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)

OPENING BRIEF FOR
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Epic Games, Inc. ("Epic") states that it has no parent corporation and that Tencent Holdings Limited owns more than 10% of Epic stock.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 15 U.S.C. § 26 and 28 U.S.C. §§ 1331 and 1337, supplemental jurisdiction over Epic's state law claims under 28 U.S.C. § 1367, and diversity jurisdiction over those claims under 28 U.S.C. § 1332. The district court entered a final judgment that disposed of all parties' claims on September 10, 2021. 1-ER-2. Epic timely noticed this appeal on September 12, 2021. 4-ER-754; Fed. R. App. P. 4(a)(1). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that a contract of adhesion is not a "contract" under Section 1 of the Sherman Act.

2. Whether the court erred in holding Apple Inc.'s ("Apple") prohibitions on competing software application ("app") distribution channels and competing in-app payment solutions for the iPhone operating system ("iOS") survive rule of reason scrutiny.

3. Whether the court erred in finding Apple is not a monopolist in markets for iOS app distribution and payment solutions for the sale of digital content within iOS apps.

4.   Whether the court erred in rejecting Epic's tying claim on the ground that app distribution and in-app payment solutions are not separate products.

STATUTORY PROVISIONS

The Addendum reproduces the pertinent statutory provisions.

INTRODUCTION

With over a billion users, the iPhone may be the most profitable technology ever, making Apple the largest company in history. The iPhone's success depends on millions of "apps" created by third-party software developers who labor to make good on Apple's tagline: "There's an app for that." Apps bring the iPhone to life. They enable users to do far more than make phone calls and check email—accessing social media, purchasing goods, playing games, watching movies, listening to music, ordering food, banking, reading the news, tracking exercise, hailing cars, and more.

But apps enable these activities under a dark cloud: contractual and technological restrictions that Apple imposes to maintain its monopoly position and restrain competition. Apple has made itself the exclusive distributor for all apps by prohibiting distribution of apps outside Apple's proprietary "App Store," deploying software that blocks

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any other apps, and threatening to evict developers that fail to comply. Additionally, Apple requires developers to use Apple's payment solution to sell digital content through their apps, and charges a 30% commission on each sale. These restrictions are unnecessary to further any legitimate procompetitive purpose—Apple does not even impose them on its Mac computers. Rather, Apple documents show it made a "policy decision" to increase its own profits by restricting app distribution and payment solutions for iPhones.

Absent these restrictions, iPhone users and app developers could use alternative app stores, and users could get apps directly from developers. Developers could procure payment mechanisms with additional features and lower costs for their apps. Epic wants to—but cannot—compete with Apple to fulfill that demand by providing an iPhone app store and in-app payment solution. Epic would charge developers much less than Apple's 30% commission, increasing innovation and reducing costs.

Apple prevents Epic and other potential competitors from offering those choices. That is why Epic brought this antitrust suit. The district court's factual findings make clear that Apple's conduct is precisely what

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the antitrust laws prohibit. The court found that Apple's contracts and policies have allowed it to collect many billions of dollars in "supracompetitive" profits from developers and consumers. Apple has "increased prices," "reduce[d] innovation," "reduce[d] quality," and "foreclos[ed] competition." The challenged restrictions "unreasonably restrain competition and harm consumers," and "Apple employs these policies so that it can extract supracompetitive commissions." But the court nonetheless found no Sherman Act violation.

The court first erred in holding Section 1 inapplicable on the ground that there is no "contract" in restraint of trade. It reasoned that the "contracts of adhesion" between Apple and app developers that exclude competing app stores and payment solutions are not contracts under Section 1. But a "contract" in restraint of trade is still a "contract," whether the terms are negotiated or imposed by one party with overwhelming market power. When such a contract is unilaterally imposed, it still unreasonably precludes competition—here, causing billions of dollars in harm.

The district court further erred in holding that Apple's conduct survives rule of reason scrutiny. The court expressly found that Apple's

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scheme causes great harm to competition, innovation, and consumers, yielding years of "extraordinarily high" supracompetitive profits. The court's own findings demonstrate that Apple's justifications are largely pretextual, and that there are less restrictive alternatives to achieve any purported benefits. Not only did the court find that Apple successfully employs far less restrictive alternatives on Mac computers, it also found that Apple uses far less restrictive alternatives for certain in-app purchases on the iPhone itself, permitting developers that sell physical goods or services to use any payment solution they want. Inexplicably, the district court ignored its factual findings and failed to conduct the required balancing of competitive harms with any valid competitive benefits. That balancing demonstrates that Apple's restrictions violate the Sherman Act.

The court also erred in rejecting Epic's Section 2 monopoly maintenance claims. Apple excludes competitors from iOS app distribution and in-app payment solutions for digital content, giving it a 100% market share. In rejecting Epic's Section 2 claims on these undisputed facts, the court misapplied settled precedent establishing that in these circumstances, an antitrust market may be defined by

reference to a single brand. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992); *Newcal Indus., Inc. v. IKON Off. Sol.*, 513 F.3d 1038 (9th Cir. 2008).

Finally, the court erred in rejecting Epic's tying claim. Apple ties its app store to its in-app payment solution for digital content; third-party developers who use the former must use the latter. The court's conclusion that they are a single product was error under the governing legal test because there is separate demand for each.

The judgment accordingly should be reversed.

STATEMENT OF THE FACTS

I. Apple, Epic, and the Dispute

A. Apple and Its Ecosystem

Apple is the largest corporation in history by market capitalization. Its empire spans Mac computers, iPhones, iPads, watches, headphones, media streaming, messaging, browsing, and gaming software. 2-ER-356–57; 3-ER-556–57.

Launched in 2007, the iPhone is among the most successful products ever, with over a billion users. 1-ER-30; 3-ER-558; 2-ER-444. Like all computing devices, it requires an "operating system"—"a foundational layer of software." 1-ER-30; 2-ER-346; 2-ER-263. The

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iPhone's operating system—the core of its smartphone ecosystem—is called "iOS"; it lets users install apps that provide enormous additional functionality. 1-ER-30. There is only one other smartphone ecosystem: Google's Android. 1-ER-141; 2-ER-268; 2-ER-411. While Google licenses the Android operating system to smartphone manufacturers, 2-ER-416, Apple keeps iOS proprietary, 1-ER-48.

The district court recognized that when consumers purchase a phone, they are "choos[ing] between the type of ecosystems." 1-ER-48. "[V]ery few consumers own both Android and iOS devices"; they typically "single home"—*i.e.*, choose one smartphone operating system. 1-ER-55. Consumers incur costs to switch between ecosystems—for example, the cost of buying a new smartphone and peripheral hardware, the challenge of learning a different operating system, the time to transfer data, and the costs of obtaining new apps since iOS apps do not work on Android, and *vice versa*. 2-ER-391–93; 1-ER-53; 2-ER-354. Once a user picks an ecosystem, "very low switching rates exist, with only about 2% of iPhone users switching to Android each year." 1-ER-55.

A cornerstone of Apple's strategy is to make switching to Android difficult. In 2010, Apple's CEO, Steve Jobs, candidly wrote that he

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wanted to "tie all of our products together, so [Apple] further lock[s] customers into [its] ecosystem" and "make[s] [the] Apple ecosystem even more sticky." 3-ER-571–72. One example is Apple's popular messaging service app iMessage, which Apple refuses to make available for Android so it is harder for iPhone users to switch. 2-ER-437; 3-ER-749–50; 3-ER-746–48.

B. App Distribution

Unlike consumers, who are locked into one ecosystem, developers must "compete for single-homing users" and "cannot afford to forego particular platforms without losing those other customers." 1-ER-55. Developers typically "multi-home" across both iOS and Android, 1-ER-55, and have strong incentives to stay on both despite unfavorable restrictions. *See* 2-ER-301; 2-ER-333; 2-ER-294.

To distribute an app to iOS users, developers must join Apple's Developer Program by executing a contract (the Developer Program License Agreement, or "DPLA") and paying Apple a $99 annual fee. 1-ER-31–32. Apple requires all developers to "agree to abide by the App [Store Review] Guidelines," which together with the DPLA govern the distribution of iOS apps. 1-ER-34 n.192. The DPLA requires developers to distribute

iOS apps *exclusively* through Apple's App Store. 1-ER-96. Apple cements this exclusivity with technology: iOS will not run apps that lack a digital certificate Apple issues only to apps distributed through the App Store. 1-ER-95–96; 1-ER-111.

Apple's complete control over iOS app distribution sharply contrasts with its approach for Mac computers, where developers can distribute software through Apple's Mac App Store, competing app stores, and directly through the developers' own websites. 1-ER-99; 1-ER-115; 2-ER-448. Apple openly advises Mac users that apps from "the internet can be installed worry-free." 3-ER-563; *see also* 1-ER-116. When Apple first launched the iPhone, it considered using that open Mac model, but made a "policy decision"—driven by commercial goals, not security concerns—to impose exclusive distribution. 1-ER-115.

C.   Payment Solutions

Developers often make digital products and features available for purchase within their apps, such as extra swipes in a dating app or character outfits in a game app. 1-ER-35–36. Those "in-app" purchases typically occur "long after" consumers install the app on their phones, and

"the App Store does not participate in a meaningful way" in these trans-actions. 1-ER-37. Developers need a "payment solution" that lets them accept payment credentials (such as credit cards) from customers and collect payment. 2-ER-275; 1-ER-6. In-app payment solutions facilitate frictionless transactions, which is critical because users are less likely to complete purchases if they instead occur outside the app. 1-ER-118; 2-ER-325–26; 2-ER-467–68.

With a few exceptions, Apple contractually requires exclusive use of its in-app payment solution ("IAP") for all in-app purchases of this digital content, and charges a 30% commission on each purchase. 1-ER-34–36; 3-ER-619; 3-ER-692; 3-ER-580–81. Apple did not consider intellectual property ("IP") in setting that rate, 1-ER-117, nor does it list specific IP covered by the commission in the DPLA, 1-ER-150. Apple does not require use of IAP or charge any commission on in-app purchases of *physical* goods and services for use outside the app; for those, developers (such as Amazon and Uber) can use any non-IAP payment solution. 1-ER-36.

Apple "aggressively" enforces its IAP requirement. 2-ER-366. It refuses developer requests to use other payment solutions to sell digital

content, and has retaliated against thousands of developers who used different payment solutions by terminating their accounts. 2-ER-371. Apple also imposes anti-steering provisions, which prevent developers from informing consumers of non-IAP methods to purchase digital content. 1-ER-166.

D. Epic

Epic develops software, including game and non-game apps. 1-ER-7. It also provides other developers with software tools and services. 1-ER-7. Epic's most popular app is *Fortnite*, which has game and non-game elements and connects millions of people across platforms. 1-ER-9–13. *Fortnite* debuted on iOS in 2018 and offers in-app purchases including character outfits and emotes (actions that characters can perform). 1-ER-14; 1-ER-16. By August 2020, "more than 115 million registered players had accessed *Fortnite* on an iOS device." 1-ER-17.

Epic also operates the Epic Games Store, which distributes Epic and third-party apps on personal computers ("PCs") and Macs. 1-ER-17–20. Epic charges a 12% commission on the initial distribution of paid apps and on in-app sales when the developer uses Epic's payment solution. 1-ER-19. Epic does not require developers to use Epic's payment

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solution for in-app sales, and developers who do not pay Epic nothing. 1-ER-19. Absent Apple's restrictions, Epic would make its store available for iOS apps on the same terms. 1-ER-20. Epic has urged Apple to end its iOS app distribution and payment solution restrictions since the mid-2010s; Apple has refused. *See* 1-ER-22; 1-ER-27–28.

E. The Dispute

Given Apple's intransigence, Epic took a stand against Apple and demonstrated that competition can exist on iOS—and that consumers would welcome and benefit from it. 1-ER-28; 2-ER-309. On August 13, 2020, Epic launched its in-app payment solution in *Fortnite*, in contravention of the DPLA's mandatory exclusivity terms. 1-ER-28–29. In response, Apple removed *Fortnite* from the App Store, terminated the *Fortnite* Developer Program account, and threatened to terminate the Developer Program accounts of all Epic affiliates. 1-ER-29.

Epic sued Apple for violations of Sections 1 and 2 of the Sherman Act, as well as California's Cartwright Act and Unfair Competition Law ("UCL"). 1-ER-4; 1-ER-28. Epic sought a temporary restraining order and preliminary injunction to prevent Apple from retaliating against Epic, both of which the district court granted in part. 1-ER-29; 3-ER-

546–47. Epic seeks only to end Apple's illegal anticompetitive business practices; Epic does not seek any monetary damages.

On September 8, 2020, Apple filed counterclaims for breach of contract and declaratory judgment, among others. 1-ER-171. Epic stipulated to its noncompliance with the DPLA, but asserted that the relevant provisions are unlawful, void against public policy, and unconscionable. 1-ER-171.

II. Proceedings in the District Court

The district court held a three-week bench trial. On September 10, 2021, the district court issued an opinion finding every fact necessary to establish that Apple is a monopolist. It also found that Apple's prohibition against competing app distribution channels has substantial anticompetitive effects, Apple's proffered justifications were largely unpersuasive, and less restrictive alternatives are available. The court made similar findings regarding Apple's payment restrictions. But the district court ignored these findings in setting forth its legal conclusions, and misapplied controlling precedent.

A. Section 1 Claims

1. *Whether Apple's DPLA Is a "Contract"*

Section 1 applies to every "contract . . . in restraint of trade." 15 U.S.C. § 1. The district court concluded that the DPLA is not a "contract" because Apple imposes it on developers. 1-ER-144–46. The court acknowledged "potential conflicts with the goals of antitrust law given this narrow view," and recognized that it is not "particularly consistent with" antitrust doctrines of tying and exclusive dealing, or the Supreme Court's ruling in *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2277 (2018) ("*Amex*"). 1-ER-145–46.

2. *Rule of Reason Analysis*

The district court nevertheless analyzed Apple's restrictions on app distribution and in-app payment solutions under the rule of reason. The court's factual findings show that both restrictions have substantial anticompetitive effects, minimal nonpretextual procompetitive justifications, and less restrictive alternatives. Yet the court denied the existence of less restrictive alternatives in its conclusions of law and failed to perform the required balancing.

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a. App Distribution Restrictions

The district court found that Apple's app distribution restrictions have substantial anticompetitive effects:

- Foreclosing competition, 1-ER-20; 1-ER-98–100; 1-ER-147;

- Reducing and slowing innovation, 1-ER-103–05;

- Preventing alternative app stores from competing on various features, including innovative ways to search for new apps, diverse forms of payment, and security, 1-ER-147–48;

- Permitting Apple to maintain a "low investment in the App Store," 1-ER-105;

- Allowing Apple to "extract supracompetitive commissions," 1-ER-121; *see also* 1-ER-100–02; 1-ER-117, and set its 30% fee "without regard to or analysis of the costs to run the App Store," 1-ER-38;

- Providing Apple "extraordinarily high" operating margins, 1-ER-46, that "have exceeded 75% for years," 1-ER-147; and

- "[I]ncreas[ing] prices for developers," 1-ER-102, and likely for consumers, 1-ER-102.

Apple proffered two primary justifications for its prohibition of competing app distribution channels: first, it purportedly helps keep iOS secure; and second, it allows Apple to collect payments for use of its IP. 1-ER-107. The district court's findings of fact demonstrate that both justifications are largely pretextual.

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Regarding security, the court found that all but one of Apple's malware protections are actually "performed by the operating system or middleware independent of app distribution." 1-ER-108. The exception is human app review, which provides some modicum of security—albeit "imperfect," and "allows some malware to slip through." 1-ER-110. However, "alternative models are readily achievable to attain the same ends," and Apple already implements a far less restrictive security measure on Macs. 1-ER-115–16; *see also* 2-ER-451; 3-ER-563; 1-ER-110 n.527. Critically, "app review can be relatively independent of app distribution." 1-ER-116.

As for IP, the court found that while Apple is entitled to "some measure of compensation," 1-ER-117, there is "no basis for the specific rate chosen," 1-ER-153, and "the record is devoid of evidence that Apple set its 30% commission rate as a calculation related to the value of its intellectual property," 1-ER-117. The court found there are less restrictive alternatives that would let Apple recoup its investment—for example, "a tiered licensing scheme" that "better correlate[s] the value of its intellectual property to the various levels of use by developers," 1-ER-

117, or an "audit [of] developers . . . to ensure compliance with its commissions," 1-ER-153 n.617.

b.   In-App Payment Solution Restrictions

The district court found that Apple's in-app payment solution restrictions also have substantial anticompetitive effects. Here, too, the court found that Apple prices "without regard to or analysis of the costs to run the App Store," 1-ER-38; "reap[s] supracompetitive operating margins," 1-ER-95; forecloses "compet[ition] on in-app payment processing," 1-ER-117; "does a poor job of mediating disputes between a developer and its customer," 1-ER-43; causes developers to provide "worse customer service" because Apple controls the refund process, which "leads to poor [customer] experiences with [developers'] products and hurts [developers'] brand[s]," 1-ER-43; maintains "overly simplistic rules" that "increase fraud," 1-ER-43; forecloses "other companies [that] could [detect fraud] better because they process more transactions," 1-ER-119; and provides a product without "any unique features," 1-ER-119. "Competition," the court concluded, "could improve . . . in-app payments." 1-ER-103–04.

Apple proffered three justifications for its payment restrictions: security, IP compensation, and centralizing transactions. 1-ER-152–53.

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The district court found that security is pretextual; "to the extent that scale allows Apple to better detect fraud, other companies could do it better because they process more transactions." 1-ER-119–20. "Similarly, with respect to data breaches, although a breach of a payment handler could expose some user data, a breach of Apple itself could expose all Apple users who use IAP." 1-ER-120.

While noting Apple is entitled to "*some* compensation" for IP use, the court reiterated that Apple's justification for its rate is pretextual, 1-ER-150, and found that "[e]ven in the absence of IAP, Apple could still charge a commission on developers." 1-ER-116–17; 1-ER-120–21; 1-ER-153.

The court found that centralization can be achieved without prohibiting competing payment solutions. 1-ER-122. Although "some consumers may want the benefits [of centralized transactions], Apple actively denies them the choice." 1-ER-122. "[L]oosening the restrictions will increase competition as it will force Apple to compete on the benefits of its centralized model or it will have to change its monetization model in a way that is actually tied to the value of its intellectual property." 1-ER-122.

c.   Less Restrictive Alternatives

In its conclusions of law, the district court ignored its factual find-

ings to conclude there are no less restrictive alternatives to Apple's anti-

competitive restraints.   Those inconsistencies are glaring.   *Compare*

1-ER-107–17; 1-ER-119–21, *with* 1-ER-148–53.   To take a few:

- The court found "alternative models are readily achievable to attain the same ends [of secure app distribution] even if not currently employed," 1-ER-116, but concluded that Epic did not show these same "proposed alternatives are virtually as effective as the current distribution model," 1-ER-152.

- The court found "the scale itself does not appear to be a problem" to adding human review to the Mac security model, 1-ER-116, but concluded that "add[ing] human re-view to [that] model" "would not scale well," 1-ER-151.

- The court found "Apple has not shown how [its fraud pre-vention] process is any different than other payment pro-cessors," 1-ER-120, but concluded that "if Apple could no longer require developers to use IAP for digital transac-tions, Apple's competitive advantage on security issues . . . would be undermined," 1-ER-153.

d.   Balancing

Asserting that its assessment of less restrictive alternatives was

"the last step" of the rule of reason analysis, 1-ER-150, the district court

did not even purport to balance the anticompetitive effects of Apple's con-

duct against any nonpretextual procompetitive benefits, and determined

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that Apple's restrictions do not violate Section 1 (and, as detailed below,

Section 2), 1-ER-150–53; 1-ER-155.

B.   Section 2 Claims

Regarding its Section 2 claims, Epic defined two separate

"aftermarkets" for services on iOS. In *Kodak*, the Supreme Court held

Kodak could violate Section 2 by monopolizing aftermarkets for servicing

and parts for Kodak-brand photocopiers. 504 U.S. at 481-82. While it

may be uncommon to define an antitrust market by reference to a single

brand, the Supreme Court found such markets warranted where

competition in the "foremarket" (there, photocopiers) does not restrain a

defendant's conduct in "aftermarkets" (there, parts and services for

Kodak's photocopiers). *Id.* at 470-78.

In *Kodak*, there was evidence that photocopier buyers had difficulty

"engag[ing] in accurate lifecycle pricing"—*i.e.*, "inform[ing] themselves of

the total cost of the 'package'—equipment, service, and parts—at the

time of purchase" of the photocopier, and after that purchase, the buyer

was "locked in" because photocopiers are expensive goods that last for

years. *Id.* at 473-77. Due to those information barriers and switching

costs, the Court found that competition in the photocopier foremarket

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might not effectively discipline Kodak's conduct in the related aftermarkets, rendering the aftermarkets appropriate antitrust markets. *Id.* at 472-79. Thus, even though Kodak lacked market power in the foremarket, the Court explained, it could still be a monopolist in the aftermarkets.

This Circuit examines four factors in analyzing *Kodak*-style claims: whether (1) the aftermarket is "wholly derivative from and dependent on the primary market"; (2) the "illegal restraints of trade and illegal monopolization relate only to the aftermarket, not to the initial market"; (3) the defendant's market power "flows from its relationship with its consumers" and "[was] not achieve[d] . . . through contractual provisions that it obtains in the initial market"; and (4) "[c]ompetition in the initial market . . . discipline[s] anticompetitive practices in the aftermarket." *Newcal*, 513 F.3d at 1049-50. The fourth factor turns primarily on whether there are information barriers and switching costs. *Kodak*, 504 U.S. at 472-79; *Newcal*, 513 F.3d at 1048, 1050.

1. *The Foremarket*

At trial, Epic established a relevant foremarket: a global market (excluding China), 1-ER-92–93, for smartphone operating systems.

2-ER-269–70. Operating systems are bundled with smartphones, not sold separately, because neither works without the other. 2-ER-268. Epic argued that smartphone operating systems "are the relevant foremarket because they are the locus of relevant developer and consumer demand." 2-ER-268. The district court made all of the factual findings necessary to establish this foremarket: developers choose whether to "create an app for Android versus iOS" or both, 1-ER-55, and consumers "choose between the type of ecosystems," 1-ER-48; *see also* 1-ER-55 ("very few consumers own both Android and iOS devices"); 3-ER-488.

Despite finding these predicates, the court rejected Epic's smartphone operating system market in a single paragraph that cites no legal authority, declaring that "it is illogical to argue that there is a market for something that is not licensed or sold to anyone." 1-ER-48.

2. *The iOS App Distribution and iOS In-App Payment Solutions Markets*

At trial, Epic established two aftermarkets. The first is a global market (excluding China), 1-ER-93, for iOS app distribution channels. 2-ER-273. The market is "two-sided" in that iPhone users and developers meet on a platform (the App Store) and engage in a transaction—in other words, users acquire apps that developers provide. 2-ER-269. But for

Apple's contractual and technological restrictions, that market would include not just Apple's App Store, but also competing app stores and direct downloading from developers' websites. *See* 1-ER-95–96. Because of Apple's restrictions, however, there is only one place where developers distribute, and consumers download, iOS apps: Apple's App Store. 1-ER-95–96.

The second aftermarket is a global market (excluding China), 1-ER-93, for payment solutions for digital content purchased within an iOS app. 2-ER-278. In-app payment solutions are tools that developers procure from third parties, or self-supply, to enable consumers to make purchases using their apps. 2-ER-275. They are separate from app distribution channels, which are the means through which developers and consumers find each other in the first place, enabling consumers to install apps. Epic established that Apple introduced its payment solution, IAP, many months *after* it launched the App Store, 1-ER-94; 1-ER-75, and that developers would procure competing payment solutions if allowed, 1-ER-103–04; 1-ER-119–20; 1-ER-122.

There was no dispute that Apple controls 100% of both iOS app distribution and payment solutions for in-app purchases of digital goods.

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The district court found that these two aftermarkets, derived from consumers' initial purchase of iPhones running iOS, "largely satisf[y]" *Kodak*. 1-ER-133. It made supporting factual findings, including that there are significant obstacles to switching away from iOS, such as "time to find and reinstall apps or find substitute apps; to learn a new operating system; and to reconfigure app settings," 1-ER-53, and unsurprisingly, "very low switching rates," 1-ER-55. The court nevertheless determined that Epic "failed to prove lock-in," primarily because the court incorrectly believed Epic needed to quantify consumers' switching costs. 1-ER-134.

3. *The District Court's Own Market*

After rejecting Epic's market definitions, the district court also rejected Apple's, 1-ER-4; 1-ER-85–88,[1] instead adopting one of its own making: "digital mobile game transactions," 1-ER-135. The court combined the market in which consumers and developers find each other to engage in the download of apps (app distribution), with the market for services that let developers subsequently sell digital content within those apps

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[1] Apple argued the relevant market is "digital game transactions"— game app downloads, in-app purchases, and app updates on *all* digital platforms, including smartphones, tablets, game consoles, PCs, and Macs. 1-ER-124.

(in-app payment solutions). It created a single "transactions" market, 1-ER-123–25, even though app distribution and in-app payment solutions involve different services and different economic activity. The court based its market definition on a misreading of *Amex*, which states that in a two-sided market, there is a single market for "transactions" between participants on each side. 138 S. Ct. at 2287. That applies to credit-card transactions (as in *Amex*) and to app distribution (as with the App Store). But the district court wrongly took this to mean that two separate transactions for different products by different market participants occurring at different times—initial app downloads between consumers and developers on an app distribution platform, and developers' procurement of in-app payment solutions from providers—should also be treated as a single transaction. 1-ER-123–25.

The court also mistakenly limited its market to "mobile game transactions." 1-ER-125–29. It distinguished between "game transactions" and "non-game transactions," and concluded that only game transactions were relevant, 1-ER-125–26, even though Apple's restrictions apply equally to all apps and digital transactions, 1-ER-170; 2-ER-428; 2-ER-380. Despite reciting the relevant precedent for market definition,

1-ER-122–23, the court nowhere analyzed whether one app store is substitutable with another; whether direct downloads from websites are substitutes for downloads from app stores; or whether payment solutions in gaming apps are substitutes for the payment solutions in other apps. Instead, the court looked to the quantum of dollars spent in transactions—a concept found nowhere in antitrust jurisprudence—and concluded that "the evidence demonstrates that most App Store revenue is generated by mobile gaming apps, not all apps. Thus, defining the market to focus on gaming apps is appropriate." 1-ER-4.

Even in the district court's market, the court found substantial direct evidence of Apple's monopoly power, including supracompetitive prices and operating margins. 1-ER-121; 1-ER-140. As for indirect evidence, the court calculated Apple's market share in digital mobile gaming transactions to be "52% to 57%," 1-ER-140, and found some barriers to entry because "economies of scale in the form of network effects favor [Apple's and Google's app stores] over new entrants," 1-ER-141. The court concluded that "Apple is near the precipice"—just short—of "monopoly power," but still "exercises market power" "with its considerable market share." 1-ER-141. Unable to "conclude that Apple's market

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power reaches the status of monopoly power in the mobile gaming market," the court rejected Epic's Section 2 claims. 1-ER-141; 1-ER-154–55.

C. Remaining Claims

1. *Tying*

The district court recognized that even if Apple did not have monopoly power, it could still violate Section 1's bar on tying by using its market power in app distribution to coerce developers into using Apple's IAP. 1-ER-155–57. The court rejected Epic's tying claim on the sole ground that the App Store and IAP are "a single platform which cannot be broken into pieces to create artificially two products." 1-ER-157. The court failed to analyze whether there is separate consumer or developer demand for payment solutions and app distribution, or reconcile its finding that "in-app payment processing is an integrated part of the App Store," 1-ER-103 n.495, with the finding that "IAP is not integrated in the App Store itself," 1-ER-68.

2. *Cartwright Act*

The district court concluded that Epic's Cartwright Act claims failed "for the same reasons as its analogous Sherman Act claims." 1-ER-158–61.

3. *Anti-Steering*

The district court found Apple liable under California's UCL based on its anti-steering provisions. 1-ER-166–67. The district court enjoined Apple from enforcing these provisions because they "hide critical information from consumers and illegally stifle consumer choice." 1-ER-5; 1-ER-171; 2-ER-195.

4. *Apple's Counterclaims*

Accepting Epic's stipulation that it did not comply with certain provisions of the DPLA, and having rejected Epic's affirmative defenses that these provisions were unlawful, void as against public policy, and unconscionable, the district court found for Apple on its breach of contract and declaratory judgment counterclaims. 1-ER-172–73; 1-ER-176; 1-ER-181–82. It awarded Apple monetary damages and a declaration that Apple's termination of its DPLA with Epic was lawful. 1-ER-182.

D. Post-Trial Proceedings

On September 13, 2021, Epic timely filed a notice of appeal, and Apple subsequently cross-appealed. 4-ER-754. On October 8, 2021, Apple moved in the district court to stay the UCL injunction pending appeal.

4-ER-854. On November 9, 2021, the district court denied Apple's motion. 2-ER-191–94. Apple then moved this Court for a partial stay, which the Court granted on December 8, 2021. 2-ER-189–90.

SUMMARY OF THE ARGUMENT

Epic proved at trial that Apple restrains trade in violation of Section 1 of the Sherman Act by contractually requiring developers to exclusively use Apple's App Store to distribute apps and Apple's IAP for payments for digital content within apps. The court's ruling that the DPLA is not a "contract" because Apple *requires* developers to sign it is contrary to the statutory text and binding precent, which provide that a contract coerced by a party with market power—which Apple certainly has—is a "contract" under Section 1. If not reversed, this decision would upend established principles of antitrust law and, as the district court itself recognized, undermine sound antitrust policy. (§ I.A.)

The district court also erred in sustaining Apple's restrictions under the rule of reason. The court made extensive factual findings regarding the anticompetitive effects of both restrictions, the pretextual aspects of Apple's procompetitive justifications, and the availability of less restrictive alternatives. Yet the district court's legal conclusions ignored, and

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indeed directly contradicted, those factual findings. The court also failed to conduct the balancing required by the rule of reason analysis. (§ I.B.)

These errors require reversal on Epic's Section 1 claims, and the court's factual findings warrant entry of judgment on liability for Epic. At a minimum, this Court should remand with instructions to conduct proper rule of reason balancing.

Second, Epic proved that Apple unlawfully maintains its monopolies in the iOS app distribution and in-app payment solutions markets by expressly excluding all competitors. Epic proved the existence of a foremarket for smartphone operating systems and aftermarkets for iOS app distribution and in-app payment solutions. The district court's reason for rejecting the foremarket—that Apple does not separately sell or license iOS—is legally irrelevant. (§ II.A.) In rejecting the aftermarkets, the court misapplied *Newcal*'s fourth factor, which asks whether competition in the initial market disciplines anticompetitive practices in the aftermarkets. Indeed, the court found that Apple is impervious to competitive pressures, and Apple indisputably has monopoly power in these aftermarkets. (§ II.B.)

The district court's legal errors in applying the rule of reason (*see supra* and § I.B) apply equally to the Section 2 claims. These errors likewise require reversal on Epic's Section 2 claims, and entry of judgment on liability for Epic or, at minimum, a remand for the requisite rule of reason balancing.

Third, Epic proved that Apple ties developers' access to app distribution to their exclusive use of Apple's IAP for digital content. Epic indisputably satisfied two elements of a tying claim: Apple has ample economic power to coerce developers into using IAP, and Apple's tie affects billions of dollars in commerce. The court erred in concluding that Epic did not prove the remaining element: that the two products are separate. The touchstone is a separate demand test, which is easily satisfied here. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 27 (2006). This error requires reversal and entry of judgment on liability for Epic on its tying claim or, at minimum, a remand. (§ III.)

Finally, once Epic prevails on any claim, the challenged provisions of the DPLA are unenforceable because they create anticompetitive restraints. Epic is therefore entitled to reversal of the district court's

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judgment on Apple's counterclaims for breach of contract and declaratory judgment. (§ IV.)

STANDARD OF REVIEW

This Court reviews the district court's conclusions of law and mixed questions of law and fact *de novo*, and its findings of fact for clear error. *OneBeacon Ins. Co. v. Hass Indus., Inc.*, 634 F.3d 1092, 1096 (9th Cir. 2011).

Whether the facts found constitute a violation of the antitrust laws is reviewed *de novo*. *United States v. Gen. Motors Corp.*, 384 U.S. 127, 141 n.16 (1966); *see also Ford v. Alfaro*, 785 F.2d 835, 839 (9th Cir. 1986).

Where the district court's conclusions of law are inconsistent with its findings of fact, reversal is appropriate. *See Gen. Motors*, 384 U.S. at 139-41 (reversing and finding violation of antitrust laws where district court's conclusion "cannot be squared with its own specific findings of fact"); *Am. President Lines, Ltd. v. Marine Terminals Corp.*, 234 F.2d 753, 759-60 (9th Cir. 1956).

ARGUMENT

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

Section 1 of the Sherman Act prohibits "[e]very contract . . . in restraint of trade or commerce." 15 U.S.C. § 1. "[T]o establish liability under § 1, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade." *FTC v. Qualcomm Inc.*, 969 F.3d 974, 989 (9th Cir. 2020) (emphasis omitted). Reasonableness is judged under the rule of reason, which "looks beyond the inherent anticompetitive potential of an activity and examines its actual effect in practice." *Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988). In a rule of reason case, "[t]he existence of market power is a significant finding that casts an anticompetitive shadow over a party's practices." *Id.*

Epic proved both elements. 2-ER-233–37. It is undisputed that Apple entered into contracts with developers requiring them to distribute iOS apps exclusively through Apple's App Store and to handle in-app payments for digital content exclusively through Apple's IAP. 1-ER-31–33. The district court found that these restrictions led to "foreclos[ed] compe-

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tition," "increased prices," "supracompetitive operating margins," "reduce[d] innovation," and "reduce[d] quality." 1-ER-95; 1-ER-98; 1-ER-102; 1-ER-105; 1-ER-148 n.606.

The court nonetheless deemed Apple's conduct lawful under Section 1 for two reasons. First, it held that Apple's contract with developers is not a "contract" because Apple uses its market power to compel developers to sign. 1-ER-144–46. Second, the court concluded that Apple's restrictions survive rule of reason scrutiny, despite making factual findings that establish exactly the opposite. 1-ER-146–53. Both conclusions are legal error.

A. The District Court Erred in Concluding that a Contract of Adhesion Is Not a "Contract" Under Section 1.

The DPLA contains an express prohibition on competing app distribution channels and in-app payment solutions on iOS. *See* Facts §§ I.B-C above; 2-ER-205–09; 2-ER-234. Developers must agree to those prohibitions when they distribute apps on iOS, and the DPLA also imposes obligations on Apple. 1-ER-31–32. Thus, the DPLA is a "contract" within the meaning of the common law, *see Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 923 (1985), and the plain language of Section 1, which

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sweepingly refers to "[e]*very* contract . . . in restraint of trade." 15 U.S.C. § 1 (emphasis added); *see Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1153 (9th Cir. 2003) ("express 'agreements'" are "direct evidence of 'concerted activity'"). The district court's contrary ruling ignores the statutory text, contradicts binding case law, relies on inapposite cases, and protects contracts likely to harm competition the most—those imposed by firms with market power.

Precedent holds that contracts of adhesion imposed by firms with market power are "contracts" under Section 1. That makes perfect sense, because a contract can restrain competition whether or not it was freely negotiated; the same contractual restraint exists either way. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, the Supreme Court held that each plaintiff-franchisee challenging franchise contracts under Section 1 could "clearly charge a combination between [the defendant-franchisor] and himself, as of the day he unwillingly complied with the restrictive franchise agreements." 392 U.S. 134, 139, 142 (1968), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984); *see Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 14, 17 (1964) (finding an "agreement" under the Sherman Act even though defendant

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allegedly required "its retail outlets to sign" it); *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 868-70 (9th Cir. 1986) ("overwhelming evidence" of agreement where "several thousand physicians signed identical contracts with Blue Cross" although Blue Cross set all "terms and structure").

The three cases on which the district court relied—*Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988), and *Toscano v. PGA*, 258 F.3d 978 (9th Cir. 2001), 1-ER-145—have no application here. *Monsanto* and *Jeanery* did not involve *any* contract (the question was whether an agreement could be inferred where firms acquiesced to the defendants' policies), and this Court has confirmed they do not apply to a Section 1 claim involving an express agreement. *See Barry*, 805 F.2d at 870; *see also* 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1451 (5th ed. 2020) ("Areeda & Hovenkamp"). *Toscano* involved claims that sponsors of golf tournaments violated Section 1 by accepting anticompetitive PGA Tour terms. 258 F.3d at 981-83. The court found the sponsors not liable because they "had no involvement in the establishment or enforcement of the allegedly

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anticompetitive provisions" established by the PGA. *Id.* at 984-85. Significantly, the district court in *Toscano*'s companion case did not dismiss Section 1 claims against the PGA itself. *See Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106 (E.D. Cal. 2002). Here, Apple itself establishes and enforces the anticompetitive provisions.

Nor can the district court's conclusion be reconciled with this Court's Section 1 precedent recognizing tying and exclusive dealing claims. The essence of such claims is that the defendant sets the agreement's terms. *See, e.g.*, *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1427 (9th Cir. 1995); *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1180 (9th Cir. 2016). "If such conduct were to be labelled 'independent,' virtually all tying arrangements would be beyond the reach of Section 1." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 619 (9th Cir. 1990).

If not reversed, the district court's decision would have disastrous consequences. Section 1 would not reach firms with the market power to coerce non-negotiable terms. Rewarding Apple for using its market power to coerce developers into signing the DPLA would incentivize anticompetitive behavior.

B.   The District Court Erred in Concluding that Apple's Restrictions Survive Rule of Reason Scrutiny.

The district court's factual findings confirm that Apple's restrictions have substantial anticompetitive effects that far outweigh any legitimate procompetitive justifications. In concluding that Epic failed to demonstrate that less restrictive alternatives could achieve Apple's professed business goals, the district court disregarded the necessary implications of those findings. (§ I.B.1 below.) The court also failed to balance the anticompetitive effects of Apple's restrictions against any nonpretextual procompetitive benefits. (§ I.B.2 below.) Each error warrants reversal.

If Epic prevails in this litigation, Apple can continue to offer its app store or payment solution. Epic asks only that Apple permit competition, and that developers and consumers be given a fair choice among competing services. Such competition will lower prices, improve quality, increase innovation, and enhance consumer welfare—the objectives of antitrust law.

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>　　1.　　*The District Court's Conclusion that Epic Did Not Show Less Restrictive Alternatives Cannot Be Reconciled with Its Factual Findings.*

Under the rule of reason, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Amex*, 138 S. Ct. at 2284. Epic met that burden; the district court found that Apple's restrictions have substantial anticompetitive effects. (*See* Facts § II.A.2 above.) As a result, "the burden shift[ed] to the defendant to show a procompetitive rationale for the restraint." *Amex*, 138 S. Ct. at 2284. The district court found some procompetitive justifications for Apple's restrictions, rejecting others.[2] (*See* Facts § II.A.2 above.) Thus, the district court reached the third step of the analysis.

Under this step, "[t]he plaintiff must . . . show that any legitimate objectives can be achieved in a substantially less restrictive manner." *O'Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (quotations omitted). That requires showing that an alternative is "virtually as effective"

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[2] As discussed below, the court improperly accepted certain business rationales that do not promote competition and are, as a matter of law, not cognizable antitrust justifications. *See Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 696 (1978); § I.B.2 below.

in serving the *legitimate* objective "without significantly increased costs."

Id. at 1074. The rule of reason tests for Section 1 and Section 2 are substantially the same, and the court must consider less restrictive alternatives for both. *See Qualcomm*, 969 F.3d at 991.

a. Apple's App Distribution Restrictions

The district court found that Apple's bar on competing app distribution channels results in significant anticompetitive effects. (*See* Facts § II.A.2.a above.) Indeed, the court found that Apple has reaped supracompetitive profits—over 75% margins for years, even while minimally investing in App Store improvements. 1-ER-44–46; 1-ER-95–97; 1-ER-105; 1-ER-147. The district court also found that Apple's restrictions prevent competitors from innovating ways to distribute apps and making them available to consumers. 1-ER-103–05. When the court considered Apple's justifications for these restrictions, it made factual findings that there are less restrictive alternatives that would achieve any nonpretextual justification. (*See* Facts § II.A.2.c above.) The district court's ultimate legal conclusion that Epic did not prove a violation under the rule of reason is contradicted by these findings.

Security. Apple argued that it alone must distribute all apps to prevent malware and other objectionable content from reaching iOS users, but the district court's findings demonstrate that this justification is largely pretextual. 1-ER-108–09. As the court recognized, "app review can be relatively independent of app distribution." 1-ER-116. Indeed, on its Mac computers, Apple employs a safe alternative that does not restrict distribution—on-device security measures and a "notarization" program where Apple scans apps but then returns them to the developer for distribution. 1-ER-115–16. Apple touts that these protections allow Mac users to "[d]ownload apps safely from the Mac App Store" "[a]nd the internet," 3-ER-563, and the court found that this alternative model protects users from installing malware and shuts down bad apps, 1-ER-115–16. Apple's "only response" was that a similar program with full manual review would be hard to implement on iOS because "app review may not scale given developers' expectation over timing," but that response is a red herring; "app review is already required for all apps in the App Store, [thus] the scale itself does not appear to be a problem." 1-ER-116. The court therefore found that "alternative models are readily achievable to

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attain the same ends even if not currently employed." 1-ER-116; *see* Facts § II.A.2.c above.[3]

Those findings establish the existence of less restrictive alternatives that would serve Apple's security needs. That cannot be squared with the court's conclusion that no "proposed alternatives are 'virtually as effective' as the current distribution model and can be implemented 'without significantly increased cost.'" 1-ER-152; *see, e.g.*, *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 46, 51-52 (9th Cir. 1971) (finding less restrictive alternative where quality requirements were "easily specifiable"); *Impax Labs., Inc. v. FTC*, 994 F.3d 484, 499-500 (5th Cir. 2021) (finding less restrictive alternative based on "actual experience in analogous situations"); *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1091 & n.34 (N.D. Cal. 2019) (finding procompetitive effect could be achieved through less restrictive means and concluding that "any new costs of implementing" the proposed alternative "would not rise to the level of 'significant'" despite testimony about "significant

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[3] Additionally, "third-party app stores could . . . have increased security." 1-ER-110 n.527 ("[A] Disney app store would plausibly screen apps more rigorously than Apple.").

additional infrastructure and expense"), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021).

IP Compensation. Apple argued that app distribution restrictions are necessary to ensure compensation for its IP. "Neither the aims of intellectual property law, nor the antitrust laws justify allowing . . . a pretextual business justification to mask anticompetitive conduct." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1997). The district court's findings show this justification is largely pretextual. 1-ER-116–17. The court found Apple did not "list any specific intellectual property in the DPLA," 1-ER-150, and failed to prove any relationship between the value of its IP (or even its investment in the App Store) and the commissions it charges, 1-ER-153 n.617. The court also found that Apple has other options to obtain IP compensation, such as "creat[ing] a tiered licensing scheme" correlated to IP use, 1-ER-117, or imposing a contractual right to audit developers, 1-ER-153 n.617. As the district court found, "loosening the restrictions will increase competition as it will force Apple to compete on the benefits of its centralized model or it will have to change its monetization model in a way that is actually tied to the value of its intellectual property." 1-ER-119.

These findings compel the conclusion that there are less restrictive alternatives to Apple's app distribution restrictions that would still allow Apple to receive IP compensation. *See, e.g.*, *Chicken Delight*, 448 F.2d at 50 (finding less restrictive alternative to compensation justification); *Kodak*, 903 F.2d at 618-19 (same); *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1344 (9th Cir. 1984) (same). Apple is not entitled to foreclose all iOS app distribution to ensure that it continues to receive a supracompetitive commission. Given the alternative methods to obtain IP compensation that the district court recognized, Apple's argument reduces to the claim that it is entitled to higher fees than it could obtain if there were competition with respect to app distribution, but "mere profitability . . . [does] not qualif[y] as a defense under the antitrust laws." *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998).

b.   Apple's In-App Payment Restrictions

The district court's findings demonstrate that Apple's three justifications for its restrictions on in-app payment solutions—security, IP compensation, and centralization—are largely pretextual. The court also found less restrictive alternatives with respect to each. (*See* Facts §§ II.A.2.b-c above.)

Security.   Apple forecloses competing payment solutions on the iPhone only for the purchase of *digital* content, even though transactions for *physical* goods and services likewise require security. 1-ER-33–34; 1-ER-36; 1-ER-120. While Apple argued that its payment restrictions enhance security by letting Apple analyze all transaction data on iOS, the district court found that "to the extent that scale allows Apple to detect fraud, other companies could do it better because they process more transactions." 1-ER-119. In addition, "with respect to data breaches, although a breach of a payment handler could expose some user data, a breach of Apple itself could expose all Apple users who use IAP." 1-ER-120. And while Apple argued that IAP allows it to verify digital transactions and ensure that developers supply the digital content users purchase, the district court found that "Apple itself does not perform the confirmation," and "any potential for fraud prevention is not put into practice." 1-ER-120.

These findings, which establish that Apple's IAP solution does not provide unique or enhanced protection, *see* 1-ER-118–19, render incoherent the court's statement in the conclusions of law that "Apple's competitive advantage on security issues . . . would be undermined" if it could

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not require developers to use IAP. 1-ER-153. Indeed, the district court's findings establish the opposite: competing providers would provide security that is as good as, if not better than, Apple's IAP. 1-ER-119–20. That resolves the rule of reason third step, since "simply abandoning the restraint . . . is surely a less restrictive alternative." *NCAA v. Alston*, 141 S. Ct. 2141, 2162 (2021) (quoting 7 Areeda & Hovenkamp ¶ 1505).

IP Compensation. Just as there are less restrictive alternatives to Apple's app distribution restrictions that permit it to recover compensation for its IP, there are less restrictive alternatives to Apple's IAP restrictions. The court found that Apple has other ways to be compensated for its intellectual property, and IP compensation is not the sole determinant of its policies on payment for in-app purchases. 1-ER-117. Developers of apps selling physical products or services can choose any non-IAP payment solution, and they generally pay Apple nothing. 1-ER-36. Similarly, "83% of apps with at least one download on the App Store were free to consumers" and "do not generate any revenue for Apple." 1-ER-35. Yet Apple raises no concerns that these developers free-ride on Apple's innovation or thwart Apple's efforts to recoup its investments.

Centralization. Although Apple argued that its in-app payment restrictions benefit consumers by centralizing payments, the district court found that "loosening the restrictions will increase competition as it will force Apple to compete on the benefits of its centralized model." 1-ER-122. That alone proves the existence of less restrictive alternatives. *See Alston*, 141 S. Ct. at 2162. Under Epic's requested remedy, Apple could still require that developers include IAP as an option within their apps, *see* 2-ER-258–59, and thus consumers could continue to use it if they value "the centralized option of managing a single account through IAP," 1-ER-153.

Given these findings, the district court should have concluded that Epic met its burden to prove less restrictive alternatives and thus established a violation of the Sherman Act under the rule of reason.

> 2. *The District Court Erred in Failing To Perform the Required Balancing.*

Not only do the district court's factual findings contradict its conclusions on less restrictive alternatives, the court independently erred by failing to conduct the required balancing. The district court found that Apple's conduct has a host of anticompetitive effects. 1-ER-95; 1-ER-105; 1-ER-147; 1-ER-148 n.606. The district court further found that Apple

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faces no competitive pressure to invest in its products or change its practices, and makes small concessions only when faced with regulatory scrutiny or litigation. 1-ER-39; 1-ER-105. Apple is actively harming consumer welfare, and is unlikely to change absent legal intervention. The district court was thus required to weigh Apple's professed justifications against the serious anticompetitive effects resulting from Apple's conduct.

Under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (internal quotation marks omitted). "Always, the goal is 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.

This requires "a balancing of the arrangement's positive and negative effects on competition." *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1391 (9th Cir. 1984); *see, e.g.*, *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991); *Qualcomm*, 969 F.3d at 991; *Impax*

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Labs., 994 F.3d at 492; *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 464 (7th Cir. 2020); *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd.*, 838 F.3d 421, 438 (3d Cir. 2016); *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 652 (2d Cir. 2015); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc); *see also* 2-ER-226–30; 3-ER-495–96. "If no balancing were required at any point in the analysis, an egregious restraint with a minor procompetitive effect would have to be allowed to continue, merely because a qualifying less restrictive alternative was not shown." *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1109; *see also* 7 Areeda & Hovenkamp ¶ 1507.

The district court did not perform this balancing. It concluded that Apple's restrictions survive rule of reason scrutiny—despite the substantial harm to competition and the availability of less restrictive alternatives—merely because Apple identified *some* benefits from its business practices. The district court's lengthy opinion includes just two references to procompetitive justifications alongside anticompetitive effects. In the last section of its findings of fact, the court found that Apple's practices prevent consumers from "find[ing] cheaper prices, increased cus-

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tomer service, and options regarding their purchases" and rejected Apple's argument that developers can communicate directly with consumers to give them this information. 1-ER-121–22. To the extent this passage reflects any balancing, it comes out in Epic's favor. 1-ER-121–22. Second, in discussing Epic's Cartwright Act claim, the court, without analysis, noted that "the DPLA provisions at issue . . . have procompetitive effects that offset their anticompetitive effects." 1-ER-160. Given the court's factual findings, this bare statement made in discussing Epic's state law claims, without reference to any factual findings, does not reflect a conclusion by the court that the justifications *outweigh* the effects, as opposed to merely providing some unspecified offset.

Instead of performing the requisite balancing, the district court treated the third step (less restrictive alternatives) as "the last step" of the rule of reason analysis, 1-ER-150, and concluded that because "Epic Games has not met its burden" to prove less restrictive alternatives, Apple's restrictions "do not violate Section 1" or Section 2. 1-ER-152–55. This omission was erroneous and requires reversal. *See Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996) (reversing where district court erred at the balancing stage); *Cnty. of Tuolumne v. Sonora*

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Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001) ("Because plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage.").

The district court's failure to balance compounds another legal error. Only *procompetitive* justifications are cognizable under antitrust law, and with no explanation of what, if anything, was weighed, the extent to which the district court credited purported business justifications that are not cognizable under antitrust law cannot be ascertained.

Specifically, the district court credited Apple's purported justifications based on IP compensation (for both the App Store and IAP). But the court made no finding suggesting those justifications advance *competition*. 1-ER-149–50; 1-ER-153. They do not. Indeed, the court found that Apple's IP justification "with respect to the 30% commission rate" is pretextual, 1-ER-117; it did not find that Apple competes on how it collects its commission rate, and it certainly did not find that Apple competes on its "supracompetitive" rate. 1-ER-121. Thus, the court should have given these noncompetition justifications no weight.

Apple's only other purported justification was security. At trial, Apple asserted it could restrict competition to force consumers to obtain security and privacy benefits they might not want to pay for. *See, e.g.*, 2-ER-475 ("Q. The question, sir, is if there are multiple stores on the iPhone and people really value the service that Apple provides in curating the store, people who value it could go shop at your store, correct? A. It seems like a decision that they shouldn't have to make."); *see also* 2-ER-475–76, 2-ER-478. The district court accepted this objective as a valid "business reason for restricting app distribution." 1-ER-148.

As Epic emphasized, that "benevolent overlord theory of antitrust law" has no merit. 3-ER-503. Antitrust laws assume that consumers fare better when there is competition, and a benefit premised on the undesirability of competition does not count. "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Pro. Eng'rs*, 435 U.S. at 695; *see also Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1152 (9th Cir. 2003) ("[T]he Sherman Act presumes that competition . . . best ensures quality products for consumers, regardless of any empirical evidence to the contrary.").

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The district court nonetheless accepted this security objective as both a "competitive differentiator" for Apple, 1-ER-113, and a noncompetition "benefit" to some users and small developers, 1-ER-114. Absent any weighing, there is no way to ascertain whether and to what extent the court credited the latter, noncompetition justification. To the extent it credited it at all, that was error; the Supreme Court has consistently rejected justifications that purportedly further noncompetition objectives, such as consumer safety. *See Pro. Eng'rs*, 435 U.S. at 695 (rejecting contention that restraint is justified because of "the potential threat that competition poses to the public safety and the ethics of its profession" as "nothing less than a frontal assault on the basic policy of the Sherman Act"); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463 (1986) (rejecting argument that restraints prevent consumers from making "unwise and even dangerous choices"). Security that is thrust upon consumers at a price they do not wish to pay is not a procompetitive justification where, as here, it involves a reduction in consumer choice.

Finally, citing *Leegin*, 551 U.S. at 890-91, the court suggested that Apple's restrictions sacrifice "intrabrand" competition to further interbrand competition between Apple and Google. 1-ER-148–49. That too is

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error; Apple's restrictions limit competition between Apple and potential providers of alternative app stores and in-app payment solutions, all of which is interbrand competition. Nothing in *Leegin* allows Apple to justify restraints on competition in two markets by a claim of product differentiation in a separate, third market. Instead, *Leegin* concerned a manufacturer's restriction of *intra*brand competition by requiring retailers selling its products to maintain minimum prices. 551 U.S. at 883.

The necessary balancing between the harms inflicted by Apple's restraints and any cognizable, nonpretextual benefits—even setting aside the less restrictive alternatives—demonstrates that Apple's conduct overall is anticompetitive and unlawful. On one side, for more than a decade, Apple has "extract[ed] supracompetitive commissions," "reap[ed] supracompetitive operating margins," and reduced innovation and quality, harming consumers and developers. 1-ER-95; 1-ER-105; 1-ER-121; 1-ER-148 n.606. On the other side, Apple has "imperfect" human app review that "can be relatively independent of app distribution," 1-ER-110; 1-ER-116; some unquantified amount of increased interbrand competition based on consumers who "value security" and the protection of a

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'walled garden,'" 1-ER-149; and its desire to continue collecting its commission, which can be obtained by other methods, 1-ER-117; 1-ER-121; 1-ER-150 n.617.

Based on these findings, there is only one possible outcome to the balancing. This Court should reverse and enter judgment on liability on Epic's Section 1 claims.

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

The district court similarly erred in rejecting Epic's claims under Section 2 of the Sherman Act. Section 2 makes it illegal to "monopolize . . . any part of the trade or commerce among the several States." 15 U.S.C. § 2. To establish liability, "a plaintiff must show: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *Qualcomm*, 969 F.3d at 990 (internal quotation marks omitted).

Epic proved each element. Apple enjoys monopolies in iOS app distribution and in-app payment solutions. Apple willfully maintains those monopolies by excluding all competition through the restrictions in the DPLA, together with technical restrictions. The district court's factual findings establish that Apple's conduct causes antitrust injury to Epic—

as an app distributor foreclosed from distributing third-party apps; an in-app payment solution provider foreclosed from providing an alternative to Apple's IAP; and an app developer denied the benefits of lower prices, more choices, and greater innovation and quality that competition would bring. 1-ER-20–22; 1-ER-27–29; 1-ER-99; 1-ER-102; 1-ER-104–05.

The district court wrongly disregarded the *Kodak* framework advanced by Epic—consisting of a smartphone operating system foremarket and iOS app distribution and in-app payment solutions aftermarkets—based on an unsupported and erroneous declaration that there cannot be a market for smartphone operating systems because they are not sold separately. (§ II.A below.) The court further erred in concluding that despite substantial barriers to accurately estimating lifecycle costs of owning an iPhone and the significant costs of switching operating systems (from iOS to Android), competition between the iOS and Android smartphone ecosystems nonetheless disciplines Apple's conduct in the aftermarkets. (§ II.B below.) Once Epic's proposed aftermarkets are sustained, the district court's factual findings compel judgment for Epic under the rule of reason on its Section 2 claims. *See* Argument § I.B above;

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Qualcomm, 969 F.3d at 991 (explaining that "the rule of reason is essentially the same" under Sections 1 and 2).[4]

Indeed, the direct evidence of the anticompetitive effects of Apple's conduct demonstrates Apple is a monopolist. Apple could not extract supracompetitive profits over an extended period if it faced material competition. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (only absent competition may a monopolist "increase prices above competitive levels, and sustain them for an extended period"); *Microsoft*, 253 F.3d at 51 ("a firm is a monopolist if it can profitably raise prices substantially above the competitive level").[5] The

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[4] Although the district court expressed some confusion about the legal standard for Section 2 and noted a "potential difference" with Section 1, 1-ER-150 n.610, the court applied the same standard for both, 1-ER-155. Apple's argument that Section 2 does not have a least restrictive alternative requirement is incorrect. *See Qualcomm*, 969 F.3d at 991; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985); *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008).

[5] The district court said that, in addition to supracompetitive profits, proof of restricted output is required to establish directly that Apple is a monopolist, and it was unsure whether Apple restricts output. 1-ER-140–41. Even if the court were correct that evidence of reduced output is also needed (it is not), its findings of reduced innovation and quality, 1-ER-105; 1-ER-148 n.606, establish a reduction of output. Moreover, the ability to exclude competition, which Apple indisputably possesses and exercises, 1-ER-5; 1-ER-98, is itself sufficient evidence of

direct evidence of sustained supracompetitive profits found by the district court both demonstrates on its own that Apple is a monopolist and provides compelling evidence that Epic's proposed market definition accurately captures the market realities.

A.   The District Court Erred in Rejecting Epic's Smartphone Operating System Foremarket.

At trial, Epic established a market for smartphone operating systems with two competitors, Apple's iOS and Google's Android, who compete for consumers and developers. 2-ER-199–204; 2-ER-216–25; 2-ER-268; 2-ER-269–70; 2-ER-459–60; *see also* 1-ER-140. Although the district court found all of the facts necessary for this foremarket (1-ER-55 (developers choose whether to "create an app for Android versus iOS" or both); 1-ER-48 (consumers "choose between the type of ecosystems"); 1-ER-55 ("very few consumers own both Android and iOS devices")), the court nonetheless rejected it in a single paragraph in the findings of fact, 1-ER-48–49, and a bare citation back to that paragraph in the conclusions of law, 1-ER-130. Its rationale—that a smartphone operating system "is

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monopoly power. *See, e.g.*, *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016, 1018 (6th Cir. 1999).

not licensed or sold to anyone" and consumers consider other features when buying a smartphone, 1-ER-48—is legal error.

The court's reasoning ignores precedent finding product markets in operating systems. *See* 2-ER-204. In *United States v. Microsoft Corp.*, which involved operating systems that Microsoft licensed to PC makers (much as Google licenses its Android operating system to smartphone manufacturers), the D.C. Circuit found that the relevant market consisted of the licensing of those operating systems. 253 F.3d at 52. The circuit court also recognized that Microsoft's browser competed with other internet browsers, even though Microsoft bundled the browser with its operating system rather than selling it separately. *Id.* at 45, 60; *see also Digidyne*, 734 F.2d at 1346 (separate markets existed for operating systems and hardware, even though bundled together).

The district court's claim that Epic "ignores" a market for smartphones is based on a legally incorrect premise. A market for operating systems and a market for smartphones are not mutually exclusive; they can coexist. *See Kodak*, 903 F.2d at 612 (products can "form distinct markets" even if they "must be used together"); *United States v. Cont'l*

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Can Co., 378 U.S. 441, 443-44 (1964) (recognizing markets and submarkets can coexist); *Olin Corp. v. FTC*, 986 F.2d 1295, 1301 (9th Cir. 1993) (same). And in the case of Apple, it is a distinction without a difference because all iPhones use iOS. 1-ER-48–49. As the court recognized, consumers "choose between the type of ecosystems," 1-ER-48; whether consumers choose Apple's ecosystem because they like the iPhone hardware or the operating system matters not. The only relevant question with respect to the foremarket, which comes under *Newcal*'s fourth factor, is whether competition between Apple's ecosystem and Android's constrains Apple's behavior vis-à-vis the billion-plus existing iPhone users and the developers who wish to reach them. As detailed below, the answer to that question is a resounding "no."

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

The district court correctly held that the first "three of the four indicators [of a *Kodak*-style aftermarket] are fulfilled": the aftermarkets are derivative of the foremarket; Apple's restrictions relate to the aftermarkets, not the foremarket; and Apple secures its market power through its relationship with consumers, not contractual provisions obtained in the foremarket. 1-ER-133 (citing *Newcal* factors). The court's

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finding that Epic failed to establish the remaining factor—that fore-market competition does not discipline anticompetitive practices in the aftermarkets—was reversible error. The information barriers and switching costs here are more substantial, and the *Kodak* claim stronger, than in *Kodak* itself.

1. *Information Barriers*

The district court made extensive findings establishing that consumers lack information to make informed purchases when selecting a smartphone or smartphone operating system. The court found that Apple prevents developers from informing consumers of Apple's commission and the availability of making purchases on other platforms, and that consumers do not know this information. *See, e.g.*, 1-ER-5; 1-ER-53–54; 1-ER-121–22. The evidence also showed that consumers cannot assess lifecycle costs for apps—that is, the cost of apps over a smartphone's life—because developers continually introduce new apps, and consumers cannot project what apps they will want to run years after buying a smartphone. 2-ER-272. Further, app distribution costs do not drive fore-market purchasing decisions, because they are low relative to the costs of smartphones. 2-ER-271–72. Apple's own analysis shows that there is

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generally "not an established price in the customer's head" for in-app pur-

chases. *See* 2-ER-285; 3-ER-551–54; 3-ER-548–50. And unlike Kodak,

which charged a supracompetitive price in the aftermarkets directly to

photocopier owners, *see Kodak*, 504 U.S. at 473-76, Apple extracts its

commission from developers who (under Apple's anti-steering rules) can-

not inform iPhone owners about the charge, making lifecycle pricing even

more opaque.

Yet having made these findings, the district court improperly im-

posed two additional requirements. First, it took Epic to task because

"there is no evidence . . . that consumers *are unaware* that the App Store

is the sole means of digital distribution on the iOS platform." 1-ER-134.

But *Kodak* does not require complete ignorance of the defendant's con-

duct in the aftermarket, only that consumers have difficulty "engag[ing]

in accurate lifecycle pricing" in the foremarket. *See Kodak*, 504 U.S.

at 473-76; *Kodak*, 125 F.3d at 1212; *Collins Inkjet Corp. v. Eastman Ko-

dak Co.*, 781 F.3d 264, 278 (6th Cir. 2015) (if the "relevant information is

simply unavailable, it is fair to say that information costs are high").

Second, the district court erroneously stated that Apple had not

changed its policy after locking developers and consumers into iOS.

1-ER-133–34. Epic proved that in 2008, Apple told developers that it does not "intend to make money off the App Store" but rather would be "giving all the money to the developers here and if that 30% of it pays for running the store, well that will be great."[6] 3-ER-734. But Apple has been making billions in profit, at margins exceeding 75% for years. 1-ER-46–47; 1-ER-147.

In any event, neither *Kodak* nor *Newcal* require a shift in policy. *See Kodak*, 504 U.S. at 473-74; *Newcal*, 513 F.3d at 1050. *Kodak* does not "apply[] narrowly to only cases involving '[a]n aftermarket policy change,' because *Kodak* mandated that courts look at 'several relevant factors.'" *Avaya Inc., RP v. Telecom Labs, Inc.*, 838 F.3d 354, 404 (3d Cir. 2016). A policy change is merely one way a plaintiff can show that foremarket competition does not adequately discipline anticompetitive practices in the aftermarket. "The test is more broad: a plaintiff pursuing a *Kodak*-style claim must present evidence to support a plausible economic

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[6] The district court downplayed this statement as "informal," 1-ER-53; 1-ER-133–34 n.584, but it was Mr. Jobs's response to developer fears that Apple's position as "the exclusive distributor for all these applications [would] raise some questions about monopolies," 3-ER-734.

explanation that competition in the primary market is 'disso-ciat[ed] . . . from conditions in the aftermarket.'" *Id.* Other cases are in accord. *See, e.g.*, *Ward v. Apple Inc.*, No. 12-cv-05404-YGR, 2017 WL 1075049, at *7 (N.D. Cal. Mar. 22, 2017); *Teradata Corp. v. SAP SE*, No. 18-cv-03670-WHO, 2018 WL 6528009, at *17 (N.D. Cal. Dec. 12, 2018).

2. *Switching Costs*

The district court's analysis of switching costs is similarly flawed. The court's findings and undisputed record evidence prove high switching costs. *See* 1-ER-50–51; 3-ER-570; 2-ER-390–91. To switch to Android, consumers must abandon a considerable sunk cost—their smartphone and its apps. *See* 3-ER-570; 2-ER-390–91. But that's not all; as the district court correctly found, "it takes time to find and reinstall apps or find substitute apps; to learn a new operating system; and to reconfigure app settings. It is further apparent that one may need to repurchase phone accessories." 1-ER-53. The court also found that Apple sought to compete by making its platforms "stickier," and its executives touted the difficulties in switching in their internal correspondence. 1-ER-50–51; *see also* Facts § I.A above. These costs, which result in persistent lock-in to iOS past the lifespan of a single device, far surpass those in *Kodak*, where a

buyer could readily switch to a different brand once its first Kodak pho-

tocopier became obsolete. 1-ER-53; *Kodak*, 504 U.S. at 476-78.

But as with its assessment of information barriers, the district

court discounted this evidence based on objections with no basis in law.

First, the court criticized Epic for not proving that the switching costs

result from "nefarious" conduct by Apple. 1-ER-51. But the law does not

require that. *See Kodak*, 504 U.S. at 476-77; *Newcal*, 513 F.3d at 1048,

1050. Switching costs lock users in—such that Apple's anticompetitive

conduct is not disciplined by competition in the foremarket—whether

they arise from misconduct by Apple or inherent market features such as

the cost of learning a new operating system or buying a new smartphone.

Courts need only assess those "commercial realities." *See Kodak*,

504 U.S. at 482.

Second, the court complained that Epic "ignor[ed] the issue of cus-

tomer satisfaction," 1-ER-53, and noted that "the features that create

lock-in also make Apple's products more attractive," 1-ER-51. Nothing

in *Kodak* or its progeny suggests that if consumers like the features that

create lock-in, switching costs should be discounted, and the district court

provided no legal support for this position.

Third, the district court said that it "is left entirely in the dark about the *magnitude* of the switching costs and whether they present a meaningful barrier to switching in practice." 1-ER-52. That assertion contradicts the court's findings, which identified numerous barriers with which all modern smartphone users are familiar, 1-ER-53, and confirmed there is no meaningful migration between platforms, 1-ER-55. Moreover, *Kodak* does not require a plaintiff to quantify the magnitude of switching costs; in *Kodak*, it sufficed that plaintiffs "offered evidence that the heavy initial outlay," along with support and parts, made switching costs very high for existing customers. 504 U.S. at 477; *see also Kodak*, 125 F.3d at 1212 (no requirement of quantification in post-trial opinion). Like-wise, in *Newcal*, this Court alluded to "market imperfections" but did not require the plaintiff to quantify switching costs. 513 F.3d at 1050; *see also Virtual Maint., Inc. v. Prime Comput., Inc.*, 11 F.3d 660, 667 (6th Cir. 1993) (testimony about "the substantial cost incurred for hardware, maintenance, and training, most of which would be substantially worth-less if the customer switched to another manufacturer's system" suffi-cient to show switching costs).

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For these reasons, Epic established the fourth *Newcal* factor; fore-market competition does not discipline Apple's conduct downstream. The district court should have concluded there are iOS aftermarkets for app distribution and in-app payment solutions, and Apple has monopoly power in each. These errors require reversal on Epic's Section 2 claims, and entry of judgment on liability for Epic or, at minimum, a remand for the requisite rule of reason balancing.

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

The antitrust laws prohibit tying arrangements, which are "a device used by a seller with market power in one product market to extend its market power to a distinct product market." *Cascade Health*, 515 F.3d at 912. Proof of *per se* tying requires "(1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market." *Id.* at 913; *see also Digidyne*, 734 F.2d at 1338 (applying *per se* test to alleged tie between computer processing units and operating system).

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Apple requires all developers who distribute apps on iOS to use Apple's IAP for digital content, 1-ER-32–36, and Apple enforces that requirement vigorously, 1-ER-28–29. This is a classic tie.

The court erred in finding that app distribution and in-app payment solutions are not two distinct products and therefore cannot be "tied" together—its sole ground for rejecting Epic's tying claims.[7] "[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." *Jefferson Parish*, 466 U.S. at 19.

That test confirms that app distribution platforms and in-app payment solutions are separate products. They perform different functions, have different suppliers and customers, and are used at separate times. 1-ER-37; 1-ER-103. Developers use app distribution platforms to reach consumers and consumers use them to find and install apps. By contrast, developers use in-app payment solutions to facilitate consumers' in-app purchases of distinct digital goods and services that take place after

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[7] Epic unquestionably proved the second and third elements of *per se* tying. Apple has enough economic power to coerce developers into using the tied product, since it can (and does) deny developers access to iOS users if they do not use IAP. *See* 1-ER-32–36; 1-ER-142. And Apple's tie affects billions of dollars of commerce. *See* 1-ER-118; 1-ER-128.

downloading an app—if ever. 1-ER-35; 1-ER-37. Thousands of developers that use Apple's app distribution platform (the App Store) do not use Apple's IAP, either because they offer no in-app purchases or offer physical goods and services, which Apple does not subject to this tie. 1-ER-36.

Moreover, each of the factors identified in *Jefferson Parish*—requests from buyers, market practices, historical evidence, and existence of competing products, 466 U.S. at 18-25—all confirm separate demand. Although the district court found each of these indicators present here, it ignored their legal significance.

First, the district court found that many developers who sell digital goods on iOS have asked to use non-IAP payment solutions. 1-ER-26–27 (Epic); 1-ER-96 (Spotify and Netflix); *see also* 3-ER-533 n.26. The record contains many more such examples. 2-ER-402 ("a number of large developers . . . includ[ing] Facebook, Microsoft, Epic, obviously Spotify, and so forth . . . have come to Apple and have sought to use their own payment solution"); 3-ER-751 (Microsoft); 3-ER-741–43 and 2-ER-303–04 (Match); 3-ER-744–45 (Netflix); 3-ER-574–76 (WeChat and Facebook). Customer requests for provision of the tied product separate from the tying product

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are a fundamental indicator of separate demand. *Jefferson Parish*, 466 U.S. at 22; *Microsoft*, 253 F.3d at 88.

Second, market practices confirm separate demand. As the district court recognized, developers who sell physical goods and services in apps on iOS (such as Amazon and Uber) use Apple's app distribution services but not Apple's IAP. 1-ER-36; *see also* 3-ER-535; 2-ER-400–01; 2-ER-276–77. The court also found that "IAP is not integrated into the App Store," and Apple "uses the system in other 'stores' on iOS devices, such as 'the iTunes Store on iOS, Apple Music, iCloud or Cloud services' and 'physical retail stores.'" 1-ER-68. Thus, in-app payment solutions are utilized separately from app distribution. *See Jefferson Parish*, 466 U.S. at 23 n.39; *Kodak*, 504 U.S. at 462; *Microsoft*, 253 F.3d at 88.

Third, historical evidence shows separate demand. The district court found that Apple distributed apps through the App Store before IAP was created, at a time when in-app payment solutions other than IAP were used. 1-ER-69; *Kodak*, 504 U.S. at 462.

Fourth, many products would compete with IAP absent Apple's restrictions, which confirms separate demand. *See Jefferson Parish*, 466 U.S. at 22-23 & n.39; *Kodak*, 504 U.S. at 462; *PSI Repair Servs., Inc. v.*

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Honeywell, Inc., 104 F.3d 811, 816 (6th Cir. 1997). The district court found that "[c]ompeting game stores could compete on features . . . including . . . in-app payment processing." 1-ER-148. The record contains numerous examples of competitor in-app payment solutions—including from Epic and Match. 1-ER-316; 2-ER-300–01.

None of the district court's grounds for concluding that the products are not separate withstand scrutiny. The court reasoned that "the App Store is a two-sided transaction platform" under *Amex*, "which cannot be broken into pieces to create artificially two products." 1-ER-157. That is a fundamental misreading of the case. *Amex* held that the two sides of a platform—here, the developer and consumer side of app distribution— must be treated as a single market. 138 S. Ct. at 2287. But app distribution and in-app payment solutions are not two sides of a single platform, and even Apple never contended otherwise. *Amex* did not turn a two-sided market into a black hole that swallows all adjacent products and services.

According to the district court, "the fact that some developers like Facebook and Spotify have tried to avoid Apple's commission by bypassing IAP is not evidence that there is separate demand for IAP, only that

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developers would prefer not to pay Apple a commission." 1-ER-158 n.621.
But the court found there are many non-price reasons why developers
demand payment methods other than IAP, including customer service,
security, and cross-platform convenience. 1-ER-43; 1-ER-119–20; *see also*
3-ER-751–52 (Microsoft asking to use its payment solution).

The district court also noted that "IAP is . . . a comprehensive sys-
tem to collect commission and manage in-app payments." 1-ER-157.
That conflates one of Apple's purported justifications for its in-app pay-
ment restrictions—that IAP provides an "efficient method for collecting
its commission," 1-ER-120—with the distinct question whether app dis-
tribution and in-app payment solutions are separate products. Antitrust
law makes clear that an inquiry into whether there are separate products
does not encompass consideration of procompetitive justifications or an-
ticompetitive effects. 10 Areeda & Hovenkamp ¶ 1741; *see also Microsoft*,
253 F.3d at 89 ("[T]he separate-products analysis is supposed to perform
its function as a proxy without embarking on any direct analysis of effi-
ciency."). And even if IAP does more than just process payments, that
does not mean it is necessarily part of app distribution.

Finally, the district court noted that the "IAP system is not bought or sold but it is integrated into the iOS devices." 1-ER-157. But whether two products or services "are functionally linked . . . is not in itself suffi-cient" to determine whether separate products are involved. *Jefferson Parish*, 466 U.S. at 19 n.30. The Supreme Court "ha[s] often found ar-rangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." *Id.* (collecting cases); *see also Kodak*, 504 U.S. at 463; *In re Data Gen. Corp. Antitrust Litig.*, 490 F. Supp. 1089, 1104 (N.D. Cal. 1980), *aff'd sub nom. Digidyne*, 734 F.2d 1336.

Because each element of a *per se* tying claim is satisfied, the Court should reverse, enter judgment on liability for Epic on the tying claim, and remand for determination of the appropriate injunctive remedy. Even if the rule of reason applies to Epic's tying claim (it does not), the analysis tracks Epic's Section 1 claim challenging Apple's prohibition against competing in-app payment solutions, and thus the result is the same. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197-1200 (9th Cir. 2012); Argument § I.B above.

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IV. THE DISTRICT COURT SHOULD HAVE DETERMINED THAT APPLE'S CONTRACTUAL RESTRICTIONS ARE UNLAWFUL, VOID AS AGAINST PUBLIC POLICY, AND UNCONSCIONABLE.

The district court found for Apple on its counterclaims for breach of contract and declaratory relief because Epic breached certain provisions of the DPLA by enabling a non-IAP payment option in *Fortnite* on iOS in August 2020. 1-ER-176; 1-ER-180–82. If this Court reverses on Epic's Section 1, Section 2, or tying claims (*see* Argument §§ I-III above), it should vacate the counterclaim rulings because the provisions are unlawful, void as against public policy, and unconscionable. *See* 2-ER-246–47; *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982); *Lhotka v. Geographic Expeditions, Inc.*, 181 Cal. App. 4th 816, 821 (2010).

CONCLUSION

The district court's judgment on Epic's Sherman Act claims should be reversed and judgment of liability entered in Epic's favor with a remand to determine the appropriate injunctive remedy. The district court's judgment on Apple's breach of contract and declaratory judgment counterclaims should be reversed and judgment entered in Epic's favor. If, however, the Court agrees with Epic that the district court erred but

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believes further analysis is required, the Court should vacate and remand with instructions.

January 20, 2022   Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 13,999 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 and complies with the word limit of Cir. R. 28.1-1.

January 20, 2022   /s/ Katherine B. Forrest
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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 January 20, 2022. All

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accomplished by the appellate CM/ECF system.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM

SECTION 1 OF THE SHERMAN ACT
15 U.S.C. § 1 (2018)
§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

SECTION 2 OF THE SHERMAN ACT
15 U.S.C. § 2 (2018)
§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.