No. 21-16506

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EPIC GAMES, INC.,
*Plaintiff-counter-defendant-Appellant*,

v.

APPLE, INC.,
*Defendant-counter-claimant-Appellee*.

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

# BRIEF OF UTAH AND 34 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-COUNTER-DEFENDANT-APPELLANT AND REVERSAL

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## INTRODUCTION AND INTEREST OF *AMICI* STATES

*Amici curiae*, the State of Utah and 34 other states, respectfully submit this brief in support of plaintiff-counter-defendant-appellant Epic Games, Inc.

Epic sued defendant-counter-claimant-appellee Apple, Inc. over Apple's practices relating to its iOS App Store. Following a sixteen-day bench trial, the district court ruled in favor of Apple on the nine counts alleging violations of state and federal antitrust laws and in favor of Epic on the remaining California unfair competition count. Epic's flagship video game *Fortnite* had more than 115 million registered players accessing *Fortnite* on an iOS device before Apple removed *Fortnite* from the App Store. Each of the *Amici* States has consumers that use the iOS platform and has an interest in ensuring a competitive marketplace for its consumers.

Further, the attorneys general of the *Amici* States are authorized by Congress to bring federal antitrust actions to protect their citizens from the harmful effects of anticompetitive conduct. 15 U.S.C. § 15c. *Amici* States thus have a strong interest in ensuring that federal courts apply clear and effective standards for liability under the Sherman Act,

15 U.S.C. §§ 1 *et seq.*, so that they may effectively enforce antitrust laws in all aspects of the economy, including the smartphone industry which, with hardware, products, and services, is approaching a trillion dollars annually.

Accordingly, *Amici* States file this brief to explain why this Court should reverse the district court's order.

## SUMMARY OF THE ARGUMENT

While the *Amici* States generally support Epic's arguments to reverse the district court's decision, the States' brief focuses on just two of those reasons.

*First*, the district court erred in deciding that Section 1 of the Sherman Act does not apply to a "unilateral contract." That's wrong under settled canons of statutory interpretation. In relevant part, Section 1 prohibits "[e]very contract, combination, . . . conspiracy, in restraint of trade." The Act does not define "contract," but the term had a broad, accepted common law meaning when the Act became law in 1890. Then, as now, a unilateral contract was simply one of various types of contracts—bilateral, implied, express, formal, informal—that were legally enforceable. Per rules of statutory construction, Congress adopted this common

law understanding when using the term "contract" in Section 1. Likewise, the interpretive canon requiring statutory terms be read in context shows that Section 1's broad terms—"[e]very contract" and "combination" or "conspiracy"— meant to capture a wide range of agreements that could harm competition.

The district court's interpretation also runs counter to Supreme Court Section 1 jurisprudence. More than 100 years ago, the Supreme Court emphasized that Section 1 embraced "every conceivable contract." The district court's error, however, seems to stem from the Court's later discussion of wholly unilateral *conduct*—coordinated conduct among a single company's officers. A single firm cannot conspire for purposes of a Section 1 violation because such coordinated conduct does not merge economic powers of separate economic actors. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). But unilateral *conduct* of a single economic actor is different than unilateral *contract* between separate economic actors.

Further, excluding contracts like Apple's simply because Apple "unilaterally imposed" the terms makes bad antitrust public policy. Not only does it needlessly complicate the Section 1 analysis, it also creates

an antitrust paradox. Firms with sufficient market power can unilaterally dictate the terms of a contract. The district court's holding blows a hole through Section 1; paradoxically, firms with enough market power to unilaterally impose contracts would be protected from antitrust scrutiny—precisely the firms whose activities give the most cause for antitrust concern.

*Second*, the district court also misapplied the rule of reason test by never weighing the anticompetitive and purported procompetitive effects of Apple's conduct. The whole point of rule of reason analysis has always been to assess the challenged restraint's effects on competition. The Supreme Court has frequently reiterated that the rule of reason involves weighing all the circumstances of the case to properly determine the restraint's net impact.

To be sure, the Supreme Court has sometimes described the rule of reason analysis as a three-part burden shifting test. But those three steps, the Court has emphasized, are not inflexible and do not substitute for careful analysis based on the circumstances of each case. That kind of careful balancing is crucial here because the district court found both anticompetitive and procompetitive effects. Weighing the relevant facts

is therefore the only way to determine whether the challenged conduct overall poses an undue restraint on trade in violation of Section 1.

As Epic points out, Apple amassed billions in supracompetitive profits from one billion iPhone users. Without balancing, this type of immense harm to consumers can go unanswered with just the slightest showing of procompetitive benefit. The Court should require Apple to account for its conduct under a complete rule of reason analysis.

## ARGUMENT

### I. The district court erred in holding that Section 1 of the Sherman Act does not apply to "unilateral contracts."

To establish liability under Section 1 of the Sherman Act, "a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was an unreasonable restraint of trade." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016). The district court held that Epic could not satisfy element one (existence of an agreement) because the Developer Product Licensing Agreement (DPLA) between Epic and Apple was a "unilateral contract." Order 142. Because Apple had dictated the terms to developers—take it or leave it if Epic wanted to distribute games on the iOS platform—the court held that it was not a Section 1 contract under "antitrust jurisprudence." *Id*.

A unilateral contract is one in which a promise is made in exchange for an act. The district court wrongly found that the DPLA (which was actually a bilateral contract of adhesion with exchange of promises by both Apple and developers) was a "unilateral contract." *See infra* Section I.C. But regardless of this finding, the district court's legal holding—that "unilateral contracts" are exempt from Section 1—is wrong as a matter of law: (1) Section 1 "contracts" include unilateral contracts under canons of statutory interpretation; (2) excluding unilateral contracts from Section 1 is inconsistent with Supreme Court precedent; and (3) an exception for unilateral contracts or contracts of adhesion is bad public policy as it needlessly complicates and impedes Section 1 enforcement of antitrust violations.

### A. Under rules of statutory interpretation, a Section 1 "contract" includes unilateral contracts.

Section 1 of the Sherman Act prohibits "[e]very 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." 15 U.S.C. § 1. There is no question that Epic and Apple had a contract. The 79-page written and executed DPLA contained "complex and comprehensive provisions addressing not only intellectual property rights, but those

relating to marketing, agency, indemnity, and myriad other considerations." Order 29. But because Epic or any other developer must accept the DPLA's "provisions (including the challenged restrictions) to distribute games on iOS," the district court found that the DPLA is a "unilateral contract" and not subject to Section 1. *Id.* at 142.

Even if Epic's contract were correctly categorized as "unilateral," excising unilateral contracts from Section 1 offends the plain text of the statute. Although scholars note that antitrust cases focus on economic policy with sometimes little more "than a passing citation to the statutory text," Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. Contemp. Legal Issues 619, 620 (2005), that does not excuse courts from interpreting the Sherman Act in accord with the actual terms of its text. Justice Gorsuch expounded the sober duty of statutory interpretation: "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020).

Here, rules of statutory interpretation direct that Section 1 includes unilateral contracts for two reasons. ***First***, the term "contract" encompassed unilateral contracts at common law in 1890 when the Sherman Act was adopted. The Sherman Act does not define the term "contract." Thus the "age-old principle" applies "that words undefined in a statute are to be interpreted and applied according to their common-law meanings." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320 (2012). As Justice Jackson explained:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

*Morissette v. United States*, 342 U.S. 246, 263 (1952). The term "contract," heavy laden with centuries of legal tradition, is a transplant of the common law that "brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

The common law recognized that legally enforceable contracts included both bilateral and unilateral contracts. The most famous unilateral contract hypothetical–enjoyed by law students everywhere—is Wormser's Brooklyn Bridge: "Suppose A says to B, 'I will give you $100 if

you walk across the Brooklyn Bridge,' and B walks—is there a contract?" Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 Yale L.J. 136, 136 (1916). Professor Wormser noted that "unilateral contracts are not infrequently met with in the practice of law," *id.* at 142—they were alive and well in the 19th century. *Id.* at 137-42 nn.2-7 (citing cases); *Bilateral and unilateral contracts*, 1 Williston on Contracts § 1:17 (4th ed.) (distinction between bilateral and unilateral contracts fully recognized by 17th century).

More important, a unilateral contract at common law was simply viewed as one of various kinds of contract. *See* Restatement (First) of Contracts § 1 cmt. e (1932) ("The term contract is generic. As commonly used, and as here defined, it includes varieties described as voidable, unenforceable, formal, informal, express, implied (*see* Comment a to 5) unilateral, bilateral."). For example, in *Richardson v. Hardwick*, the Supreme Court affirmed dismissal of a bill of complaint involving a unilateral contract relating to the purchase of land. 106 U.S. 252, 255 (1882). The appellant had failed to pay within the time limit: "In suits upon unilateral contracts, it is only where the defendant has had the benefit of the

consideration for which he bargained that he can be held bound." *Id.* (citing *Jones v. Robertson*, 17 L. J. Exch. 36; *Mills v. Blackhall*, 11 Q. B. 358; *Morton v. Burr*, 7 Adol. & E. 23; *Kennaway v. Treleavan*, 5 Mees. & W. 501). Although the Court recognized the application of unilateral contract principles, it still repeatedly referred to the written agreement as "a contract" or "the contract" without distinction. *Richardson*, 106 U.S. at 252-54. Accordingly, Section 1's "contract" is best understood in 1890 to include unilateral contracts.

***Second***, context supports a broad definition of "contract" that includes a "unilateral contract." "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The words surrounding the term "contract" support Section 1's application to the entire universe of contracts. To begin, Section 1 expressly extends to "[e]very contract." 15 U.S.C. § 1. The preceding word "every" is comparable to "any," which indicates "'an expansive meaning,' bringing within a statute's reach *all* types of the item (here, [contract]) to which the law refers." *Yates v.*

*United States*, 574 U.S. 528, 555 (2015) (Kagan, J., dissenting); *see* 73 Am. Jur. 2d *Statutes* § 150 (2021) ("every" is a term of inclusion).

Next, in addition to "contract[s]," the statute applies to every "combination in the form of trust or otherwise, or conspiracy." 15 U.S.C. § 1. By following "contract" with the words "combination" and "conspiracy," Congress sought to capture a wide range of potential agreements that could restrain trade. Applying a "narrow" definition to contract "clashes strongly" with the "sweeping" language on either side of the term. *See United States v. Rodgers*, 466 U.S. 475, 480 (1984). Thus, context shows that Congress wrote the Sherman Act with the broadest of brushes.[1]

In short, all roads of statutory interpretation lead to the most expansive meaning of "contract" possible that includes unilateral contracts.

[1] Nor does the rule of lenity save the district court's error. The rule of lenity instructs that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000). But that rule only applies when, "after all legitimate tools of interpretation have been exhausted, a reasonable doubt persists regarding whether Congress has made the defendant's conduct a federal crime." *Abramski v. United States*, 573 U.S. 169, 264 (2014) (Scalia, J., dissenting) (cleaned up). Applying tools of interpretation, there is no ambiguity—"contract" under Section 1 includes a unilateral contract.

### B. Excluding unilateral contracts from Section 1 "contract" is inconsistent with Supreme Court precedent.

Interpreting Section 1 to exclude unilateral contracts is inconsistent with Supreme Court precedent. Adopted in 1890, the Act responded to the harmful effects of a wide variety of anticompetitive mechanisms used in the 19th Century. *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911). The Court observed that Section 1's language is "broad enough to embrace ***every conceivable contract*** or combination which could be made concerning trade or commerce or the subjects of such commerce." *Id.* at 60 (emphasis added). It is because of this breadth that the Supreme Court has long read Section 1 to prohibit only "undue" restraints of trade, applying a "rule of reason" analysis. *Id.* at 59-62; *see Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (without the rule of reason, Section 1 "would outlaw the entire body of private contract law").

As Justice Scalia explained, "[t]he term 'restraint of trade' in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by ***quite different sorts of agreements*** in varying times and circumstances." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717,

731 (1988) (emphasis added). Thus, while the Court has shaped the contours of "restraint of trade" as the limiting principle for Section 1, the Court has not restricted the *sweep* of Section 1's "every contract."

And the Supreme Court's discussion of unilateral and concerted conduct under Section 1 does not limit that sweep. The district court here relied on the Supreme Court's explanation of unilateral activity:

> "Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2" because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." . . . Thus, even unreasonable unilateral restraints are not subject to antitrust scrutiny unless "they pose a danger of monopolization."

Order 141-42 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768-69 (1984)). But in excluding unilateral contracts from Section 1's reach, the district court mistakes *Copperweld's* discussion of unilateral *conduct* to mean unilateral *contract*.

In *Copperweld*, the Supreme Court held that a parent company and its wholly owned subsidiary were incapable of conspiring for purposes of Section 1. 467 U.S. at 777. Section 1 does not proscribe coordinated conduct among those of the *same company*: "The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power

that was previously pursuing divergent goals." *Id.* at 769. Thus, Section 1 "does not reach conduct that is 'wholly unilateral.'" *Id.* at 768 (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968)).

Unilateral contracts, by contrast, involve different economic actors. A party choosing to accept a unilateral contract does so based on its own economic interests. Here, there is no question that Apple and developers are separate economic actors with separate economic interests. So however Apple's DPLA is viewed (as a unilateral contract or correctly categorized as a bilateral contract of adhesion), it did not constitute wholly unilateral conduct that excused Apple from Section 1 scrutiny.

Thus, excluding an entire body of contracts from Section 1 contradicts the statutory text and is inconsistent with Supreme Court precedent.

### C. Excluding unilateral contracts or contracts of adhesion from Section 1 is bad public policy because it would impede antitrust enforcement.

It would be bad public policy to exclude unilateral contracts from Section 1 scrutiny because it would both complicate and impede effective antitrust enforcement. As an initial matter, it would add an unnecessary—and sometimes complicated—element to the Section 1 analysis.

After determining whether there was an agreement, the court would then have to determine whether that agreement was a unilateral contract.

"A unilateral contract results from an exchange of a promise for an act, while a bilateral contract results from an exchange of promises." *Bilateral and unilateral contracts*, 1 Williston on Contracts § 1:17 (4th ed.). But scholars have called the distinction between bilateral and unilateral contracts artificial and false. *See* Samuel J. Stoljar, *The False Distinction Between Bilateral and Unilateral Contracts*, 64 Yale L.J. 515, 516 (1955) ("If *ex hypothesi* a contract does exist, what difference does it make, in terms of legal consequences, whether two promises were consideration for each other, or no promise was consideration for the promisor's promise?").

Indeed, modern contract law has moved away from distinguishing between bilateral and unilateral contract. Commentators have questioned the distinction's utility and noted the confusion it creates. *See* Restatement (Second) of Contracts § 1, Reporter's Note (1981). That is because "in some cases a promise may not readily be characterized as

clearly bilateral or clearly unilateral." *Bilateral and unilateral contracts*, 1 Williston on Contracts § 1:17 (4th ed.).

Of course, in this case, the district court's finding that the DPLA was a "unilateral contract" is wrong. Order 142. The fact that Apple had greater bargaining power in negotiating—"unilaterally" imposing the terms—does not make the contract unilateral. *Id.* at 141. The district court recognized that *both* parties made promises under the DPLA. The developers promised to comply with the terms of the agreement, use the software consistent with Apple's rights, create apps that can only be distributed through the App Store, submit apps for review, configure apps to use IAP, and not to hide or misrepresent features; Apple, in return, promised membership in its developer program to distribute apps with access to application programming interfaces. Order 28-30. The DPLA was a bilateral exchange of promises.

But regardless of how a contract is categorized, it is bad public policy to excise from Section 1 those contracts where one party unilaterally imposes the terms, i.e., contracts of adhesion. Such a limitation would complicate and impede enforcement of antitrust violations against firms

that exercise greater bargaining power in contract negotiations. Bargaining power is never fully equal in contractual negotiations. And the district court's holding leaves many questions unanswered about the parameters of "unilaterally imposed" terms: Must courts dissect the contract negotiations to see who proposed which terms? What if *some* of the terms were negotiated?

Further, it creates an enforcement impossibility. Firms with sufficient market power can unilaterally impose contractual terms. The district court's holding creates a paralyzing paradox: once a firm acquires market power and unilaterally imposes a contract, then it is no longer subject to Section 1. Affirming this paradox would gut the Sherman Act and prevent the *Amici* States from enforcing antitrust violations by large firms that harm their citizens.

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This Court should reverse the district court's holding that Section 1 does not apply to unilateral contracts or unilaterally imposed contracts because it violates rules of statutory interpretation and conflicts with Supreme Court jurisprudence and sound public policy considerations.

## II. The district court's rule-of-reason analysis failed to balance the overall competitive effects of Apple's restraints.

The Court should reverse and remand for another reason. The district court's rule of reason analysis stopped short of the most important inquiry in a case like this: weighing all the relevant facts to determine whether the challenged restraints are unduly anticompetitive. Without that crucial step, the injuries of the *Amici* States' citizens go unheard and Apple gets to continue its substantial anticompetitive conduct based on relatively feeble procompetitive justifications.

The whole purpose of rule of reason analysis is to assess the challenged restraint's "actual effect on competition." *NCAA v. Alston*, 141 S. Ct. 2141, 2155 (2021) (internal quotation marks omitted). That goal has remained preeminent since the rule's inception more than a century ago. *See, e.g., Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) (stating the "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition"); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 691 (1978) (stating "the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one

that promotes competition or one that suppresses competition"); *NCAA v. Bd. of Regents*, 468 U.S. 85, 103-04 (1984) (explaining that the rule of reason inquiry is "whether or not the challenged restraint enhances competition"); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (under rule of reason the "finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition"); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (rule of reason analysis determines "whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition" (internal quotation marks omitted)).

Though the goal is "[a]lways" the same, *Alston*, 141 S. Ct. at 2151, the scope of a rule of reason inquiry can vary depending on the nature of the restraint. A quick look may suffice for conduct at the competitive extremes—restraints either so obviously anticompetitive or harmless that more detailed analysis is unnecessary. *Id.* at 2155-56. But for all the other restraints "in the great in-between," *id.* at 2155, rule of reason analysis demands more. The test, the Supreme Court has repeatedly stated, requires the fact finder to weigh "all of the circumstances of a case" to assess the restraint's competitive effects. *Leegin*, 551 U.S. at 885

(quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)); *see also Khan*, 522 U.S. at 10 (rule of reason "take[s] into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect"); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 343 (1982) (stating "the rule of reason requires the factfinder to [consider] all the circumstances of the case"). By "design and function" the rule of reason's balancing of all the circumstances "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin*, 551 U.S. at 886.

To be sure, the Court has "sometimes" described the rule of reason as a three-part burden-shifting test. *Alston*, 141 S. Ct. at 2160. Under that framework, the plaintiff first proves the challenged restraint "has a substantial anticompetitive effect"; the defendant must then show "a procompetitive rationale for the restraint"; after which the plaintiff carries the burden of proving there are "less anticompetitive" ways for defendant to achieve the "procompetitive efficiencies." *Id.* (internal quotation marks omitted).

While acknowledging its occasional use of this test, the Supreme Court emphasized that the three steps "do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis." *Id.* The rule of reason should always fit the case, not the other way around. Indeed, the "whole point of the rule of reason is to furnish 'an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint'" to assess whether it unduly harms competition. *Id.* (quoting *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 781 (1999)).

The district court acknowledged most of this. The court even recited *Alston's* warning not to rigidly apply the three-part burden-shifting analysis. *See, e.g.,* Order 140-41, 143. Yet that's exactly what the court ended up doing—analyzing only the three steps. *Id.* at 141-150. The court never weighed all the relevant facts in this case to make the critical determination—whether the challenged restraints overall help or harm consumers.

Admittedly, rigidly applying the three-part test without any balancing may not matter much in most antitrust cases where the plaintiff fails the first step and can't show a substantial anticompetitive effect. *See Alston*, 141 S. Ct. at 2161 (noting amicus brief asserting that courts

decided 90% of antitrust cases on this ground over the past 45 years). If there are no anticompetitive effects, there's nothing to balance against the restraint's purported benefits, and no possible Section 1 violation.

But that's not the situation here. The district court concluded that the challenged restraints had anticompetitive effects and some procompetitive justifications. Order 143-47, 149-50. The court then reached the third step and determined that Epic had not shown adequate less restrictive alternatives Apple could use. *Id.* at 147-49, 150. So the court stopped there and held that the challenged restraints did not violate Section 1. *Id.* at 149, 150.

That truncated analysis, however, did not fully address the rule-of-reason's purpose—to "distinguish[] between restraints" that harm consumers and those that help. *Leegin,* 551 U.S. at 886. That's why weighing all the circumstances remains critical, so the court can determine the restraint's overall competitive effects. In a case like this—with anticompetitive and purported procompetitive effects—the absence of an adequate less restrictive means cannot logically be the deciding factor.

As one perceptive district court put it, "[i]f no balancing were required at any point in the [rule of reason] 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 Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 2141 (2021).

That is not and never has been the law. Nor should it be. It would facilitate what Section 1 forbids—undue restraints of trade. Gabe Feldman, *The Demise of the Rule of Reason*, 24 Lewis & Clark L. Rev. 951, 954 (2020). ("By allowing restraints that are collateral to relatively small procompetitive aims but are overwhelmingly net anticompetitive, the [less restrictive alternatives] formulations create problems that may neuter the competition-protecting function of antitrust law.").

The Ninth Circuit, in line with the Supreme Court's precedent, has required balancing as part of the rule of reason analysis—where a plaintiff has not met its "burden of advancing viable less restrictive alternatives," the court "must balance the harms and benefits of the [challenged

restraints] to determine whether they are reasonable." *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001); *see also Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) ("Finally, the court must weigh the harms and benefits to determine if the behavior is reasonable on balance."); *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1391 (9th Cir. 1984) (stating rule of reason requires "a balancing of the arrangement's positive and negative effects on competition" (internal quotation marks omitted)). The Court should reverse and require the district court to follow suit.

Epic's brief highlights what a proper balancing test would look like in this case. And *Amici* States have a significant interest in seeing that the test occurs. Apple's conduct has harmed and is harming mobile app-developers and millions of citizens within the *Amici* States' boundaries. Meanwhile Apple continues to monopolize app-distribution and in-app-payment solutions for iPhones, stifle competition, and amass supracompetitive profits within the almost trillion-dollar-a-year smartphone industry. Apple must account for its conduct under a complete rule of reason analysis.

Finally, endorsing the district court's approach here could frustrate future enforcement actions in the Ninth Circuit. By stopping at the less-restrictive means inquiry and failing to balance the overall competitive effects, the district court's analysis "morph[s] the role of antitrust law from an *ex ante* deterrent of net anticompetitive behavior to an *ex post* regulator of procompetitive business decisions." Feldman, *The Demise of the Rule of Reason*, 24 Lewis & Clark L. Rev. at 954. Firms with the most egregious anticompetitive behavior could escape liability by showing only the slightest procompetitive benefit.

## CONCLUSION

For the foregoing reasons, the district court's order should be reversed.

DATED this 27th day of January, 2022.

Respectfully submitted,

*/s/ Melissa A. Holyoak*

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## CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,856 words.

Dated: January 27, 2022

*/s/ Melissa A. Holyoak*
Melissa A. Holyoak
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## CERTIFICATE OF SERVICE

I certify that on January 27, 2022, I caused service of the forgoing brief to be made by electronic filing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all parties with an email address of record, who have appeared and consent to electronic service in this action.

Dated: January 27, 2022

*/s/ Melissa A. Holyoak*
Melissa A. Holyoak
Solicitor General