Nos. 21-16506 & 21-16695

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPIC GAMES, INC.,

Plaintiff/counter-defendant,
Appellant/cross-appellee,

v.

APPLE INC.,

Defendant/counter-claimant,
Appellee/cross-appellant.

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

BRIEF OF *AMICI CURIAE* THE CONSUMER FEDERATION OF AMERICA AND DEVELOPERS IN SUPPORT OF EPIC GAMES, INC.'S BRIEF ON APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *amici curiae* state that they have no parent corporation and no publicly held corporation owns 10% or more of their stock.

Dated: January 27, 2022

/s/ *Peter D. St. Phillip, Jr.*
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Apple has granted "blanket consent to the filing of *amicus curiae* briefs in support of either party or no party, provided the *amicus curiae* brief is timely and otherwise complies with the Federal Rules of Appellate Procedure and this Court's local rules." ECF No. 33.

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* declare that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (3) no person—other than the amici curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Consumer Federation of America ("CFA") is an association of non-profit consumer organizations that was established in 1968 to advance consumer interests through research, advocacy, and education. For over two decades, CFA has supported meaningful consumer protection in digital markets.[1]

Amicus Curiae Basecamp is a Chicago, Illinois-based web software company. Founded in 1999, Basecamp provides project management web application services online and through its mobile apps.

Amicus Curiae Knitrino is a Seattle, Washington-based company that hosts online interactive knitting communities. Cue Knitrino is a mobile app that Knitrino operates.

Amicus Curiae Match Group, Inc. ("Match") is a Dallas, Texas-based online dating service which operates dating web sites in over 50 countries. Originally founded in 1993, Match operates www.match.com and mobile apps. Basecamp, Knitrino, and Match each sponsor mobile apps that are available for consumers to download and operate in Apple's App Store.

[1] *See* Mark Cooper, *Antitrust as Consumer Protection in the New Economy: Lessons from the Microsoft Case,* 52 HASTINGS L.J. 813 (2001) (article written by CFA's Director of Research, analyzing the antitrust implications of the *Microsoft* decision).

Amici curiae Consumer Federation of America, and app developers Basecamp, Knitrino, and Match, respectfully submit this brief in support of Epic Games, Inc. ("Epic"). *Amici curiae* fully support and incorporate by reference all arguments made by Epic in its Opening Brief.

INTRODUCTION

The *amici curiae* submit this brief as app developers and an advocacy group dedicated to promoting consumer interests in order to present the Court with the views of significant economic victims of Apple's restrictive practices relating to the use of apps on its iOS system used on its popular iPhone. The district court made factual findings that supported Epic's case that Apple's conduct violated long-standing principles of antitrust law, correctly concluding that app developers paid billions of dollars of supracompetitive rents to Apple. But remarkably, the district court accepted the pretextual procompetitive justifications Apple presented to permit its profiteering at app developers' and consumers' great expense.

The district court was wrong. If it had conducted the requisite balancing under the rule of reason, it would have found that the massive harm caused by Apple's policies dwarfs the purported justifications that Apple put forth. Epic's brief ably demonstrates how very little substance lies behind those justifications. In this brief, *amici* aim to shed additional light on the other side of the rule of reason balancing test: the magnitude of the harm to consumers, developers, and

competition itself caused by Apple's misconduct. Apple's anticompetitive policies increase consumer costs; reduce consumer choice; reduce the quality of the consumer experience; and reduce innovation. All of these harms to the billion-plus consumers who use Apple's iPhone are equally harmful to app developers, who are prevented from using more, better, and cheaper options to distribute and facilitate payment within their apps. Apple's prohibition of any alternative app stores, payment methods and forms of app distribution, and its anti-steering policies precluding app developers from communicating with consumers about alternative payment options, combine to inflict staggering damage on the market. The district court correctly recognized that these policies were anticompetitive and harmful: enough so to enjoin the anti-steering provisions under the UCL, but failing to understand the full scope of the harm all of Apple's policies cause in order to find liability under the Sherman Act.

Apple is not the first technology company to maintain its monopoly status through unlawful anticompetitive conduct, not just the quality of its products. Microsoft, for example, was held liable twenty years ago for Sherman Act violations in many ways reminiscent of Apple's exclusionary conduct here. As the New York Times put it in an article entitled "What the Microsoft Antitrust Case Taught Us," "keeping markets open can require a trustbuster's courage to take

decisive action even against a very popular monopolist."[2] The D.C. district court's and Court of Appeals' actions in holding Microsoft to account improved competition in the market for billions worldwide—without, of course, causing the demise of Microsoft. This Court can and should do the same here.

ARGUMENT

In August 2020, Apple became the first U.S. company worth more than $2 trillion.[3] Its astronomical and ever-climbing profits (leading its valuation to double in just two years, from $1 trillion in 2018[4]) come straight from the pockets of over a billion consumers worldwide. Even with over 80% of apps available to download for free, consumers still managed to spend an estimated $85.1 billion in 2021 on in-app purchases, subscriptions, and premium apps in Apple's app store.[5] Every one of those transactions is tainted by the restrictions Apple places on app developers' ability to offer consumers alternative payment options and ways to obtain their apps.

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[2] Richard Blumenthal & Tim Wu, *What the Microsoft Case Taught Us,* N.Y. TIMES, May 18, 2018.

[3] Sergei Klebnikov, Apple *Becomes First U.S. Company Worth More Than $2 Trillion*, FORBES, Aug. 19, 2020, https://www.forbes.com/sites/sergeiklebnikov/2020/08/19/apple-becomes-first-us-company-worth-more-than-2-trillion/?sh=4b36b58d66e6.

[4] *Id.*

[5] L. Ceci, *Worldwide gross app revenue of the Apple App Store from 2017 to 2021*, Statista, December 13, 2021, https://www.statista.com/statistics/296226/annual-apple-app-store-revenue/#:~:text=Apple%20App%20Store%3A%20annual%20gross%20app%20revenue%202017%2D2021&text=Between%202017%20and%202021%2C%20global,and%20premium%20apps%20in%202021.

The district court correctly found "that common threads run through Apple's practices which unreasonably restrain[] competition and harm consumers, namely the lack of information and transparency about policies which effect [sic] consumers' ability to find cheaper prices, increased customer service, and options regarding their purchases. Apple employs these policies so that it can extract supracompetitive commissions from this highly lucrative gaming industry." *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR, 2021 WL 4128925, at *81 (N.D. Cal. Sept. 10, 2021) ("Op."). Yet it somehow stopped short of actually imposing liability under the Sherman Act. *Id.* at *119. In *amici*'s view, that error stems in part from the district court's failure to appreciate the full scope and severity of the harm that Apple's anticompetitive policies cause.

I. THE SPECIFIC HARMS SUFFERED BY CONSUMERS AND APP DEVELOPERS AS A RESULT OF APPLE'S POLICIES

Apple's policies increase consumer costs.

Cost of course is a crucial factor. As Epic demonstrated when it temporarily avoided Apple's restrictions and offered its own alternative payment system in its *Fortnite* app on iOS, it was able to offer the same game to consumers at a 20% discount.[6] Research indicates that other developers similarly pass on Apple's

[6] Andrew Webster, *Epic offers new direct payment in Fortnite on iOS and Android to get around app store fees*, THE VERGE, Aug. 13, 2020, https://www.theverge.com/2020/8/13/21366259/epic-fortnite-vbucks-mega-drop-discount-iphone-android.

increased costs to consumers.[7] To name just a few more examples, app developer Down Dog testified at trial in the district court that its average subscription price for Apple users is roughly 15% higher than on Android due to Apple's prohibition on telling users about discounted purchase options on the web. The district court accordingly concluded that "evidence shows Apple's anti-steering restrictions artificially increase Apple's market power by preventing developers from communicating about lower prices on other platforms." Op. at *62. Unsurprisingly, then, as soon as the district court issued its now-stayed injunction against Apple's anti-steering provision, *amicus curiae* Match announced plans to offer lower prices to customers who pay directly.[8] That developers were able to offer discounts as high as 15% and 20% outside of Apple's In-App Purchase system ("IAP") gives a sense of the sheer magnitude of the profits that Apple is skimming from consumers

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[7] Damien Geradin and Dimitrios Katsifis, *The Antitrust Case against the Apple App Store (Revisited)*, TILEC Discussion Paper No. DP2020-035, December 7, 2020, at 2, Available at SSRN: https://ssrn.com/abstract=3744192 or http://dx.doi.org/10.2139/ssrn.3744192. *See also* Op. at *144 ("High commission rates certainly impact developers, and some evidence exists that it impacts consumers when those costs are passed on.").

[8] Kristin Broughton, *Match Group Hopes for Savings From Looser App-Store Payment Rules,* THE WALL STREET JOURNAL, Sept. 16, 2021, https://www.wsj.com/articles/match-group-hopes-for-savings-from-looser-app-store-payment-rules-11631793601.

as a result of its exclusionary conduct—recall that consumers spent over $85 billion in Apple's app store in 2021 alone.[9]

In short, the increased costs to consumers arising from Apple's restrictions are not just theoretically logical: they are real. And given the enormous volume of consumers and sums of money involved, the damage done by those increased costs is equally enormous.

Apple's policies restrict innovation and reduce consumer choice.

The increased costs that Apple's provisions impose on app developers (to then pass on to consumers) represent wasted funds that could otherwise be used far more productively. For instance, news of the district court's injunction on Apple's anti-steering provisions led developers to make plans to use "any potential savings from the payment changes to invest in new products or hire more people."[10] And beyond cost alone, Apple's restrictions constrain developers' business strategies. To take a concrete example, *amicus curiae* Knitrino planned to offer its customers precisely what they want: knitting patterns (digital), and yarn to knit with (physical). But Apple's policies do not permit app developers to sell physical goods through Apple's IAP. Knitrino accordingly implemented an alternative payment system, leading Apple to reject Knitrino from the app store. Apple insisted that patterns could *only* be sold through Apple's IAP, and yarn could *only*

[9] *See supra* n.5.

[10] *Id.*

be sold outside it, such that Knitrino's business model of offering both products together in its app with the same payment solution—the established model used by brick-and-mortar yarn shops—was not allowed. In a competitive market, Knitrino would have offered its app to consumers directly, or through another app store with less restrictive policies. But Apple's total control over the distribution of apps to the world's billion-plus iPhone users left Knitrino without recourse. Both businesses and consumers suffer when businesses cannot offer their goods and services in the way that they want.

Apple's policies damage the consumer experience.

By forcing app developers and users to interact through Apple's proprietary payment system and nowhere else, Apple reduces the quality of the customer service consumers receive—to the consumers' own detriment and to the detriment of the app developers, who would like to compete to earn customer goodwill by providing the best service. Apple's IAP restrictions force app developers to outsource several aspects of consumer support to Apple. If users have any issues related to billing, such as needing a refund or a payment cancellation, they are forced to speak with an Apple employee, who necessarily has less familiarity with the goods and services involved than the app developer would—not to mention less incentive to impress the customer with the quality of service. Apple's employees also have less access to the underlying transaction than the developer

has: they can neither verify delivery of a good nor take action to correct a good-related issue other than offering a refund. The district court acknowledged these difficulties when it found that "Apple does a poor job of mediating disputes between a developer and its customer. Consumers do not understand that developers have effectively no control over payment issues . . . or even access to consumers' information. Consequently, it can be frustrating for both sides when issues arise relating to the inability to issue and manage the legitimacy of requests for refunds." Op. at *26.

As Jason Fried, CEO of *amicus curiae* Basecamp, has explained, Apple's policies block developers from helping users with a variety of issues, including "[r]efunds, credit card changes, discounts, trial extensions, hardship exceptions, comps, partial payments, nonprofit discounts, educational discounts, downtime credits, tax exceptions, etc."[11] When approached by users, the developer can only answer "Go Ask Apple." Simply put, Apple's policies undermine the experience of app users and the relationship between users and developers.

This results in a complex and poor user experience, as well as additional inefficiencies. For instance, app developers have no visibility into the reason why a customer stops paying a subscription, a crucial piece of information (*e.g.*, if the

[11] Jason Fried, *Our CEO's take on Apple's App Store payment policies, and their impact on our relationship with our customers* , Jun. 19, 2019, https://hey.com/apple/iap/.

customer has failed to make a payment because her credit card has expired, the developer might wish to make a new offer).[12] In addition, developers are precluded from offering customers extra services (*e.g.*, allowing them to carry over unused credits to subsequent months), as they cannot identify them.[13] Moreover, if the app developer suspends a subscriber's account (*e.g.*, for violating its terms of use), Apple continues to charge the user until the latter (which in the case of card fraud may not be the same person that purchased a subscription) contacts Apple.

As Basecamp's CEO has explained, Apple's IAP is about so much more than simply money: it is about Apple inserting itself between businesses and their customers.[14] At its core, Apple's IAP forcibly separates the provision of a good or service (for which the app developer is responsible) and the provision of customer support (which is handed over to Apple), resulting in a diminution in quality of the customer's experience with the good or service in question.

Apple's policies impose significant switching costs on consumers.

Consumers face extensive switching costs that prevent them from leaving the iOS ecosystem and making use of alternatives to Apple's IAP. On top of the expense of purchasing a costly new smartphone and replacing all the accessories

[12] Report, The Netherlands Authority for Consumers and Markets, Market study into mobile app stores, Apr. 19, 2019, at 94, https://www.acm.nl/sites/default/files/documents/2019-04/marktstudies-appstores.pdf

[13] *Id*.

[14] Fried, *supra* n.11.

(*e.g.* extra chargers) that go with it, consumers experience switching costs in the form of: (1) learning costs, from the effort that consumers must expend to learn to use an unfamiliar operating system; and (2) transaction costs, from the time involved in researching and purchasing an appropriate replacement smartphone model and then transferring a user's data and applications.[15] These costs are significant enough that, without them, Apple would be incapable of maintaining its market share.[16] For this reason, Apple has adopted a strategy of maximizing switching costs for consumers— studies have found that switching from iOS to Android imposes substantially higher costs than switching in the other direction.[17]

The centralized way that Apple's payment system functions further increases the already sky-high cost to consumers of switching from Apple to Android. When consumers use Apple's payment system, only Apple gains access to their payment information—the app developers lack the ability to see that information or transfer it to an application on an Android device.[18] If app developers want to provide a subscription service that is available through both Apple and Android apps, they need to spend time and effort developing additional infrastructure to do so—at

[15] Lukasz Grzybowski and Ambre Nicolle, *Estimating Consumer Inertia in Repeated Choices of Smartphones*, 69 J. OF IND. ECON. 33, 41 (2021).

[16] *Id.* at 54.

[17] *Id.* at 50.

[18] Fried, *supra* n.11.

additional cost that makes its way through to consumers. However, if app payments could be made through a platform-agnostic billing system, the user could more easily switch to another operating system and immediately access its subscription.[19] Apple, of course, knew that increased switching costs would result from its payment system restrictions, and imposed them for precisely this reason, as demonstrated by Steve Jobs' candid comment in an internal email in response to the threat of competition from Android: "The first step might be to say they must use our payment system for everything, including books (triggered by the newspapers and magazines). If they want to compare us to Android, let's force them to use our far superior payment system. Thoughts?"[20]

II. PARALLELS TO THE D.C. CIRCUIT'S DECISION IN *MICROSOFT*

The phenomenon of a dominant technology company using its market power to restrict consumer choice, increase consumer costs, and cement its own position in the market is nothing new. Both the district and appellate courts in *Microsoft* found that Microsoft acted anticompetitively by "closing to rivals a substantial percentage of the available opportunities for browser distribution." *U.S. v.*

[19] Damien Geradin and Dimitrios Katsifis, *The Antitrust Case against the Apple App Store (Revisited)*, TILEC Discussion Paper No. DP2020-035, December 7, 2020, at 2, Available at SSRN: https://ssrn.com/abstract=3744192 or http://dx.doi.org/10.2139/ssrn.3744192.

[20] Jay Peters, *Read Steve Jobs' emails about why you can't buy digital books in Amazon's apps*, THE VERGE, Jul. 30, 2020, https://www.theverge.com/2020/7/30/21348130/apple-documents-steve-jobs-email-books-amazon-apps-antitrust-investigation-schiller.

Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001). In so finding, those courts properly conducted the rule of reason balancing analysis that the district court here failed to undertake. *See id.* at 59. The techniques Microsoft used to maintain its monopoly, and the harm it created, are very similar to Apple's exclusionary conduct here. The only difference—a difference that this Court has the power to remedy—is that Apple, unlike Microsoft, has been permitted to evade liability under the Sherman Act for the damage it has done.

Microsoft preserved its monopoly through a series of exclusive agreements with internet access providers that forced them to offer its own Internet Explorer browser either as the default browser or as the only browser available to their subscribers. *Id.* at 71. These exclusive agreements helped to keep usage of alternate browser Navigator "below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly." *Id.* Microsoft also took steps to cause "unpleasant consequences for users" who attempted to use alternate browsers on Microsoft's system. *Id.* at 65. The D.C. Circuit found Microsoft's conduct anticompetitive because "through something other than competition on the merits, [it had] the effect of significantly reducing usage of rivals' products and hence protecting its own operating system monopoly." *Id.* In other words, Microsoft reduced the usage of alternate browsers "not by making [its] own

browser more attractive to consumers, but, rather, by discouraging OEMs from distributing rival products." *Id.*

Here, similarly, Apple blocks app developers from distributing iOS apps outside of Apple's own app store, and from providing app users access to alternate payment methods. Indeed, Apple goes one better than Microsoft, by making it not just "unpleasant" to use alternate distribution or payment systems, but impossible. App developers who attempt to use an alternate payment system are rejected from Apple's app store (as in the case of *amicus curiae* Knitrino); users who attempt to download an app onto their iPhones from a source other than Apple's app store are unable to do so. In both cases, the technology giant thrusts itself artificially into the relationship between consumers and service providers, to no one's benefit but its own.

The district court in this case threw up its hands when faced with the difficulty of calculating the damage inflicted by Apple's anticompetitive conduct: "Unfortunately, what is needed is a comparison of output in a 'but-for' world without the challenged restrictions." Op. at *67. The *Microsoft* court faced the same problem, but properly shifted the burden of that challenge onto the wrongdoer, Microsoft. "[N]either plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development absent the defendant's exclusionary conduct." 253 F.3d at 79. In imposing liability all the

same, the D.C. Circuit ensured that it was the defendant, not the plaintiff, who was "made to suffer the uncertain consequences of its own undesirable conduct." *Id.* (quoting 3 Areeda & Hovenkamp, Antitrust Law ¶ 651c).

Faced with the same kind of unlawful behavior from a similar technology monopolist, this Court should reach the same result as the D.C. Circuit did in *Microsoft.* The purported procompetitive justifications that Apple advanced to the district court do not come close to justifying the harm that Apple's conduct causes, whether measured in billions of dollars lost, billions of consumers receiving inferior products, losses in innovation and creativity from developers, or any combination of the above.

CONCLUSION

The Court should reverse and remand as set forth in Epic's Opening Brief.

Dated: January 27, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,067 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: January 27, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: January 27, 2022

/s/ *Peter D. St. Phillip, Jr.*
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