacated. (Epic Br. 74.) Apple asserts Epic breached an additional DPLA provision—that developers may not "hide, misrepresent or obscure any features, content, services or functionality" in their apps, 3-ER-635—and that Epic did not challenge that provision as unlawful under the Sherman Act.[25] (Apple Br. 100-01.) Apple is wrong: Epic challenged "the DPLA's requirement that developers use Apple's IAP to the exclusion of all other payment processors" as unlawful under the Sherman Act. 2-ER-236–37. As applied here, the provision Apple cites is such a restraint—as demonstrated by Apple's claim that Epic breached it by offering a competing in-app payment solution to consumers. Epic asserted its affirmative defenses as to this provision. 1-ER-176; 2-ER-246–54; *see* 3-SER-631 (stipulation).

Accordingly, Apple's breach of contract counterclaims rise and fall on the determination of Epic's Sherman Act claims: If this Court reverses on Epic's Sherman Act appeal (any of §§ I to III above), it should vacate the counterclaim rulings. (Epic Br. 74.)[26]

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[25] Apple cites another provision in its brief, but it states only that Apple will "expel[] from the Developer Program" any developer that "attempt[s] to cheat the system." (Apple Br. 100 (quoting 3-ER-683).)

[26] There is an irony in Apple seeking to enforce contractual provisions from the DPLA that it elsewhere argues are solely the product of "unilateral conduct." (§ I.B above.)

## ARGUMENT ON APPLE'S CROSS-APPEAL

By imposing pernicious anti-steering provisions that "contractually enforce[] silence," "hide[] information" regarding "consumer choice," and "result in supracompetitive pricing and profits" for Apple, Apple violated the UCL. 1-ER-169. Apple's restraints "actively impede" iOS developers from informing users that the same digital content sold within their apps is available elsewhere, such as through the developer's own website, at lower prices. 1-ER-168. These restrictions are not the result of competition or product design, but "Apple's market power and resultant ability to control how pricing works for digital transactions." 1-ER-168. The district court rejected Apple's sole proffered justification for these restraints—that they help Apple collect its "supracompetitive" tax on app developers. 1-ER-168–69. Accordingly, the court properly found for Epic on its UCL claim and permanently enjoined Apple from enforcing its anti-steering restraints.

On appeal, Apple argues Epic now lacks standing to bring its UCL claim because of *Apple*'s own post-judgment conduct, but that is wrong. Apple's suggestion that no UCL liability lies because the district court denied Epic's Sherman Act claims is also wrong. The UCL was enacted to thwart schemes that are unfair but might not be otherwise unlawful, *Nationwide Biweekly Admin., Inc. v. Super. Ct. of Alameda Cnty.*, 9 Cal. 5th 279, 300 (2020), and contains an "unfair" prong separate from the "unlawful" prong. Cal. Bus. & Prof. Code § 17200. Wrong as well are Apple's contentions that Epic can prevail under the UCL only as a competitor, but not a consumer of Apple's App Store platform and IAP; its effort to engraft a requirement for a comprehensive market analysis found nowhere in the UCL; and its insistence that *Amex*'s analysis of entirely different anti-steering provisions somehow controls here. Apple's objections to the district court's UCL injunction likewise fall flat: the court had ample authority to enjoin Apple—a company headquartered in California, and whose contracts at issue specify that California law applies—under California law for conduct Apple committed in California.

Finally, the DPLA's third-party indemnification provision does not require Epic to pay Apple's attorneys' fees, and the few cases Apple cites involve provisions materially different from the DPLA.

This Court should affirm the district court's injunction and affirm the denial of Apple's petition for attorneys' fees.

## I. APPLE'S POST-JUDGMENT CONDUCT DOES NOT MOOT EPIC'S CLAIM.

After repeatedly telling the district court and the world it would reinstate the developer account Epic used to offer *Fortnite*, Apple refused to do so and now argues its about-face strips Epic of standing. (Apple Br. 103.) That is wrong on the law and ignores the scope of Epic's case. Epic's claims have never been confined to *Fortnite*, as the district court recognized, but encompass other Epic apps and apps from third-party developers that rely on Epic's software development tool (*Unreal Engine*), as well as Epic's efforts to offer in-app payment solutions to iOS developers, in competition with Apple's IAP. 1-ER-7–9; 1-ER-19–20.

As the district court recognized in denying Apple's motion to stay the UCL injunction, Apple confuses standing with mootness. 2-ER-192 n.1. "[S]tanding is determined as of the date of the filing of the complaint." *Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). Apple never asserted Epic lacked standing at the outset of the case, and even today does not contend that Epic *never* suffered injury that supports Article III standing.[27] Rather, Apple posits that its *post-judgment* actions eliminated Epic's standing.

That argument sounds in mootness—"the doctrine of standing set in a time frame." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). The test for mootness is "whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in [its] favor." *City of Colton v. Am. Promotional Events, Inc.*, 614 F.3d 998, 1005 (9th Cir. 2010). A party has a "'heavy burden' to establish mootness at the appellate stage." *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1011 (9th Cir. 2018).

Although at trial, Apple "repeatedly . . . offered to allow Epic Games to return *Fortnite* to the App Store," 1-ER-29; *see also* FER-222; FER-95; FER-197–98, Apple changed course after judgment and refused to reinstate Epic's developer account, FER-19. Apple's own conduct cannot moot Epic's claim. *See, e.g.*, *S. Or. Barter Fair v. Jackson Cnty.*, 372 F.3d 1128, 1133-34 (9th Cir. 2004) (no mootness where defendant

[27] California Civil Justice Association argues the court's finding of an "incipient" antitrust violation means that Epic lacks standing (CJAC Br. 4-9), but this argument confuses prevailing on the merits with Article III standing.

prevented plaintiff from carrying on its desired conduct); *Freitag v. Ayers*, 468 F.3d 528, 547-48 (9th Cir. 2006) (employee's property interest in employment was "not lost upon termination but continue[d] post-termination pending the final resolution of the administrative proceeding" regarding lawfulness of termination). If that were true, any time an iOS developer challenged Apple's contractual restraints, Apple could simply terminate that developer's account to avoid an equitable remedy and, indeed, any remedy at all for UCL violations given that "the cause of action established by [the UCL] is equitable in nature," *Nationwide Biweekly*, 9 Cal. 5th at 301. Such manipulation cannot deprive this Court of jurisdiction. *Am. States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 885 (9th Cir. 2003) (discussing the "significant concern" of parties attempting to "manipulate . . . appellate jurisdiction").

Apple's position that Epic can no longer show injury or redressability also ignores the consequences for the other apps that Epic and its subsidiaries currently offer on iOS, 1-ER-8–9, which include an app that offers in-app purchases. FER-10–11. Epic proved that developers who build third-party apps using *Unreal Engine* pay royalties to Epic based on revenue from those apps. 1-ER-8. Apple's anti-steering restraints lead to higher prices and thus reduced output because they ensure "developers cannot communicate lower prices on other platforms." 1-ER-166–67. Epic therefore suffers financial injury through the restraints' effects on Epic's subsidiaries and licensing revenue. *See Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (parent has redressable injury where harm is principally directed at subsidiaries but parent faces "actual financial injury").

Apple argues that because Epic collects *Unreal Engine* royalties from its licensees "based on gross sales—*not* net profits after commission," the district court incorrectly concluded Apple's commission rates harm Epic. (Apple Br. 104.) This argument ignores marketplace dynamics. If *Unreal Engine* developers could inform their customers that out-of-app purchases are available at lower rates than in-app purchases through IAP, consumers would have the choice to seek the better deal, and, as the district court found, they would. 1-ER-96. As a matter of basic economics, lower prices would result in higher demand, thus driving an increase in Epic's royalty revenues based on gross sales.

The out-of-circuit case Apple cites does not move the needle either. (Apple Br. 104 (citing *Cont'l Auto. Sys., Inc. v. Avanci, LLC*, 27 F.4th 326

(5th Cir. 2022)).) There, the Fifth Circuit found an injury too "speculative" because it depended on third parties changing their conduct and invoking contractual rights that might subject the plaintiff to liability. *Avanci*, 27 F.4th at 332. There is nothing "speculative" about Epic's injury—consumers already use IAP for billions of dollars in purchases, and the district court found that Apple's anti-steering restraints lead to higher prices for consumers and developers, including Epic. 1-ER-166–67. Moreover, Epic is a potential competing provider of in-app payment solutions. 1-ER-19; 2-ER-316. In its cross-appeal, Apple does not meaningfully address the harm Epic faces as a would-be competitor, which in and of itself proves Epic's claims are not moot.

## II. EPIC'S UCL CLAIM IS NOT FORECLOSED AS A MATTER OF LAW.

None of Apple's attacks on the district court's ruling that Apple violated the UCL, 1-ER-162–67, has merit.[28] Apple argues that the

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[28] Epic agrees with the California Attorney General's interpretation of the UCL. (*See* Cal. AG Br. 5-24.) Certification is unnecessary because Epic proved a UCL violation under settled California law. In addition, certification would likely significantly delay resolution of Epic's Sherman Act and UCL claims and perpetuate the ongoing harm to Epic and others injured by Apple's restraints. *See In re McLinn*, 744 F.2d 677, 681-82 (9th Cir. 1984) (considering "possible delays involved" in deciding

court's rejection of Epic's Sherman Act claims required it to dismiss the UCL claim as well. (Apple Br. 105.) But the UCL imposes liability for unfair practices that fall short of Sherman Act violations (§ II.A), and the district court correctly found that Apple's conduct violated the unfair prong of the UCL, whether Epic is considered Apple's competitor or consumer (§ II.B). Apple faults the court for not conducting a comprehensive market analysis (Apple Br. 108-09), but the UCL does not require this. (§ II.C.) Finally, Apple's argument under *Amex* fails because Apple's restraints are different from the anti-steering provision in *Amex*, as the district court found, 1-ER-168; and *Amex* did not hold that all anti-steering restraints are procompetitive as a matter of law. (§ II.D.)

### A. "Unfair" Conduct Need Not Be "Unlawful."

Apple argues that the court's rejection of Epic's Sherman Act claims required it to dismiss its UCL claim as well. (Apple Br. 105.) Not so.

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whether certification is appropriate). In any event, because Apple concedes that if Epic prevails on any of its antitrust claims, Epic satisfies the UCL's "unlawful" prong, *see* 3-SER-731, this Court should decide those claims before addressing whether to certify any question to the California Supreme Court, as finding for Epic would moot any certification consideration.

The UCL was enacted to "broaden the types of business practices that can properly be found to constitute unfair competition." *Nationwide Biweekly*, 9 Cal. 5th at 322; Cal. AG Br. 5-9. The statute's "primary objective" is "preventive, authorizing the exercise of broad equitable authority to protect consumers from unfair . . . business practices." *Nationwide Biweekly*, 9 Cal. 5th at 326; *Barquis v. Merchs. Collection Ass'n*, 7 Cal. 3d 94, 111 (1972) (the UCL's "sweeping language" is intended "to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur"). To that end, the UCL authorizes private parties to obtain injunctive relief against "[a]ny person who engages, has engaged, or proposes to engage in unfair competition," which is defined to include any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code §§ 17200, 17203. "Each of these three adjectives [unlawful, unfair, or fraudulent] captures a 'separate and distinct theory of liability.'" *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1177 (9th Cir. 2016).

Decades of California Supreme Court precedent hold that "a practice may be deemed unfair [under the UCL] even if not specifically proscribed by some other law." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel.*

*Co.*, 20 Cal. 4th 163, 180-81 (1999); *Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1125 (2014) (same); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003) (same); Cal. AG Br. 12. Under longstanding precedent, conduct is "unfair" when it threatens harm to competition, *Cel-Tech*, 20 Cal. 4th at 187, or inequitably harms consumers, *Rubio v. Cap. One Bank*, 613 F.3d 1195, 1205 (9th Cir. 2010); *see also Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 253 (2010). While this Court should reverse the district court's dismissal of Epic's Sherman Act claims (Epic Br. 33-73; Argument on Epic's Appeal §§ I-III above), Apple is wrong that affirmance on the Sherman Act claims would defeat Epic's claims under the UCL's "unfairness" prong. (*See* Cal. AG Br. 16-19.)

The two cases Apple cites—*Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363 (2001), and *City of San Jose v. Office of the Commissioner of Baseball*, 776 F.3d 686 (9th Cir. 2015) (*see* Apple Br. 105)—are inapposite because they involve conduct protected by a safe-harbor provision. As *Cel-Tech* explains, "[a]lthough the unfair competition law's scope is sweeping," "[w]hen specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." *Cel-Tech*, 20 Cal. 4th at 182. The California Supreme Court distinguished between a statutory "safe harbor," which bars a UCL "unfairness" claim, and a statute that merely does not prohibit an activity, which does not have that effect. *Id.* at 182, 184. *Chavez* and *San Jose* merely applied this safe harbor principle. *See In re Ambac Bond Ins. Cases*, No. A139765, 2016 WL 661903, at *11 (Cal. Ct. App. Feb. 18, 2016) (unpublished decision).

In *Chavez*, the California Court of Appeal held that "conduct that the courts have determined to be permissible under the *Colgate* doctrine" (which provides a safe harbor for certain refusals to deal, *United States v. Colgate & Co.*, 250 U.S. 300 (1919)) "cannot be deemed 'unfair' under the unfair competition law." *Chavez*, 93 Cal. App. 4th at 375. But here, there is no doctrine providing that Apple's anti-steering restraints fall within a safe harbor "condoned under the antitrust laws." *Id.* In *City of San Jose*, this Court barred a UCL claim where Major League Baseball's conduct was granted safe harbor under baseball's "exemption from the antitrust laws." 776 F.3d at 688, 691-92. No analogous safe harbor is at issue here.[29]

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[29] Apple also cites *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554 (9th Cir. 2008), where the plaintiff's UCL claim was dismissed at the

Apple's argument that Epic loses its UCL claim if it loses its Sherman Act claims directly contradicts *Cel-Tech*. But even if there were a requirement to prove an antitrust violation, the Cartwright Act—which Apple ignores in its brief—is broader than the Sherman Act and could support a UCL claim regardless of whether a Sherman Act claim succeeds. *See In re Cipro Cases I & II*, 61 Cal. 4th 116, 160-61 (2015); 3-SER-731.

### B. The District Court Correctly Applied Both the Competitor Tethering and Consumer Balancing Tests To Find Apple Violated the UCL.

Apple disputes none of the findings underpinning the district court's UCL analysis. It quibbles only with one of the tests the court applied, but the court's analysis was correct. In determining whether a practice is "unfair" under the UCL, courts ask whether a plaintiff is a competitor, consumer, or both. *Cel-Tech*, 20 Cal. 4th at 187 & n.12; *Nationwide Biweekly*, 9 Cal. 5th at 303-04.

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pleading stage because it "concede[d]" that claim rose and fell with its antitrust claim, *id.* at 558. Here, by contrast, the district court found after trial that Epic presented sufficient evidence to support its UCL claim, notwithstanding the court's ruling against Epic on its antitrust claims. 1-ER-167. It properly limited *LiveUniverse* to the facts of that case and found that "on this record" *LiveUniverse* was unpersuasive. 1-ER-166 n.632.

In this case, despite Apple's cursory assertion that Epic's UCL claim should be evaluated only under the test applicable to competitors (Apple Br. 104), Epic is *both* Apple's competitor in the distribution of apps and in-app payment solutions (since it would offer a competing app store and in-app payment solution absent Apple's restraints) and *also* a consumer of Apple's app distribution and IAP (as a developer offering apps with in-app purchases in the App Store). *See* 1-ER-163–64 (finding Epic both a competitor and a "quasi-consumer"). In making this argument, Apple does not reference *Cel-Tech*, the seminal case explaining how the UCL's "unfair" prong applies to competitors. (Apple Br. 104.) Indeed, Apple's brief is largely devoid of California state cases, even though this Court must apply California law as it believes the California Supreme Court would. *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1284 (9th Cir. 2017). Apple offers only a citation to *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718 (9th Cir. 2007), but that decision merely notes the different tests for competitors and consumers, with no suggestion that a plaintiff may bring a UCL claim only under one or the other. *Id.* at 735-36. Other cases confirm that a plaintiff may bring a UCL suit as both a competitor and a consumer. *See,* *e.g.*, *Gerawan Farming, Inc. v. Rehrig Pac. Co.*, No. 1:11-cv-1273-LJO-BAM, 2013 WL 1934173, at *3-4 (E.D. Cal. May 9, 2013); *Worldwide Travel, Inc. v. Travelmate US, Inc.*, No. 14-cv-00155-BAS-DHB, 2015 WL 1013704, at *11-12 (S.D. Cal. Mar. 9, 2015).

As this Court recently affirmed, "a business that uses a product as an input to create another product or service is a consumer of that input for antitrust purposes." *PLS.com*, 32 F.4th at 832. Epic does exactly that—using Apple's in-app payment solution, 1-ER-29, 1-ER-103—and as such, is a consumer for antitrust purposes. 1-ER-163–64; 1-ER-163 n.628. This puts to rest any suggestion that applying the consumer tests along with the competitor test would "eviscerate" *Cel-Tech*. (AFPF Br. 15-17.)

1. *Epic Satisfied* Cel-Tech*'s Competitor Test.*

*Cel-Tech* held that "any finding of unfairness to competitors under [the UCL must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." 20 Cal. 4th at 186-87. A competitor satisfies this "tethering" test and proves a defendant's conduct is "unfair" by establishing the conduct (1) "threatens an incipient violation of an antitrust law," (2) "violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law," or (3) "otherwise significantly threatens or harms competition." *Cel-Tech*, 20 Cal. 4th at 187; *accord Nationwide Biweekly*, 9 Cal. 5th at 301-03; 1-ER-164.

The district court correctly applied *Cel-Tech* in determining that Apple's contractual anti-steering restraints violate the UCL, and Apple identifies no clear error in these findings. The restraints threaten an incipient violation of federal and state antitrust law because they lead to information costs that "may create 'lock-in'" and "prevent[] [users] from making informed choices." 1-ER-166–67. They violate the policy and spirit of the antitrust laws by preventing substitution among platforms for transactions. 1-ER-167. They "unreasonably restrain[] competition and harm[] consumers," and thereby substantially foreclose Epic's ability to compete with Apple. 1-ER-121–22 (Apple blocks the flow of information to consumers, thereby "exploit[ing] its position" and insulating itself from "compet[ing] on the benefits of its centralized model"); *see also* 1-ER-5–6, 1-ER-53–54, 1-ER-96. The court's findings confirm that the effect of these restraints is particularly severe: the lack of competition stifles "substantial innovation in payment processing," 1-ER-103 n.495, and allows Apple to charge commission rates that give it "excessive margins," 1-ER-166.

2. *Epic Satisfied the Consumer Balancing Test.*

California courts have applied a "balancing" test to evaluate UCL claims based on consumer injury. *See Nationwide Biweekly*, 9 Cal. 5th at 303 n.10; *accord* 1-ER-164. Under the balancing test, a court must weigh "the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Drum*, 182 Cal. App. 4th at 257. The district court found that Apple's anti-steering restraints harm Epic as a developer by "enforc[ing] silence to control information and actively impede users from obtaining the knowledge to obtain digital goods on other platforms." 1-ER-168. The court also found Epic was harmed as a consumer of in-app payment solutions, 1-ER-163–64, by being forced to use Apple's IAP—and pay Apple's "supracompetitive" fee—instead of using alternative means to process payments for digital content, 1-ER-168–69. The court rejected Apple's sole proffered justification—entitlement based on its IP rights—and concluded that, on balance, the harms "outweigh[] [the] benefits."[30] 1-ER-169. The law requires no more. *See Progressive W. Ins. v. Yolo Cnty. Super. Ct.*, 135 Cal. App. 4th 263, 285-87 (2005).

### C. Comprehensive Market Definition Analysis Is Not Required for UCL Unfairness Claims.

Apple claims that even after the district court found Apple's restraints "unfair," it had to conduct a comprehensive antitrust market definition analysis before finding Apple liable. (Apple Br. 108-09.) Nothing in the UCL's text or relevant precedent mandates this step.

As the California Attorney General explains, importing this additional requirement into the UCL "would be illogical for a competition law that is expressly intended to be broader and more flexible than antitrust statutes," and would render *Cel-Tech* "effectively a nullity." (Cal. AG Br. 20.) No court has ever held that market definition analysis is required for UCL unfairness liability; just the opposite—courts have routinely sustained UCL claims without conducting that analysis. As a

[30] The district court's conclusion that the balance of anticompetitive harms against procompetitive justifications came out in Epic's favor under the anti-steering provisions underscores that it should have done the same under the Sherman Act as well. (Argument on Epic's Appeal § I.C.4 above.)

federal court recently noted in allowing a UCL claim to proceed without allegations of "specific product or geographic markets, market power, or other allegations typical of claims alleging violations of state or federal antitrust laws, a claim pursuant to the UCL's unfair prong does not necessarily require such specific allegations." *Metricolor LLC v. L'Oréal S.A.*, No. 2:18-cv-00364-CAS, 2020 WL 3802942, at *17 (C.D. Cal. July 7, 2020); *see also Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074, 1090-91 (N.D. Cal. 2019) (allowing UCL claim to proceed without conducting market analysis); *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1118 (N.D. Cal. 2017) (similar).

Nothing Apple cites stands for the sweeping proposition that a comprehensive market definition analysis is required to support a UCL unfairness claim. (Apple Br. 108.) Apple's cases were brought under *Cel-Tech*'s competitor test and do not apply to Epic's claim as a consumer. But even under the competitor test, no market definition is needed—particularly when the claim is not limited to an alleged "incipient violation of the antitrust law" under *Cel-Tech*. One of Apple's cases relied on Sherman Act precedent analyzing market definition where the UCL counterclaimant did not allege conduct "that violates the 'policy and spirit' of the antitrust laws without violating the actual laws themselves." *Facebook, Inc. v. BrandTotal Ltd.*, No. 20-cv-07182-JCS, 2021 WL 2354751, at *15 (N.D. Cal. June 9, 2021) (internal quotation marks omitted). By contrast, the district court found that Epic proved Apple's anti-steering provisions "violate the 'policy [and] spirit'" of the antitrust laws. 1-ER-167. Notably, when the *BrandTotal* UCL counterclaimant amended to add a "policy and spirit" claim, the court evaluated it without asking whether that party had adequately defined an antitrust product market. 2021 WL 3885981, at *6-8 (N.D. Cal. Aug. 31, 2021) (citing *Diva Limousine*, 392 F. Supp. 3d at 1090-91).

Another of Apple's cases states merely that a plaintiff must allege harm to competition in "the market as a whole" rather than harm to competitors. *Snapkeys, Ltd. v. Google LLC*, No. 19-cv-02658-LHK, 2020 WL 6381354, at *3-5 (N.D. Cal. Oct. 30, 2020). As detailed above, Epic proved "the harm to users and developers who are also quasi-consumers . . . is considerable." 1-ER-168. Apple also cites *People's Choice Wireless, Inc. v. Verizon Wireless*, 131 Cal. App. 4th 656 (2005), but that case expressly recognized "*Cel-Tech* does not require an antitrust violation in order to state a [UCL] claim"; instead, the court must "look at the alleged impact of the conduct, and . . . consider any countervailing policies." *Id.* at 668. That is precisely what the district court did here. 1-ER-164–69. Apple's remaining citations to *Amex*, 138 S. Ct. at 2285, and *California Dental Ass'n v. FTC*, 224 F.3d 942, 951-52 (9th Cir. 2000), address market definition for a Sherman Act claim, not the UCL, and are inapposite.

### D. *Amex* Has No Bearing on UCL Claims or Apple's Anti-Steering Restraints.

Apple draws a specious syllogism between the anti-steering restrictions in *Amex* and those at issue here. At base, Apple argues that because the *Amex* anti-steering restrictions were upheld, Apple's anti-steering provisions must be upheld, too. (Apple Br. 106.) But there was no UCL claim in *Amex*, and the Supreme Court's treatment of anti-steering restrictions in an unrelated market under federal law has no bearing on the district court's treatment of Apple's anti-steering provisions under California's UCL. (Cal. AG Br. 22-23.)

Moreover, the *Amex* restraints differ greatly from Apple's, with respect to both competitors and consumers. The competitors in *Amex* were other credit card companies. *See Amex*, 138 S. Ct. at 2282. The anti-steering restraints there "prohibited merchants from dissuading customers from using Amex cards," but, as the district court in this case noted, did not prevent other credit card companies from competing against Amex by offering merchants lower fees or encouraging them to accept their cards. 1-ER-168 (quoting *Amex*, 138 S. Ct. at 2289-90). Here, Apple uses its "market power" (which Amex did not have, *Amex*, 138 S. Ct. at 2288) more broadly, to "create[] an ecosystem with interlocking rules and regulations" that "unreasonably restrains competition." 1-ER-121. And unlike the *Amex* restrictions, which left merchants free to accept other credit cards but reject Amex (as many do), 138 S. Ct. at 2282, Apple's restraints require developers to use IAP as a condition of distributing iOS apps, 1-ER-32–33.

The *Amex* restraints also differ from Apple's on the consumer side. Consumers are aware of—and often carry around—competing credit cards, and merchants accept these alternative payment options. *Amex*, 138 S. Ct. at 2282. But as the district court found, Apple has created a "black box" and enforces "a prohibition on letting users know that [competing payment] options exist in the first place." 1-ER-168. Moreover, Apple's anti-steering restraints apply more broadly than Amex's point-of-sale prohibition. 1-ER-34 ("Apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase.”).

## III. THE UCL INJUNCTION WAS WITHIN THE DISTRICT COURT’S AUTHORITY.

Apple argues “[t]he UCL injunction violates both California and federal law.” (Apple Br. 109.) It violates neither.

### A. The District Court Properly Exercised Its Authority Under California Law.

“The remedial power granted under [the UCL] is extraordinarily broad.” *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 972 (1992). A court may issue any order “as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition.” Cal. Bus. & Prof. Code § 17203. “The UCL authorizes broad injunctive relief to protect the public from unfair business practices.” *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052, 1059 (9th Cir. 2013); Cal. AG Br. 23-24 (“If the UCL cannot apply to a California company’s interactions with out-of-state customers, a company could avail itself of the benefits of California law while using California as a launching pad for anticompetitive acts with effects in other States.”).

Apple first complains that the injunction is too broad, extending relief beyond merely Epic itself. (Apple Br. 111.) But as Apple grudgingly acknowledges, the UCL permits claims for "public injunctive relief" (Apple Br. 110), which is "relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 951 (2017). While Apple claims this remedy is only "narrow[ly]" available (Apple Br. 110), a plaintiff "is clearly seeking public injunctive relief" when it "transcends [the plaintiff's] personal situation," *Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240, 1258 (N.D. Cal. 2019) (applying *McGill*); *see also McGill*, 2 Cal. 5th at 955 (question is whether the relief sought "by and large benefits the general public," as opposed to "primarily resolv[ing] a private dispute" (internal quotation marks omitted)).

Epic seeks exactly such public injunctive relief. FER-231–32. It asks for no damages. FER-226. The injunction Epic sought was not to give Epic special treatment, but to benefit "hundreds of millions of consumers and tens of thousands, if not more, of third-party app developers," FER-226. And that is what the district court ordered—an injunction that covers "all apps," 1-ER-170, and lets all developers "direct customers to purchasing mechanisms" other than Apple's IAP, 1-ER-171.

After complaining that the injunction is too broad, Apple next argues it is too narrow. Apple insists that because the injunction is "designed to benefit a discrete class of developers," it does not qualify as a "public injunction" under California law. (Apple Br. 110.)[31] No UCL injunction ever benefits every single member of the public. And here, Epic was granted relief that would benefit "over 30 million registered iOS developers" subject to Apple's restraints. 1-ER-32. Beyond the developers, there are also a billion-plus consumers to whom "developers cannot communicate lower prices on other platforms" due to Apple's anti-steering restraints, 1-ER-166, and who pay higher prices as a result, 1-ER-167. Any injunction that protects millions of consumers, including future consumers who have not yet been harmed, "falls squarely within the province of public injunctive relief." *Greenley v. Avis Budget Grp.*,

[31] Apple's brief suggests Epic needed to seek class certification to obtain injunctive relief that benefits others. (Apple Br. 109.) There is no such requirement. *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987); *see also McGill*, 2 Cal. 5th at 960-61 (permitting plaintiffs to bring "representative action[s]" for injunctive relief *without* certifying a class).

No. 19-cv-00421-GPC-AHG, 2020 WL 1493618, at *7 (S.D. Cal. Mar. 27, 2020).

Apple's authority is inapposite. In *Hodges v. Comcast Cable Communications, LLC*, this Court found that a remedy for "past harms suffered" by a specific group of people, which "would require consideration of the private rights and obligations of individual non-parties," was not public injunctive relief. 21 F.4th 535, 543 (9th Cir. 2021). Here, by contrast, the UCL injunction would protect an enormous group of developers and consumers against future harm without the need to inquire into any private rights.

### B. The District Court Properly Exercised Its Authority Under Federal Law.

Apple also suggests that even if a state court could issue the public injunction Epic seeks, a federal court may not. That is incorrect as well.

Federal law provides district courts "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) (internal quotation marks omitted). Apple primarily argues that the court's injunction is overbroad because enjoining the restraints as to Epic alone would fully redress Epic's injuries, and Epic would not benefit from "an injunction applicable to other developers." (Apple Br. 111.) That is wrong on both counts.

Apple's authority makes clear that courts may provide relief to parties other than the named plaintiff if "necessary to give prevailing parties the relief to which they are entitled." *Bresgal*, 843 F.2d at 1170-71; *see also Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1502 (9th Cir. 1996) (granting statewide injunction without certifying class to ensure plaintiffs received complete relief); *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 486 (9th Cir. 2021) ("[i]njunctive relief covering nonpart[ies] . . . is proper" to prevent future anticompetitive harms).

That is true here: Epic's injuries would not be redressed by an injunction covering Epic alone. Epic developed its own payment solution, for which Epic charges just a 12% commission. 1-ER-78. Epic wants to make it "available to other developers," 2-ER-316, but Apple's anti-steering restraints foreclose this competition by "contractually enforc[ing] silence" and prohibiting developers from linking to Epic's payment solution from within their apps, 1-ER-169. Enjoining Apple's restraints with respect to all iOS developers is required to remedy Epic's injury from being foreclosed from competing with Apple's IAP.[32]

Apple briefly raises two other arguments, neither of which has merit. Apple asserts the district court "did not identify any irreparable injury to Epic from the anti-steering provisions." (Apple Br. 111.) That is wrong. The court found that "the elements for equitable relief are satisfied" and that Apple "hides information for consumer choice *which is not easily remedied with money damages*." 1-ER-169 (emphasis added). Further, the court found that Apple's anti-steering restraints stunt innovation, 1-ER-166, a harm that is difficult to measure. Epic has been unable to adequately engage with its consumers and offer lower prices, 1-ER-166–67, and this irreparably injures Epic's relationship with its customers. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*,

[32] Apple's reliance on *Hansberry v. Lee*, 311 U.S. 32 (1940), is misplaced. *Hansberry* held that African American plaintiffs' due process rights would be violated if they could not challenge a racially restrictive housing covenant due to claim preclusion, even though some plaintiffs were not parties to the prior lawsuit. *Id.* at 44-46. Apple asserts that "Apple's due process rights" would be violated here if the injunction benefited anyone other than Epic, because other developers "can claim the benefit" of the injunction "without being bound by it." (Apple Br. 111.) This is effectively an argument that every claim for injunctive relief benefiting anyone other than the plaintiff must be brought through Rule 23(b)(2). That is not the law. *See, e.g.*, *Bresgal*, 843 F.2d at 1171.

240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."). Epic's injuries are irreparable for the additional reason that Epic lacks an "adequate legal remedy, such as an award of damages." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017); *see also Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.*, 160 Cal. App. 4th 528, 548 (2008) ("[T]he UCL allows equitable remedies only."); *Nationwide Biweekly*, 9 Cal. 5th at 301.[33]

*Amicus* Washington Legal Foundation argues the injunction is overbroad because it benefits non-California parties. (WLF Br. 21-28.) This argument is waived because Apple did not make it in its opening brief. It also fails because the UCL may prohibit misconduct that "emanated from California," *Ehret v. Uber Techs., Inc.*, 68 F. Supp. 3d 1121, 1130 (N.D. Cal. 2014), and Apple—which relies heavily on the fact that it has chosen to impose a single set of restrictions worldwide (*e.g.*, Apple Br. 26-27, 56-66), and enforce them in California courts—does not contest

[33] While Apple argues that *it* faces irreparable harm (Apple Br. 112 n.13), the district court rightfully rejected this argument as "exaggerated" when Apple sought a stay of the UCL injunction. 2-ER-193.

that its conduct, including the DPLA, which specifies that California law applies, 3-ER-648, emanates from California. (Cal. AG Br. 23-24.)

Finally, Apple passingly and without authority argues that the court "did not grapple with Apple's unclean hands defense" (Apple Br. 112), but the court rejected this defense. 1-ER-174 (granting an injunction notwithstanding the bases for Apple's unclean hands defense, such as Epic's "rush to the courthouse"). And the court, which "*has the discretion* to consider equitable defenses such as unclean hands in creating the remedies," was under no obligation to give Apple's argument any credence. *Ticconi*, 160 Cal. App. 4th at 544-45 (emphasis altered); *Dickson, Carlson & Campillo v. Pole*, 83 Cal. App. 4th 436, 447 (2000) (similar).

## IV. THE DISTRICT COURT CORRECTLY INTERPRETED APPLE'S INDEMNIFICATION CLAUSE.

Apple argues that the DPLA's indemnification clause provides for fee shifting (Apple Br. 112-14), but as the district court correctly concluded, it does not. 1-ER-178–80. Under California law, attorneys' fees are covered only if the contract "'specifically provide[s]'" for them. 1-ER-180 (quoting *Alki Partners, LP v. DB Fund Servs., LLC*, 4 Cal. App. 5th 574, 600-01 (2016)). Accordingly, "'[a] clause that contains the words "indemnify" and "hold harmless" generally obligates the indemnitor to reimburse the indemnitee for any damages [due] third persons . . . , not attorney fees incurred in a breach of contract action between the parties to the indemnity agreement itself.'" 1-ER-179 (quoting *Alki*, 4 Cal. App. 5th at 600-01).

The DPLA includes no fee-shifting provision, and its section titled "Indemnification" obligates developers "to indemnify and hold harmless, and upon Apple's request, defend, Apple" against third-party claims. 3-ER-642. As such, the district court found it cannot be read to allow fee shifting. 1-ER-179. Even if there were any ambiguity over the meaning of this provision—which there is not—it "should be interpreted most strongly against the party who caused the uncertainty to exist." *Linton v. Cnty. of Contra Costa*, 31 Cal. App. 5th 628, 636 (2019). That party is Apple, which admits that the DPLA is a contract of adhesion and describes it as Apple's "unilateral conduct." (Apple Br. 56.)

Apple claims that subdivision (i) of the Indemnification provision, which requires indemnification for costs "arising from or related to" the developer's "breach of . . . this Agreement," 3-ER-642, encompasses "direct claims" between Apple and developers—here, Epic. (Apple

Br. 113.) As the district court explained, the broader indemnification provision includes no express language that "'reasonably can be interpreted as addressing the issue of an action *between the parties* on the contract.'" 1-ER-180 (quoting *Alki*, 4 Cal. App. 5th at 601). Thus, subdivision (i) must be read as referencing costs from *third-party* claims relating to the developer's breach. *See, e.g.*, *Convergent Mobile, Inc. v. JTH Tax, Inc.*, No. 4:19-cv-06484-YGR, 2021 WL 1580830, at *15 (N.D. Cal. Apr. 22, 2021) (applying same reasoning to provision indemnifying "any material breach . . . by [contractual counterparty]").

The two cases on which Apple relies (Apple Br. 111-12) are inapposite. Unlike the DPLA, they involved contract provisions that expressly extended beyond third-party claims. *See Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 556 (2004) (indemnification "whether or not arising out of third party Claims"); *Zalkind v. Ceradyne, Inc.*, 194 Cal. App. 4th 1010, 1027-28 (2011) (indemnification for damages "whether or not they have arisen from or were incurred in or as a result of any demand, claim, action, suit").

The district court properly denied Apple's indemnification claim, and its ruling on this point should be affirmed.

## CONCLUSION

The Court should order the relief Epic requested in its opening brief. It should also affirm the judgment denying Apple's counterclaim for indemnification, and affirm the judgment for Epic on its UCL claim and the UCL injunction entered against Apple.

May 25, 2022

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## CERTIFICATE OF COMPLIANCE

This brief contains 22,940 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief is a cross-appeal brief that is responding to the opposing party's brief as well as *amicus curiae* briefs filed under Fed. R. App. P. 29(a) and is accompanied by a motion to file a longer brief pursuant to Circuit Court Rule 32-2(a).

May 25, 2022

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 25, 2022. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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