Nos. 21-16506 & 21-16695

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPIC GAMES, INC.,

Plaintiff/Counter-Defendant,
Appellant/Cross-Appellee

v.

APPLE INC.,

Defendant/Counter-Claimant,
Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 4:20-cv-05640-YGR
The Honorable Yvonne Gonzalez Rogers

BRIEF OF *AMICI CURIAE* 38 LAW, ECONOMICS, AND BUSINESS PROFESSORS IN SUPPORT OF APPELLANT/CROSS-APPELLEE

Michael A. Carrier
Distinguished Professor
Rutgers Law School
217 North Fifth Street
Camden, NJ 08102
856-225-6380
mcarrier@law.rutgers.edu

Attorney for Amici Curiae

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of law, economics, and business. (A list of signatories is attached as Addendum A.) Their sole interest in this case is to ensure that antitrust law develops in a way that serves the public interest by promoting competition. While the *amici* differ in our legal and political views, we are united in our agreement that the court below erred in its application of a central framework of antitrust analysis today: the Rule of Reason.

INTRODUCTION

Antitrust law assesses most conduct under the Rule of Reason. Such evaluation takes the form of a burden-shifting framework, with a determination of net competitive effects serving as the core of the analysis. In the first step, the plaintiff is required to show that the challenged conduct has anticompetitive effects. The court below held that Epic satisfied the first step.

When the plaintiff makes this showing, the defendant must demonstrate that the conduct has procompetitive benefits sufficient to justify the conduct. If the court finds that the conduct provided such benefits and that they could not be

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* declare that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person—other than the *amici*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

obtained from alternatives less harmful to competition, the court is to weigh the benefits and the anticompetitive effects to determine whether the conduct on balance harms competition.

In applying the Rule of Reason after the first step, the court below committed three fundamental errors. First, it accepted business rationales that do not promote competition or economic efficiency and are, as a matter of law, not cognizable antitrust justifications. Second, it failed in its legal conclusions to credit a less restrictive alternative to Apple's restraints that it recognized in its factual findings. And third, in dismissing the case based on its conclusion that the plaintiff failed to show such an alternative, it never engaged in the required analysis of net competitive effects.

I. Unlike the Vast Majority of Rule-of-Reason Cases, Epic Showed Substantial Anticompetitive Effects

The first step of the Rule-of-Reason analysis requires a plaintiff to show a substantial anticompetitive effect. *E.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("*Amex*"). The court below found that Epic satisfied this burden by showing that Apple's restrictions on competition from other means of app distribution had substantial anticompetitive effects. That is no small accomplishment.

Of the 915 Rule of Reason cases decided in the modern era, courts have disposed of nearly all at the initial stage on the grounds that the plaintiff failed to

demonstrate a significant anticompetitive effect.[2] When plaintiffs do make this showing, courts take note. For example, the Court in *NCAA v. Alston*, relying on this empirical analysis, found that this case was "different" from the vast majority of Rule-of-Reason cases, which meant that, "[u]nlike so many cases," the district court "proceeded to the second step." 141 S. Ct. 2141, 2161 (2021).

Like the *Alston* case, the court below found that Epic met its burden of demonstrating substantial anticompetitive effects. It found that "Apple's restrictions on iOS game distribution have increased prices for developers." *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR, at 99 (N.D. Cal. Sept. 10, 2021) ("Op."). In particular, "in light of Apple's high profit margins on the App Store, a third-party store could likely provide game distribution at a lower commission and thereby either drive down prices or increase developer profits." *Id.*; *see also id.* at 144 (prices are "artificially high given Apple's growing market power and growing demand").

[2] Since 1977, courts have decided 90% (824 of 915) on this ground, with the figure rising to 97% (406 of 420) after 1999. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827 (2009) (reviewing cases between 1999 and 2009); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. Rev. 1265 (reviewing cases from *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977) to 1999). The principal drafter reviewed every Rule of Reason case between 2009 and January 2022 for this brief.

Such a finding of increased price would, alone, have been sufficient for Epic to meet its burden under the Rule of Reason.[3] But the court additionally found "[d]ecreased innovation" in "core" game distribution services. *Id.* at 100, 102. The court relied on developer surveys Apple conducted to observe that the company "is not moving quickly to address developer concerns or dedicating sufficient resources to their issues." *Id*. at 101. The court pointedly reminded Apple that "[i]nnovators do not rest on laurels." *Id.*

The court also noted "a top reason for dissatisfaction with the App Store," namely a "lack of functions which other platforms have, such as personalized recommendations." *Id.* Developers lamented characteristics of the App Store such as a need "to spell names exactly correct," which it found "ridiculous for a multi-billion dollar company." *Id.* Similarly, the search algorithm was "terrible," discoverability "is still a significant challenge," and the App Store "desperately needs . . . testing." *Id.* Nor was Apple's lack of innovation discerned by third parties alone. The company's own former Head of App Review "described the App Store as 'antiquated,' with 'no radical innovation, only evolution' for the last ten years." *Id*. at 102.

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[3] *E.g.*, *Alston*, 141 S. Ct. at 2155; *In re Glumetza Antitrust Litig.*, No. C 19-05822 WHA, 2021 WL 1817092, at *8 (N.D. Cal. May 6, 2021).

The court explained that "Apple's slow innovation stems in part from its low investment in the App Store." *Id.* And it noted how, absent Apple's restrictions, innovation could increase given that "a third-party app store could put pressure on Apple to innovate by providing features that Apple has neglected." *Id*. Finally, the court found harm to "large game developers who have well-known games" who "would likely, and have the resources to, open their own stores to forego Apple's 'fees, rules, and review'" absent Apple's "restrictions [that] foreclose competition." *Id.* at 96; *see also id.* at 144.

Considering the company's restrictions as a whole, the court recognized "common threads run[ning] through Apple's practices which unreasonably restrain[] competition and harm consumers, namely the lack of information and transparency about policies which affect consumers' ability to find cheaper prices, increased customer service, and options regarding their purchases." *Id.* at 118. Apple "employs these policies so that it can extract supracompetitive commissions from this highly lucrative gaming industry." *Id.*

In short, unlike the overwhelming majority of Rule-of-Reason cases, the court found that Epic demonstrated substantial anticompetitive effects. Even rarer, the effects took place along two separate axes: price and innovation.

II. The Court Below Erred in Treating Apple's Security and Privacy Explanations as Antitrust Justifications

After a plaintiff demonstrates a substantial anticompetitive effect, the burden shifts to the defendant to demonstrate a procompetitive justification. In this case, Apple argued that its restrictions on competition were necessary to ensure that products developed and sold by competing app developers met security and privacy standards selected by Apple. The court below erred in crediting these explanations because they are not cognizable *antitrust* justifications.[4]

The court erred as a matter of law in treating what it called the "security, privacy, and reliability" benefits claimed by Apple as cognizable justifications for restricting competition (1) among third party app developers and between those developers and apps developed and sold by Apple and (2) between Apple and

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[4] The court reasonably did not rely on Apple's purported justification based on "distribution restrictions [being] part of its [IP] licensing arrangement for which it is entitled to be paid." Op. 104. For starters, Apple did not need the restrictions to be compensated because it could simply charge a fee when it licensed its application programming interfaces ("APIs") to app developers. *E.g.*, *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 675 (1992) ("When payment is possible, free-riding is not a problem because the 'ride' is not free.").

In addition, Apple could not reasonably claim that it was entitled to the inflated compensation the restrictions enabled it to charge (Op. 92–94, 144) because (1) the court found that its claim to a 30% commission rate was "pretextual," *id.* at 114, 146, and (2) for more than a century, courts have held that charging even a "reasonable price" is not a defense to otherwise anticompetitive conduct. *E.g.*, *United States v. Trenton Potteries Co*., 273 U.S. 392, 396 (1927); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 570–71 (1898); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (1945). Apple is entitled only to the compensation it can obtain without imposing anticompetitive restrictions.

competing app distributors. *Id.* at 105. The court explained that those alleged benefits were intended to protect users from misrepresentations from app suppliers, "constant crashing" from unreliable apps, objectionable content like pornography, and apps that ask for home addresses or access to a user's camera or microphone. *Id.* The claimed benefits, in other words, were purported improvements in the quality of apps developed and sold by *third parties* in competition with one another and with apps developed by Apple. Apple implemented these claimed benefits by restricting competition in app distribution and, in particular, requiring that all apps for Apple devices be distributed exclusively through Apple's app store and that all fees paid by consumers to app developers be processed through Apple's app store. Such restrictions directly impose anticompetitive harm by denying customers the option of obtaining apps and buying app services through other distribution channels that might offer them lower prices or more innovative and attractive distribution services.

Apple tries to justify this harm by arguing that it is necessary to enable it to provide the claimed security and privacy benefits. In effect, Apple is arguing that it should be permitted to reduce competition in app distribution in order to force consumers not only to pay higher prices for inferior distribution services, but also to buy security and privacy benefits that they might not want. Imagine if automobile manufacturers claimed that they should be permitted to restrict

competition to ensure that they could provide higher-quality cars—perhaps cars with bigger engines, better sound systems, or more reliable and safer brakes. Such contentions—similar to those offered by Apple—would be dismissed. And this would not be a close call. For more than four decades, one of the most uncontroversial principles in antitrust law is that restrictions on competition cannot be justified by arguments that they will improve product quality or even safety.

The leading case articulating this principle is *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) ("*Engineers*"). In that case, the Supreme Court held that a professional association violated antitrust law by prohibiting its members' competitive bidding to "minimiz[e] the risk that competition would produce inferior engineering work endangering the public safety." *Id.* at 681. The Court acknowledged that the restriction could effectuate the claimed benefit, in part because of the complexity of engineering matters and difficulty of observing in a competitive market "all the variables which will be involved in the [product's] actual performance." *Id.* at 694.

But the Court rejected the justification as a matter of law and explained that "[t]he Sherman Act reflects a legislative judgment that ultimately *competition* will produce not only lower prices, but also better goods and services." *Id.* at 695 (emphasis added); *see also id.* (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the

value of competition.”)). Foreshadowing Apple’s arguments here, the Court explained that “[t]he assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.” *Id.* And in one of the most cited clauses in antitrust’s modern era, the Court concluded that the attempt to fabricate a safety-based antitrust justification was “nothing less than a frontal assault on the basic policy of the Sherman Act.” *Id.*

In the years since *Engineers*, the Supreme Court has never wavered from the core principle of the case—that conduct that harms competition cannot be justified under antitrust law on the ground that it furthers other, non-competition objectives. In *FTC v. Indiana Federation of Dentists* (“*Indiana Dentists*”)*,* for example, the Court rejected an attempt by dentists collectively to “refuse to submit x rays to dental insurers for use in benefits determinations.” 476 U.S. 447, 448 (1986). The dentists were responding to insurers’ cost-containment measures, which they viewed “as a threat to their professional independence and economic well-being” and which they argued would lead to lower-quality medical care. *Id.* at 449. But the Court held that the defendants were not “justified in deciding on behalf of [their] customers that they did not need the information” because “if that were the case, the discipline of the market would itself soon result in the insurers’

abandoning their requests for x rays." *Id.* at 462. Applying *Engineers*, the Court held that the defendants could not claim that the provision of x rays would result in "inadequate treatment" because such an attempt to block consumers from "an unrestrained market" that could lead to "unwise and even dangerous choices" is "a frontal assault on the basic policy of the Sherman Act." *Id.* at 463 (quotation marks omitted).

In *FTC v. Superior Court Trial Lawyers Association* ("*SCTLA*"), "a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation." 493 U.S. 411, 414 (1990). While recognizing that "the city purchases respondents' services because it has a constitutional duty to provide representation to indigent defendants" and that "the quality of representation may improve when rates are increased," the Court held that "neither of these facts is an acceptable justification for an otherwise unlawful restraint of trade." *Id.* at 423. Relying on *Engineers*, the Court concluded that "[t]he social justifications proffered for [the defendants'] restraint of trade . . . do not make it any less unlawful." *Id.* at 424.

And just last year in *NCAA v. Alston*, the Court addressed restraints that limited the education-related benefits available to collegiate student-athletes. The Court emphatically rejected the NCAA's efforts to seek "a sort of judicially

ordained immunity from the terms of the Sherman Act for its restraints of trade . . . because they happen to fall at the intersection of higher education, sports, and money." 141 S. Ct. at 2159. Relying in large part on *Engineers*, the Court made clear that it "has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives *beyond enhancing competition*." *Id.* (emphasis added).[5]

Like the unsuccessful defendants in these cases, Apple is arguing that interbrand competition—in this case, in robust app distribution—will lead to inferior product quality and that it should be therefore permitted to prohibit such competition. But if *Engineers* and its four decades of Supreme Court progeny mean anything, it is that this argument is foreclosed as a matter of law.[6] Indeed, the

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[5] Courts have accepted defendants' antitrust justifications only when they enhance competition. *See, e.g.*, *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 21–22 (1979) (joint selling arrangement created a new product that increased output and competition); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977) (restrictions on intrabrand competition ameliorated free-rider problems and other market failures and thereby "promote[d] interbrand competition").

[6] *See* Erika M. Douglas, *Data Privacy Protection as a Procompetitive Justification*, 36 Antitrust 1, 12 (Dec. 2021) (decision of the district court in *Epic v Apple* is contrary to *Engineers* and *Indiana Dentists* because the "asserted social welfare improvement" of "greater app security and privacy," even if "normatively 'good' for consumers, . . . requires the absence or reduction of competition"); *see also id.* ("It is true that a reliable, secure source for app downloads benefits consumers in the broader sense of social welfare achieved through privacy and security

requirement that antitrust justifications must be based on "enhancing competition" has special force when the purported non-competition justification has to do with increasing product quality. There is no basis in economics for concluding that higher-quality products are better for consumers when, as the court below found in this case, they are also higher-priced.[7] (Some consumers, for example, prefer Chevrolets to BMWs, and vice versa.) And under the antitrust laws, it is consumers and competition, not powerful firms like Apple, that are supposed to decide what combination of price and quality they prefer.

The court below asserted that Apple's restraints on competition among app developers enhanced *interbrand* competition between Apple and Android devices. Op. 145–46. This statement, asserted with no factual findings in support, rests on a fundamental misunderstanding of the applicable law and the underlying economics.

The court relied on *Leegin Creative Leather Products, Inc. v. PSKS, Inc*. for the proposition that "restricting price competition among retailers *who sell a particular product* can help the manufacturer *of that product* compete against other manufacturers." Op. 145–46 (citing 551 U.S. 877, 890–91 (2007)) (emphasis

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protection," but "this type of normative privacy claim is not cognizable as a justification under current antitrust case law.").

[7] *See, e.g.*, Richard J. Gilbert & A. Douglas Melamed, *Innovation Under Section 2 of the Sherman Act*, 84 Antitrust L.J. 1, 15 (2021); Michael Spence, *Cost Reduction, Competition, and Industry Performance*, 52 Econometrica 101 (1984).

added). The idea is that a manufacturer can decide how to distribute its product—for example, through a particular combination of quality and price—because it is motivated to maximize the product's commercial value. The court did find that Apple believed that users generally value privacy and security and thus chose to feature those attributes in *its* products. *See* Op. 110 (security and privacy are "a competitive differentiator for Apple"). The quoted language from *Leegin* and the court's findings would be relevant if the restraints at issue involved distribution of *the iPhone and other Apple products* and were thus restrictions on *intrabrand* competition. But they are beside the point for the restraints here, which limit *interbrand* competition by restricting the distribution of apps developed and produced by *third parties* that compete with each other and with apps provided by Apple. The antitrust laws do not allow such a restriction of interbrand competition to be justified on the ground that it improves the quality of *other app developers' products*.

Apple's interest in security and privacy might have been relevant if Apple had shown that restricting the product quality and distribution choices of competing app developers is necessary to enable *Apple* to compete effectively with Android or other rivals. Apple might have shown, for example, that security problems with third-party apps undermine the security of Apple's devices or its apps. Or Apple might have shown that users that purchased apps in other

distribution channels might have blamed Apple for security and privacy problems with those apps, notwithstanding the reasonable and predictable warnings that Apple would have communicated to users about acquiring apps from somewhere other than the App store. But Apple made no such showings, and the court made no such findings. In short, with respect to security and privacy, the court's findings show that the only possible effect of Apple's restrictions was to affect the security and privacy attributes of *competitors'* products and *their* ability to compete with one another and with Apple.

In failing to recognize the uncontroversial principle—articulated in *Engineers*, *Indiana Dentists*, *SCTLA*, and *Alston*—that it is the market, not a powerful competitor, that determines preferable price/quality combinations of competing products, the court below erred.

III. The Court Erred in Not Crediting the Less Restrictive Alternatives It Found in Its Findings of Fact

If the defendant has proven a cognizable benefit to justify its conduct, the court is required to determine whether that benefit could be achieved by some other means, usually called a "less restrictive alternative," that would be materially less harmful to competition. *E.g.*, *Alston*, 141 S. Ct. at 2162–63; *O'Bannon v. NCAA*, 802 F.3d 1049, 1060 (9th Cir. 2015). The court below erred in its assessment of less restrictive alternatives as it overlooked its own factual findings when it reached its conclusions about this issue.

In its factual determinations (Op. 2 (“Part I: Findings of Fact”)), the court found a less restrictive alternative to Apple’s constrictive app review. The court observed that under the “notarization” model “currently used on macOS,” Apple “could continue to review apps without limiting distribution.” *Id.* at 112. Pursuant to this model, “Apple scans apps using automatic tools and ‘notarizes’ them as safe before they can be distributed without a warning.” *Id.* Apps “can still be distributed through the Mac store (with complete app review) or with a warning if not notarized, but notarization provides a ‘third path’ between full app review and unrestricted distribution.” *Id.*

The court found this model “particularly compelling” because “Apple contemplated a similar model when developing iOS,” which “is based on macOS and share[s] the same kernel.” *Id.* According to documents in the case, “Apple initially considered using app signing for security while allowing developers to distribute freely on iOS.” *Id.* In fact, “Apple could continue performing app review even if distribution restrictions were loosened.” *Id.*[8]

[8] Although Apple’s Senior Vice President of Software Engineering claimed that macOS had a “malware problem” relative to iOS, the court observed that these opinions “appear to have emerged for the first time at trial,” which “suggests he is stretching the truth for the sake of the argument.” *Id.* at 113; *see also id.* (“Prior to this lawsuit, Apple has consistently represented Mac as secure and safe from malware.”).

The court observed that, if Apple implemented a review "similar to the type done on the App Store, there is no reason why the results would be different." *Id*. And the court rejected "Apple's only response," which is that "app review may not scale given developers' expectation over timing." *Id.* The court found that "[g]iven that app review is already required for all apps in the App Store, the scale itself does not appear to be a problem." *Id.*

The court "[u]ltimately" found that "app review can be relatively independent of app distribution" and that "once an app has been reviewed, Apple can send it back to the developer to be distributed directly or in another store." *Id.* In conclusion, "alternative models are readily achievable to attain the same ends even if not currently employed." *Id.*

These detailed findings were nowhere to be found in the court's legal section (*id.* at 119 ("Part II: Application of Facts to the Law and Conclusions Thereon"), where the court's conclusions were inconsistent with its factual findings. Here, the court said that the notarization model was "missing . . . human app review which provides most of the protection against privacy violations, human fraud, and social engineering." *Id.* at 148. This conclusion is directly contrary to the court's earlier factual finding that Apple "could continue to review apps without limiting distribution." *Id.* at 112. Also at odds with its factual findings, the court stated that "[t]hese proposed alternatives would require Apple to either add human review to

the notarization model or leave app review to third-party app stores." *Id.* at 148; *but see id.* at 112 ("particularly compelling" notarization model "provides a 'third path' between full app review and unrestricted distribution"). And the court stated that "security could increase or decrease depending on the quality and diligence of the store," *id.* at 148, contrary to its earlier finding that "app review can be relatively independent of app distribution." *Id.* at 112; *see also id.* at 107 n.527 ("Of course, third-party app stores could also have increased security [more] than Apple"; "For example, a Disney app store would plausibly screen apps more rigorously than Apple.").

Even the court's ultimate conclusion—that "Epic Games has not met its burden to show that its proposed alternatives are 'virtually as effective' as the current distribution model and can be implemented 'without significantly increased cost'"[9]—is contradicted by its earlier factual finding that "alternative models are readily achievable to attain the same ends." *Id.* at 112.[10] It is hard to see how Epic

[9] Op. 149 (quoting *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1260 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021)).

[10] The court also found that Epic has not "shown that the restraints are 'patently and inexplicably stricter than is necessary," Op. 149 (internal quotation marks omitted), even though the "particularly compelling . . . third path" of notarization that would have led to "app review [being] relatively independent of app distribution," *id.* at 112, did not threaten the "increased prices," *id.* at 99, or "slow[ed] innovation," *id.* at 102, that resulted from Apple's restrictions.

did not meet its burden to show similarly effective alternatives. The court's recognition, based on a thorough review of the facts, of the existence of "alternative models" that are "readily achievable" to "attain the same ends" presents the very definition of a less restrictive alternative. In fact, such an alternative would even satisfy the strictest standard in the caselaw as notarization would be "virtually as effective" as the current model and could be implemented "without significantly increased cost." Such a finding, rare in the modern Rule-of-Reason era, should have been enough to satisfy Epic's burden.

The court's acknowledgment in its factual findings of a less restrictive alternative that achieved Apple's objectives allows us to have our antitrust cake and eat it too, as the defendant can attain its goals while doing so in a way that much less significantly harms competition. Such an alternative ensures that there is nothing to balance and that the court need not reach an assessment of net competitive effects. The existence of a less restrictive alternative disposes of the case.

To the extent the court imposed an additional requirement that a plaintiff prove that Apple's practices were unreasonable, that is not consistent with the caselaw. *See* Op. 149 ("Apple's business choice of ensuring security . . . through centralized app distribution is reasonable, and the Court declines to second-guess that judgment on an underdeveloped record.").

IV. The Court Erred in Not Balancing the Harms Against the Claimed Benefits

If the court finds both harm to competition and benefits that enhance competition that cannot be obtained by less restrictive alternatives, it is expected to weigh the harms against the benefits to determine whether, on balance, the conduct at issue harms or benefits competition. In this case, the court below, having found both harms and benefits, ruled for the defendant without engaging in any balancing. The court held in effect, and contrary to the case law, that any benefit, no matter how insignificant, is sufficient to justify any restraint on competition, no matter how great.

The leading case setting forth the balancing framework in the monopolization setting is *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). In that unanimous, en banc ruling, the D.C. Circuit explained that if the plaintiff shows an anticompetitive effect and the monopolist demonstrates a procompetitive justification, then the plaintiff must show that "the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* at 59; *see also id.* (observing that courts "routinely apply a similar balancing approach" to agreements).

The leading treatise also contemplates balancing. The treatise acknowledges that weighing harms and benefits is sometimes difficult but explains that balancing is nevertheless essential. VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust*

Law: An Analysis of Antitrust Principles and Their Application ¶1507a, at 442 (4th ed. 2017); *see* Michael A. Carrier, *The Four-Step Rule of Reason*, 33 Antitrust 50, 53–54 (Spring 2019). Other than conduct deemed *per se* illegal, antitrust doctrine requires courts to consider anticompetitive and procompetitive effects, and it is hard to see how a court can make this assessment without, at some point, having the chance to directly compare the two.[11]

The court's failure to engage in balancing in this case was not just a formalistic failing. Given the court's own findings, it seems unlikely that the claimed benefits (even if they were cognizable) would be found to outweigh the competitive harms. For starters, the court recognized substantial anticompetitive

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[11] In *Amex*, which involved Section 1 of the Sherman Act, the Supreme Court summarized the Rule of Reason by articulating without explanation a three-step framework that did not include the balancing step. 138 S. Ct. at 2284. But because the Court decided the case at the first stage on the grounds that it found that the plaintiff did not demonstrate an anticompetitive effect, this was dicta. *Id.* at 2290; *see also Alston*, 141 S. Ct. at 2162 (repeating three-step framework in the context of Section 1 but deciding the case on the grounds that the plaintiffs were able to demonstrate a less restrictive alternative).

Each of the sources the *Amex* majority cited in support of its framework included balancing in its analysis. *See* 138 S. Ct. 2284 (citing *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs. Inc.*, 996 F.2d 537, 543 (2d Cir. 1993); I J. von Kalinowski, *Antitrust Laws and Trade Regulation* §12.02[1] (2d ed. 2017); VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶1502, at 398–99 (4th ed. 2017) (explaining that if a 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")); *see generally* Michael A. Carrier, *The Four-Step Rule of Reason*, 33 Antitrust 50, 53 (Spring 2019) (discussing cases).

effects not only on price but also on innovation. And even if the court were correct in concluding that the less harmful alternatives would not provide all of the claimed benefits, the court's findings about those alternatives make clear that the restraints on competition provided no more than modest, incremental benefits over those alternatives. The court erred as a matter of law in holding in effect that a justification that is "reasonable" and not "inexplicably stricter than necessary" automatically wins the balancing, without regard to magnitude of harm.

In short, the court could have concluded that, on balance, Apple's restraints were anticompetitive. Short-circuiting the analysis at an earlier stage prevented the court from assessing the ultimate competitive effects under the Rule of Reason, as courts have done for the past 45 years. The court erred in not balancing harms and benefits.

CONCLUSION

Because the court below erred in recognizing non-antitrust justifications, failing to credit the less restrictive alternative it described in its factual findings, and not engaging in the required analysis of net competitive effects, this Court should reverse.

Dated: January 27, 2022

/s/ Michael A. Carrier

Michael A. Carrier
Distinguished Professor
Rutgers Law School
217 North Fifth Street
Camden, NJ 08102
856-225-6380
mcarrier@law.rutgers.edu

Attorney for Amici Curiae

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,211 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: January 27, 2022

/s/ Michael A. Carrier

Michael A. Carrier
Distinguished Professor
Rutgers Law School
217 North Fifth Street
Camden, NJ 08102
856-225-6380
mcarrier@law.rutgers.edu

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on January 27, 2022, 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.

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Dated: January 27, 2022

/s/ Michael A. Carrier

Michael A. Carrier
Distinguished Professor
Rutgers Law School
217 North Fifth Street
Camden, NJ 08102
856-225-6380
mcarrier@law.rutgers.edu

Attorney for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM A
List of Academic Signatories*

Professor David Abrams
University of Pennsylvania Carey Law School

Professor Erin C. Fuse Brown
Georgia State University College of Law

Professor Darren Bush
University of Houston Law Center

Professor Irene Calboli
Texas A&M University School of Law

Professor Stephen Calkins
Wayne State University Law School

Professor Michael A. Carrier
Rutgers Law School

Professor Michael W. Carroll
American University Washington College of Law

Professor Thomas Cheng
Faculty of Law
The University of Hong Kong

Professor Mark Conrad
Gabelli School of Business
Fordham University

Professor Stacey Dogan
Boston University School of Law

Professor Michal Gal
University of Haifa Law School

* The brief presents the views of the individual signers. Institutions are listed for identification purposes only.

Professor William Gallagher
Golden Gate University School of Law

Professor Shubha Ghosh
Syracuse University College of Law

Visiting Professor Thomas Greaney
Hastings College of the Law
University of California

Professor of Economics Emerita Bronwyn H. Hall
University of California, Berkeley

Professor Jeffrey L. Harrison
University of Florida College of Law

Professor Herbert Hovenkamp
University of Pennsylvania Carey Law School

Professor Michael J. Hutter
Albany Law School

Professor Eric E. Johnson
University of Oklahoma College of Law

Professor Eileen M. Kane
Penn State Dickinson School of Law

Professor Yvette Joy Liebesman
Saint Louis University School of Law

Professor Orly Lobel
University of San Diego School of Law

Professor Lee Ann Wheelis Lockridge
Louisiana State University Law Center

Professor Duncan Matthews
Queen Mary University of London

Professor Stephen McJohn
Suffolk University Law School

Professor of the Practice of Law Doug Melamed
Stanford Law School

Emeritus Professor of Economics Roger Noll
Stanford University

Professor Jordan Paradise
Loyola University Chicago School of Law

Professor Aaron Perzanowski
School of Law
Case Western Reserve University

Professor Donald Polden
Santa Clara University School of Law

Professor Zia Rahman
Penn State University College of Medicine

Professor Stephen F. Ross
The Pennsylvania State University

Professor Ana Santos Rutschman
Saint Louis University School of Law

Professor Christopher L. Sagers
Cleveland State University

Professor Steven Semeraro
Thomas Jefferson Law School

Visiting Professor Jennifer Sturiale
Francis King Carey School of Law
University of Maryland

Researcher Sunita Tripathy
Law Department
European University Institute

Emeritus Professor Arthur E. Wilmarth, Jr.
George Washington University Law School