No. 23-337

IN THE

Supreme Court of the United States

EPIC GAMES, INC.,

Petitioner,

v.

APPLE INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Epic's Petition for Certiorari provides the Court with the unique opportunity to decide two critical questions that govern the application of the Rule of Reason. First, is a less-restrictive alternative that would achieve a restraint's procompetitive benefits nonetheless irrelevant as a matter of law if it would impose a cost on the defendant? Second, if there is no less-restrictive alternative, is the claim then dismissed, without weighing the restraint's procompetitive benefits against its harms to determine whether it is anticompetitive overall?

Those questions arise in the context of Epic's profoundly important antitrust challenge to Apple's preclusion of competition for its App Store and in-app payment solution. Three findings by the Ninth Circuit should make this an open and shut case. The court held: (1) that Apple has significant power over a market involving $100 billion in annual commerce, hundreds of thousands of developers, and 1 billion consumers (Pet. App. 7a); (2) that Apple's restraints both sustain massively supracompetitive prices and inhibit both quality and innovation (*id.* at 45a-46a); and (3) that Apple's justifications for those practices could be achieved through procompetitive alternatives (*id.* at 63a-64a, 65a n.18).

The Ninth Circuit nonetheless rejected Epic's claims by applying sweepingly pro-defendant answers to the Questions Presented that seriously threaten the enforcement of the Sherman Act. This fact-pattern — in which a technology platform claims the right to engage in anticompetitive behavior merely to recoup the value of its intellectual property — is sure to recur.

The court recognized that Apple could enter into licensing agreements that would achieve its procompetitive interest in being compensated for its investment in intellectual property. Pet. App. 66a. As an antitrust matter, that is obviously a vastly superior alternative to Apple's current use of the restraints to grossly overcharge developers and consumers billions of dollars every year. But the Ninth Circuit held as a matter of law that the burden on Apple of auditing the licensing payments — literally, "a small price to pay" — precluded finding that licensing is a less-restrictive alternative. *Id.* at 66a.

The Ninth Circuit then recognized that in the absence of a less-restrictive alternative, the court should proceed to a fourth "balancing" step. The district court had refused to weigh the restraint's benefits and harms. Pet. App. 372a-76a. Instead, it had merely stated in passing that the benefits "offset" the harms. *Id.* at 392a-93a. But the Ninth Circuit held that this conclusory statement substituted for an actual weighing of the restraint's effects. *Id.* at 67a-69a.

The Petition demonstrated that certiorari is warranted because the Ninth Circuit's twin rules conflict with the precedent of this Court and other circuits, and because in combination they seriously undermine sound antitrust enforcement. Indeed, in the Ninth Circuit, the United States Government, a large coalition of states, and leading antitrust scholars all submitted amicus briefs highlighting the importance to sound antitrust enforcement of substantively balancing a restraint's competitive effects. Pet. 6. Moreover, this case provides the Court with a rare opportunity to consider these questions in a case in which the record is fully developed, the issues are thoroughly

briefed, and the other elements of the antitrust claim are satisfied—eliminating any obstacle to reaching the Questions Presented.

Apple has no serious answer to that showing, so it spends little space trying. Instead, it mostly misdescribes both the case's procedural history and the opinion below. Because those attempts to evade this Court's review lack merit, certiorari should be granted.

I. Certiorari Should Be Granted to Decide Whether an Additional Cost Categorically Disqualifies a Procompetitive Substitute as a "Less-Restrictive Alternative."[1]

A. The Ninth Circuit's rule conflicts with the precedent of this Court and of other circuits.

The Ninth Circuit's rule giving dispositive weight to cost conflicts with this Court's precedents, which straightforwardly ask whether "substantially less restrictive means exist to achieve any proven procompetitive benefits." *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2126 (2021). Apple's reliance on this Court's further statement that "[c]osts associated with ensuring compliance with judicial decrees may exceed efficiencies gained" (BIO 10 (quoting *Alston*, 141 S. Ct. at 2163)) is misplaced, because the Court there referred only

1. Epic's position obviously is not that "a court must, as a matter of law, ignore the costs of proposed alternatives." *Contra* BIO i; *id.* at 7 (mischaracterizing the Petition as presenting "The Question Whether Courts Must Disregard Costs"). Lower costs can be considered. But they cannot be a *dispositive* fact that resolves the case in the defendant's favor as a matter of law.

to costs created by a remedial *injunction* rather than by the restraint itself.

Three other circuits have held that a less-restrictive alternative is simply one that achieves the same benefits while causing less harm to competition. Pet. 16-17. No other circuit has deemed the alternative's cost to be a relevant consideration, let alone a dispositive factor. *Ibid.*

Apple denies that there is a circuit conflict because no court holds "that it is legally impermissible for a trial court to consider costs at step three." BIO 11. Other circuits, Apple argues, "endorse judicial consideration of the 'practical implications' and the 'economics' of the plaintiff's proposed alternatives." *Id.* 11-12. But that *describes* the conflict. Those circuits *consider* questions like cost, whereas the Ninth Circuit has held that an increase in costs bars consideration of any less-restrictive alternative.[2]

B. Rejecting any more costly alternative as a matter of law undermines sound antitrust enforcement.

Apple has no answer to the Petition's showing that the Ninth Circuit's myopic focus on cost severely

2. Apple's argument that the Second Circuit impliedly endorsed the Ninth Circuit's rule by affirming a district court ruling that applied it (BIO 11) misunderstands that case's history. The appellee there asked the Second Circuit to adopt the cost requirement. *See* Brief for Defendant-Appellee United States Soccer Fed'n, Inc. at 45-46, *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, No. 17-3585 (2d Cir. Dec. 4, 2017), ECF No. 65. But the court did not do so. It conspicuously affirmed without relying on that ground. Pet. 16.

undermines antitrust enforcement. In that court, even a grossly anticompetitive restraint is immune from antitrust scrutiny if it is a less expensive way to achieve some meager pro-competitive benefit. *See* Pet. 14. It will often be more expensive for a monopolist to compete. But the fundamental premise of the antitrust laws is that competition is preferable because it will benefit consumers through lower prices and higher quality.

Apple counters that "[a]n antitrust plaintiff cannot carry its burden by proposing wildly expensive alternatives that marginally enhance competition." BIO 12. Fair enough. But the reverse is true, too. Here, the costs of the alternative are meager, while the benefits of competition to consumers are enormous. *See* Pet. 8-9; infra at 9. The Ninth Circuit rejected Epic's claims only by holding that in such a case, additional costs are dispositive in favor of the defendant.

C. This case is an ideal vehicle to decide whether an alternative's cost should receive dispositive weight.

The Ninth Circuit's holding that a technology company has a procompetitive interest in recouping its investment in intellectual property, but licensing is not a less-restrictive alternative due to its cost, is sure to control numerous antitrust challenges to high-technology platforms in the future. Apple argues that the Question Presented is not relevant here because the Ninth Circuit made "dispositive findings" (BIO 15) that Epic's proposed less-restrictive-alternatives are not "virtually as effective" as Apple's restraints in achieving Apple's two procompetitive interests (*id*. at 13).

First, Apple asserts that "[t]he Ninth Circuit affirmed the district court's conclusion that Epic failed to show that its proposed alternative model for app distribution 'would be "virtually as effective" in accomplishing Apple's procompetitive rationales' related to 'user security and privacy.'" BIO 14 (quoting Pet. App. 63a). That is an inexplicable misstatement of the ruling below, which squarely held the *exact* opposite: that a notarization model augmented by human review "would clearly be 'virtually as effective' in achieving Apple's privacy and security rationales (it contains all the elements of Apple's current model)." Pet. App. 64a.

Apple was therefore left with its second interest: receiving "some compensation" for intellectual property that — as the district court found (Pet. App. 158a) and the Ninth Circuit agreed (*id.* at 51a) — Apple did not even identify, much less value with specificity. The less-restrictive alternative to recouping an investment in intellectual property is straightforward, commonplace, and utterly obvious: licensing. To the extent developers or competing platforms did genuinely use Apple's intellectual property in a way that merited compensation, they could pay for the privilege. Apple strikingly does not argue otherwise.

With respect to Apple's requirement that developers use its in-app payment solution, the Ninth Circuit rejected that less-restrictive alternative *exclusively* because it would impose on Apple "increased monetary and time costs" of auditing the licensing payments. Pet. App. 66a. The case is therefore an ideal vehicle to decide whether cost should be given dispositive weight.[3]

3. With respect to Apple's exclusive App Store, the Ninth Circuit accepted that it was unclear how Apple could implement a

II. Certiorari Should Be Granted to Decide Whether "Balancing" Requires a Substantive Weighing of the Restraint's Harms and Benefits.

A. The Ninth Circuit refused to require that courts actually determine if the restraint's anticompetitive harms outweigh its procompetitive benefits.

The Ninth Circuit held that if the court finds no less-restrictive alternative, it must engage in "balancing." *See* BIO 16-17; Pet. App. 66a. Apple hopes to create the impression that the label "balancing" always equates with an actual comparison of the restraint's pro- and anti-competitive effects. *See* BIO 18-20. But this case demonstrates that is not true.

To be sure, nothing in the ruling below precludes a weighing of harms and benefits. For example, Epic recently prevailed in parallel antitrust litigation against Google. In that case, the jury was instructed that it could determine that the restraints violated the Sherman Act because their anticompetitive harms outweigh their procompetitive benefits. *See* Final Jury Instrs. at 40, *Epic Games, Inc. v. Google LLC*, No. 21-md-2981-JD (N.D. Cal. Dec. 6, 2023), ECF No. 850.

But in the opinion below, the Ninth Circuit granted a court the discretion not to perform a substantive comparison of the restraint's effects. In the Ninth Circuit's

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licensing regime. Pet. App. 62a. But it is hard to imagine a more straightforward, conventional, and well-established practice among technology companies than IP licensing. Apple notably does not attempt to explain why licensing would be impracticable here.

view, the first three steps of the Rule of Reason are "already intended to assess a restraint's overall effect." Pet. App. 68a. Anticompetitive restraints, it believed, will generally be weeded out in the second and third steps. *Ibid.* Therefore, "[i]n most instances," balancing "will require nothing more than . . . briefly confirming the result suggested by a step-three failure: that a business-practice without a less-restrictive alternative is not, on balance, anticompetitive." *Id.* at 68a-69a.

The Ninth Circuit applied its rule in this case to affirm the district court's dismissal of Epic's antitrust claims, notwithstanding its recognition that the district court had deemed the third step "the last step" and had refused to engage in balancing. Pet. App. 69a, 372a. The Ninth Circuit found sufficient a single sentence in the district court's opinion to the effect that the restraints' procompetitive benefits "offset" their anticompetitive harm. *Id.* at 69a. But of course, to "offset" just means to compensate or reduce, not necessarily to outweigh. (Tax revenues offset spending, yet the debt continues to balloon.)

There are two other irrefutable proofs that the Ninth Circuit did not require a substantive weighing of pro- and anticompetitive effects of Apple's restraints. First, the lower courts did not discuss or consider the costs and benefits in comparative terms *at all*, much less terms that favor Apple.

Second, the Ninth Circuit would have had to redo any balancing, not merely rubber stamp it. The Ninth Circuit held that the district court erroneously concluded that Apple's restraints were necessary to achieve a

procompetitive interest in differentiating the iPhone on the basis of privacy and security. Pet. App. 64a. That would have been the principal purported benefit the district court considered, if it had engaged in balancing. But the Ninth Circuit squarely rejected that holding, finding that this interest could be achieved through a less-restrictive alternative. *See id.* at 64a; *supra* at 6. So at the very least, the Ninth Circuit would have had to remand for the district court to engage in balancing, which is exactly what the dissent unsuccessfully urged it to do. Pet. App. 95a.

Epic's Petition demonstrated that the Ninth Circuit easily should have concluded that the anticompetitive effects of Apple's restraints (billions of dollars in overcharges, combined with lessened quality and innovation) outweigh the procompetitive benefit for which it believed there is no alternative (recouping "some compensation" for Apple's intellectual property). Apple briefly attempts to dispute that conclusion by pivoting back to the district court's finding that the restraints promote intrabrand competition by providing greater privacy and security. BIO 19-20. But as discussed, the Ninth Circuit found that there was "clearly" a less-restrictive alternative that achieved that interest. *See supra* at 6.

B. Apple's invocation of *American Express* only demonstrates that certiorari is warranted.

Epic's Petition demonstrated that this Court has held for more than a century that under the Rule of Reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007); *see also, e.g., Chicago Bd. of*

Trade v. U.S., 246 U.S. 231, 238 (1918); Pet. 19 (collecting cases). Apple brushes past this precedent, ignoring all of it. Instead, Apple argues that *American Express* endorsed a three-step inquiry that excludes any role for balancing. BIO 2-3. Epic's Petition anticipated this argument. The better view is that *American Express* merely stated the position of the parties to that case. *Alston* then stated unambiguously that *American Express* did not announce an inflexible rule to be applied in all cases. *See* Pet. 20-21.

As Apple itself effectively acknowledges, no court agrees with its reading of *American Express* and rejects balancing altogether. Even the Ninth Circuit *permits* a weighing of harms and benefits. To the extent Apple's reliance on *American Express* has merit, it highlights the need for this Court's intervention. If the Court intends to depart so dramatically from prior precedent, it must do so much more expressly.

Epic's Petition demonstrated that six courts of appeal provide that if the court finds no less-restrictive alternative, it must actually weigh the restraint's harms and benefits. *See* Pet. 17, 26. No other court of appeals has ever suggested that it was sufficient to merely "confirm" in a single sentence a presumption that the restraint is not anticompetitive. Apple attempts to counter all those decisions in a single sentence, asserting that "none of them actually required (or conducted) a balancing inquiry." BIO 18. But that uninterrupted line of precedent cannot be so easily dismissed. Each ruling contains an unambiguous and complete statement of the respective circuit's rule. There is no reason to disregard the language in any of those cases as dictum, much less all of them.

Importantly, Apple does not dispute the Petition's detailed showing that the Ninth Circuit errs in concluding that a three-step inquiry identifies all anticompetitive restraints and therefore substitutes for an actual weighing of the restraints' competitive consequences. The first three steps of the Rule of Reason are instead a structured process of elimination that identifies the cases in which weighing is *unnecessary* because there are no harms, there are no benefits, or the benefits can be achieved in a less-restrictive manner. Pet. 22-24.

But if there is no less-restrictive alternative, that should not end the inquiry. The fact that a restraint causes anticompetitive harms, yet has benefits for which there is no less-restrictive alternative, does not mean that the restraint is not anticompetitive. In such a case, the harms obviously may be vastly greater than any benefits, such that the restraint should be invalidated.

III. Apple's Remaining Arguments Are Meritless.

Before the panel, Epic argued that it could satisfy the Ninth Circuit's settled "cost" requirement. It did not concede that requirement was a "correct" statement of the law. Opening Brief for Appellant, Cross-Appellee Epic Games, Inc. at 39-42, *Epic Games, Inc. v. Apple, Inc.*, Nos. 21-16506, 21-16695 (9th Cir. Nov. 14, 2022), ECF No. 41. Epic urged the full court to overturn that precedent in its petition for rehearing en banc (at 22). There accordingly was no waiver. *See United States v. Williams*, 504 U.S. 36, 44-45 (1992); *contra* BIO 6.

Epic also argued to the panel that a court is required to weigh the restraint's harms and benefits. Opening

Brief for Appellant, *supra,* at 47-49. The Ninth Circuit in turn decided that question in detail. Pet. App. 66a-68a. The fact that the question was pressed in or passed upon is dispositive. *United States v. Wells*, 519 U.S. 482, 488 (1997). Further, by deciding the balancing question, the Ninth Circuit correctly rejected Apple's assertion that Epic waived its position in an oral colloquy before the district court. *See* Pet. App. 66a-69a.

Finally, the Ninth Circuit correctly rejected Apple's argument (BIO 20) that the district court was required to dismiss Epic's claims when it rejected Epic's market definition: "None of the authorities Apple cites comes anywhere close to supporting its radical argument that, where parties offer dueling market definitions, the case immediately ends if the district court finds the record supports the defendant's proposed market (or a third in-between market, as was the case here) rather than the plaintiff's market." Pet. App. 32a-33a n.9. To the extent any circuit does disagree, that is a reason to grant review and resolve the circuit conflict, not to deny certiorari. *Contra* BIO 20-22.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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