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)

APPELLANT, CROSS-APPELLEE EPIC GAMES, INC.'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

INTRODUCTION

Apple forces software developers offering apps and digital goods to iPhone owners to use only Apple's own distribution and payment services. Then, Apple imposes a huge commission on every sale the developers make to Apple's 1 billion captive customers. A panel of this Court found that Apple has market power, and that its conduct imposes tens of billions of dollars in supracompetitive costs, reduces innovation, and lowers quality. Those are the hallmarks of Sherman Act violations.

The panel majority concluded that Apple had identified only one valid procompetitive rationale: Apple is entitled to "*some* compensation" for developers' use of its intellectual property. Op. 51-52. But the majority recognized that this interest is abstract; Apple has not identified any specific intellectual property or its value. The panel also recognized that Apple need not preclude competing distribution and payment solutions to obtain that compensation; it could charge developers that use competing services a licensing fee. That left Apple with only the meager interest in avoiding the administrative burden of potentially auditing developers' payments.

On these facts, the majority found no Sherman Act violation only by eviscerating the required balancing of pro- and anticompetitive effects under the Rule of Reason. The majority held that it was enough that the district court had summarily stated its view that the benefits of Apple's practices "offset" their harms in "just one sentence" that is not substantively reviewable on appeal. Op. 65-66. En banc review is warranted because that legal rule is irreconcilable with precedent mandating a "rigorous" and "most careful weighing of alleged dangers and potential benefits." *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 947 (9th Cir. 2000) (citation omitted). The panel's failure to apply that standard was not harmless; mere administrative convenience cannot outweigh the severe anticompetitive harms the Court found here.

The conflict between the panel's ruling and prior precedent involves important legal questions, the stakes here are uniquely high, and the outcome is plainly unsustainable. En banc review is warranted.

STATEMENT

This case involves two policies that Apple applies to the ubiquitous iPhone. First, "[d]evelopers can distribute their apps to iOS [iPhone] devices only through Apple's App Store." Op. 12. Second, "[d]evelopers are

also required to use Apple's in-app payment processor (IAP) for any purchases [of digital goods] that occur within their [applications]." *Ibid.* These in-app purchases occur directly between the developer and iPhone user, often years after the app is downloaded. But Apple still takes 30% of the sale, collecting billions of dollars in annual profits.

Petitioner Epic Games is a software company. Its flagship title is Fortnite. Epic offers digital goods—such as outfits—that users can purchase for use within Fortnite. Epic has invested vast sums in developing those digital add-ons, to which Apple contributes nothing. But Apple required Epic to pay the 30% commission on every in-app purchase.

As relevant here, Epic sued Apple under the Sherman Act, seeking only injunctive relief. After trial, the district court dismissed Epic's antitrust claims. Epic appealed, supported in substance by numerous amicus briefs, including from the United States, a coalition of thirty-five states, and leading antitrust scholars.

In relevant part, the panel affirmed in a published opinion by Judge Milan D. Smith, joined by District Judge McShane; Judge Thomas dissented. The panel unanimously held that the district court "erred as a matter of law on several issues." *See* Op. 24; *see also, e.g.*, Op. 25 ("[T]he

district court erred in certain aspects of its market-definition analysis[.]"); Op. 42 ("district court erred when it held that [Apple's agreement with developers] falls outside of the scope of Section 1"); Op. 68 ("district court clearly erred in its separate-products finding," *i.e.*, that Epic "did not identify separate products" for its tying claim). But the majority deemed all those errors "harmless." Op. 24.

The majority adopted the district court's market definition: a market for "mobile-game transactions—*i.e.*, game transactions on iOS and Android smartphones and tablets." Op. 18.[1] Apple has market power there; indeed, its "52 to 57% market share and barriers to entry," Op. 20, put it "near the precipice" of monopoly power, 1-ER-142. The volume of commerce affected is breathtaking: Over 300,000 developers have created iPhone gaming apps that "generate an estimated $100 billion in annual revenue." Op. 11.

The majority analyzed Epic's claims under the burden-shifting regime of the Rule of Reason. At step one, the panel agreed with the district

[1] For ease of understanding, we address the basis for rehearing en banc using the market defined by the district court and panel majority. Epic reserves the arguments presented to the panel regarding the correct market definition.

court that Epic proved that Apple's practices directly cause substantial anticompetitive harms. Op. 47-50. Apple extracts many billions of dollars in "supracompetitive commissions"; and by "foreclos[ing] competition" from other app stores and payment providers, it both "reduces innovation" and "reduces quality." Op. 20, 46-47; 1-ER-98, -121, -103-05, -148 n.606.

At step two, the majority accepted that Apple had identified a procompetitive interest in receiving "*some* compensation" for developers' use of its intellectual property. Op. 51-52. But it deemed Apple's interest to be narrow, for two reasons.

First, Apple had not proved that it was entitled to a particular amount of compensation, or even identified the relevant intellectual property. The district court found that this justification "was pretextual with respect to the 30% commission rate specifically." Op. 51 (internal quotation marks and emphasis omitted). Apple was thus left only with a "general goal" that was "nebulously defined and weakly substantiated." Op. 52.

Second, the court recognized (at step three) that even with respect to that abstract interest in receiving some undefined amount of compensation, Apple could charge developers a license fee as an alternative to excluding all competition for IAP. The majority's only criticism of licensing was that Apple could face the administrative burden of auditing the payment streams. Op. 64. But it deemed that burden sufficient to reject licensing as a less-restrictive alternative (LRA). *Ibid.*

Notably, the majority narrowed the case significantly by rejecting the district court's reliance on the principal procompetitive interest asserted by Apple: differentiating its product by providing iPhone users with greater privacy and security. The majority accepted that Apple proved (at step two) that it has such an interest. But it held that Epic proved (at step three) that Apple had an LRA to excluding competing app stores. Apple could continue to review iPhone apps, just as it does now. It would then provide for iPhones to recognize only those apps that it approved through that review. The apps could then be distributed through any means, not only by Apple. This is a variation on the "notarization" model that Apple uses for the Mac computer. The majority recognized that if Apple augmented the Mac's notarization system with the

"human review" that Apple uses for iPhone apps, that system "would clearly be 'virtually as effective' in achieving Apple's security and privacy rationales" because "it contains all elements of Apple's current model." Op. 62-63; *see also* Op. 64 n.18 (strongly suggesting that Epic is correct that privacy and security are not a justification for excluding competing payment providers either, but declining to reach that question).

Epic finally argued that if it did not prevail on the third step, the court must then conduct an overall balancing—sometimes considered a "fourth step"—that weighs a practice's anticompetitive consequences against its procompetitive benefits. Otherwise, a practice that causes severe harm would be upheld, so long as there was no less-restrictive way to achieve even trivial procompetitive benefits.

The district court disagreed, deeming the LRA inquiry "the last step" in the Rule of Reason analysis. 1-ER-150-55. The panel majority was similarly "skeptical of the wisdom of" a balancing step but reluctantly accepted that it was "bound by" precedent to recognize some kind of balancing inquiry. Op. 66-67. For that reason, it "agree[d] with Epic" that the district court erred when it "omitted a fourth balancing step." Op. 42.

But the majority also deemed that error to be "harmless." It asserted that the form of the balancing test remained open, because this Court has been "inconsistent in how we describe the Rule of Reason." Op. 65 (collecting cases).

The majority resolved that perceived inconsistency by holding that only the district court (not the court of appeals) needed to conduct the balancing inquiry, and that it could do so with "just one sentence of analysis." Op. 65-66 (citing *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148 (9th Cir. 2001)). It was therefore sufficient in this case that the district court, in addressing Epic's separate state law claims, had tersely "stated that it 'carefully considered the evidence in the record and . . . determined, based on the rule of reason,' that the distribution and IAP restrictions 'have procompetitive effects that *offset* their anticompetitive effects.'" Op. 67 (emphasis added by the majority).

Strikingly, the majority only looked to whether language in the district court's opinion could be read to reflect a nominal balancing of interests. The majority conducted no appellate review of the substance of the district court's balancing—even for clear error. Indeed, the majority accepted the district court's conclusion, despite having rejected the district

court's predicate finding that Apple had a procompetitive interest in privacy and security for which there was no LRA.

Judge Thomas dissented in relevant part on several grounds. He agreed with the majority that the district court committed serious legal errors. Op. 88. But unlike the majority, he "would reverse the district court and remand to evaluate the claims under the correct legal standard." *Ibid*. The majority's application of the Rule of Reason, despite rejecting fundamental aspects of the district court's decision, "amounts to appellate court fact-finding." Op. 89. Further, because the district court "did not undertake" a balancing inquiry, Judge Thomas concluded that "[r]emand for a formal balancing should be required." Op. 90.

REASONS FOR GRANTING EN BANC REVIEW

I. THE LEGAL ISSUES PRESENTED BY THE PETITION ARE CRITICALLY IMPORTANT.

The Court's determination whether to grant en banc review should be informed by the unique importance of this case. Apple's exclusionary practices govern its relationship with hundreds of thousands of developers—not just of apps, but also of app stores and payment solutions—and 1 billion consumers. The defined market produces $100 billion in revenue, every year.

Within this important factual context, this Petition raises critical legal issues. "Antitrust law assesses most conduct under the Rule of Reason." Dkt. 52, 38 Professors (Carrier, Hovenkamp et al.) Br. 1. Most cases are resolved at step one because the plaintiff fails to prove the defendant's practices cause anticompetitive harms. But in the most important cases that involve demonstrated consumer harm, like this one, courts address the questions raised here: whether the plaintiff has identified less-restrictive alternatives; and whether the anticompetitive harms outweigh their procompetitive benefits.

Those questions are central not only to private suits but also to governmental enforcement actions. The brief of the United States expresses its "strong interest" in the case, given that the ruling—including the failure to conduct a robust balancing analysis—"could significantly harm antitrust enforcement." Dkt. 56, U.S. Br. 1. Thirty-five states concur that a ruling in Apple's favor on the balancing of competitive effects "could frustrate future enforcement actions in the Ninth Circuit." Dkt. 55, 35 States Br. 25.

The serious concerns expressed by antitrust enforcers show that these legal questions—and the factual context in which they arise—will

only grow in importance. The United States has stressed that the legal rules adopted here will be important "especially in the digital economy." Dkt. 56, U.S. Br. 7. The "smartphone industry" alone, "with hardware, products, and services, is approaching a trillion dollars annually." Dkt. 55, 35 States Br. 2.

Large technology companies exercise extraordinary control over the availability, price, and innovation of tools that are central to Americans' everyday lives. All of those enterprises have intellectual property for which they are entitled to "*some* compensation." Op. 51-52. These enterprises may often prefer to exclude competition and obtain monopoly rents by establishing "walled gardens," which could incidentally simplify the collection of compensation. The panel majority nonetheless concluded that administrative burdens associated with collecting compensation defeat the viability of an LRA. That rule virtually guarantees severe anticompetitive harm and effectively insulates the most monopolistic tech-platform practices from antitrust scrutiny.

II. THE PANEL'S RULING CONFLICTS WITH SUPREME COURT AND NINTH CIRCUIT PRECEDENT.

A. The Panel Majority Rendered the Balancing Inquiry Meaningless.

Any rigorous inquiry into the balance of pro- and anticompetitive effects would easily find in Epic's favor. The panel accepted the district court's findings that Apple has market power. Moreover, Apple's exclusion of competition causes substantial consumer harm. With no competition, Apple can leverage its market power to maintain its 30% commission rate. The Apple App Store's profit margin exceeds an astonishing 75% and, the district court found, is impervious to competitive pressures. Op. 46. Substantial non-economic harms exist too. Apple blocks the development of more innovative and higher-quality app stores and payment solutions—including those that would provide greater privacy and security—and reduces its investment in its own products. Op. 20.

The majority upheld Apple's foreclosure of all competition in app distribution and in-app payments as an efficient way to recover "*some* compensation" for its intellectual property investment: All the developers' transactions must flow through Apple. But the majority itself ac-

cepted that Apple could simply collect a license fee from those transactions, as an alternative to excluding competition altogether. Op. 64. That is no novelty; it is how almost every intellectual property license works.[2]

Even assuming that administrative savings in collecting Apple's IP royalties count as a procompetitive benefit, any robust balancing inquiry would come out in Epic's favor. The point of the Sherman Act is to foster competition, which lowers consumer prices and increases the quality of goods. This case directly implicates those core purposes, on a massive scale involving billions of dollars every year and one billion consumers. That trounces any administrative burden from licensing.

But it gets much worse. The district court (erroneously) relied on Apple's "security and privacy" rationale. It therefore did not consider the correct question: whether the substantial economic and non-economic

[2] Because the district court and panel majority decided the case on the premise that the law permits Apple to charge a licensing fee, we assume so *arguendo*. Further proceedings relating to the scope and implementation of any injunction would address the details of any licensing scheme. Any such fee must not become a vehicle for Apple to reimpose its supracompetitive charges by another name. Instead, any fee must be tied to the actual value contributed by Apple's intellectual property and the administrative costs Apple actually incurs.

harms Apple inflicts on hundreds of thousands of developers and one billion consumers outweigh the mere administrative burden on Apple of auditing royalty streams. The answer would seem self-evidently yes; the question answers itself. At the very least, even if this Court does not resolve the balancing inquiry in Epic's favor in the first instance, then—as Judge Thomas explained in dissent—the district court must have the opportunity to decide it on remand. Epic should not lose when no court has conducted the requisite balancing of the now-properly-recognized interests on either side of the scale.[3]

The panel majority nonetheless found in Apple's favor only by reducing the balancing inquiry to a trivial, cursory exercise in literary criticism of the district court's opinion. It held that the district court need

[3] Moreover, in conducting a proper balancing test, the district court would consider the cumulative effect of the multiple *other* errors the Court unanimously found it had made regarding the relative costs and benefits of Apple's conduct. For example, as Judge Thomas explained, the district court could consider its errors in assessing the relevant markets, and "could have found greater increases in costs if its analysis concerned Epic's markets, [which] would change a properly conducted balancing analysis." Op. 72.

only incant certain magic words in "just one sentence." Op. 65. The district court's ruling is then dispositive. It is not reviewed on appeal, even deferentially for substantial evidence or clear error.

Here, the district court held that step three of the Rule of Reason was "the last step." 1-ER-150. But the majority found dispositive that, in addressing Epic's separate state law claims, the district court stated that the procompetitive benefits "offset" the anticompetitive harms. It pointedly did *not even say* that the former were greater or even comparable; "offset" can mean "reduce," not only "balance."[4] (Federal tax revenues "offset" the government's spending, but the national debt continues to balloon.)

B. Supreme Court and Ninth Circuit Precedent Require a "Rigorous" Balancing Inquiry.

En banc review is also warranted because the panel's ruling conflicts with Supreme Court and Ninth Circuit precedent, which require a robust balancing of pro- and anticompetitive consequences. Indeed, that is the crux of the Rule of Reason. Decades ago, this Court recognized:

> From the time of its announcement in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and the elaboration of the rule by

[4] *Offset*, Merriam-Webster, https://www.merriam-webster.com/dictionary/offset#legalDictionary.

> Mr. Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), to its . . . articulation in *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977), . . . the rule of reason has been *primarily directed* to a balancing of the competitive evils of the restraint against the competitive benefits asserted on its behalf.

Gough v. Rossmoor Corp., 585 F.2d 381, 388-89 (9th Cir. 1978) (emphasis added). The Supreme Court has since reaffirmed that "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).

Consistent with the Supreme Court's direction, this Court has often reiterated that the Rule of Reason 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 also, e.g.*, *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). Although some aspects of antitrust law have evolved, recent rulings show that this rule has not. *See SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1120 (9th Cir. 2022) ("[W]e ask whether the alleged restraint's harm to competition outweighs its procompetitive effects." (internal quotation marks

omitted)); *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1108 (9th Cir. 2021); *FTC v. Qualcomm*, 969 F.3d 974, 991 (9th Cir. 2020).

Critically, this Court has been emphatic that the balancing inquiry is not—contrary to the panel majority's ruling—a passing formalism. The Court held, in a case in which the Supreme Court specifically remanded for application of the Rule of Reason, that "[s]uch analysis *is rigorous*, requiring 'a detailed depiction of circumstances and the *most careful* weighing of alleged dangers and potential benefits.'" *Cal. Dental*, 224 F.3d at 947 (emphases added) (citation omitted). A "factual determination [is] central to th[e] case—whether the [] restrictions are net pro- or anticompetitive." *Id.* at 957-58. The "ultimate task" is to "determine whether, on balance, [the] restrictions [] are procompetitive or anticompetitive," *id.* at 946, and the plaintiff prevails if there is "a net harm to competition," *id.* at 957.

The majority did not address that voluminous precedent, or acknowledge the stark conflict between its holding and this Court's decision in *Cal. Dental*. Instead, it derived its contrary rule—in which the balancing inquiry is not remotely "rigorous" and the findings that would

permit a "factual determination" are entirely missing—from *County of Tuolumne*. In fact, *County of Tuolumne* faithfully reiterated the settled rule that "we must balance the harms and benefits of the [challenged restrictions] to determine whether they are reasonable." 236 F.3d at 1161.

Although the opinion in *County of Tuolumne* stated the result of the balancing inquiry in a single sentence, the Court's consideration of the issue was still appropriately "rigorous" for that easy case. *County of Tuolumne* was a challenge to a hospital rule that sensibly permitted C-sections to be performed only "by Board-certified or Board-eligible obstetricians or by those doctors who had completed a 36-month residency program in obstetrics-gynecology." *Id.* at 1152. The court detailed the nature and scale of the rule's effects: It precluded certain unqualified physicians from performing a particular procedure, but it did so for an *incredibly* important reason—to ensure the quality of care "in potentially life-threatening situations." *Id.* at 1159. Not surprisingly, other courts had previously found that it was "obvious" that antitrust challenges to the same practice failed. *Id.* at 1160 (quoting *Weiss v. York Hosp.*, 745 F.2d 786, 821 n.60 (3d Cir. 1984)). Where the result was so uniquely self-evident and already-settled, it was unnecessary for this Court to repeat its

description of those interests in the form of a detailed explanation of why the balancing inquiry favored the defendant. Particularly given the prior ruling in *Cal. Dental*, the particular wording that *County of Tuolumne* used to describe its conclusions cannot be extrapolated into a rule broadly excusing a substantive balancing inquiry.

En banc review is also warranted because, as the majority indicated, the precedent of this Court and the Supreme Court has occasionally been inconsistent in describing the Rule of Reason. Op. 65. No court has previously held that balancing is not required (as Apple argued), or that it can be conducted in "just one sentence" (as the majority held). But some cases have omitted a reference to balancing, because the court did not need to reach that stage of the analysis. Op. 65. Some other decisions characterizing the balancing inquiry as the essence of the Rule of Reason predate the more recent adoption of a multi-step, burden-shifting inquiry. The en banc court can use this case to helpfully bring clarity to this critical area of antitrust law.

C. The Majority's Remaining Arguments for Refusing to Conduct a Rigorous Balancing Analysis Are Not Persuasive.

The majority opined that a robust balancing inquiry is unnecessary because the other steps of the Rule of Reason analysis are "already intended to assess a restraint's overall effect." Op. 66. That is not correct, and the majority notably cited nothing to support that claim. Rather, the first three steps assign the appropriate burden of proof, weed out those cases that do not require balancing (because there are no anticompetitive harms or procompetitive benefits, or LRAs exist), and identify the factors that are considered in the balancing inquiry.

For cases not resolved by the first three steps, a rigorous balancing of the practice's effects is required. The majority's contrary rule "could significantly harm competition and consumers by allowing a minor benefit to condone a major harm." Dkt. 56, U.S. Br. 7. Here, "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." Dkt. 55, 35 States Br. 5. Balancing is accordingly "the most important inquiry in a case like this." *Id.* at 18.

Nor was the panel majority correct that when a practice causes a net harm to competition, balancing is duplicative and unnecessary because the court "is likely to find the purported benefits pretextual at step two, or step-three review will likely reveal the existence of viable LRAs." Op. 66. The majority held that a viable LRA is negated merely by the fact that it is administratively inconvenient. Under such a rule, a practice with minor—but nonpretextual—benefits can still cause a vastly greater net harm to competition that is condemned only through the balancing process.

The district court and the panel *agree* that Apple is extracting vastly supracompetitive commissions by using an exclusionary strategy. Apple does not use the same strategy for iPhone apps selling non-digital content or apps on the Mac. These findings support ready-made LRAs already tested in parallel contexts, and other plaintiffs are unlikely to have better-proven LRAs to propose. The panel nonetheless concluded that these LRAs were inadequate because Epic could not prove that they would be equally administratively efficient for Apple. That sets the bar too high.

That high bar could perhaps work if the competitive benefits and harms of the walled-garden approach are robustly considered at a final balancing step. But it plainly undermines the antitrust laws to adopt a rule where any practice that saves administrative costs is ultimately greenlighted, no matter how exclusionary it is or how much consumer harm it generates. In essence, the panel's view is that an exclusionary practice does not violate the Sherman Act even if, for example, it adds 10% in rents to the price (and results in lower quality, innovation, and consumer choice going forward), so long as it saves 1% of administrative costs. Allowing that rule to become the law of this Circuit would throw future antitrust enforcement—particularly against powerful hi-tech platforms—into serious doubt.

CONCLUSION

The Petition for Rehearing En Banc should be granted.

June 7, 2023

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature s/ Thomas C. Goldstein **Date** Jun 7, 2023

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