Nos. 21-16506 & 21-16695

United States Court of Appeals For the Ninth Circuit

Epic Games, Inc.,

Plaintiff-Appellant,

v.

Apple, Inc.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 4:20-cv-05640-YGR

BRIEF FOR THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the Committee to Support the Antitrust Laws states that it is a nonprofit corporation, and no entity has any ownership interest in it.

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Interest of Amicus Curiae[1]

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The Supreme Court and this Court have long recognized the key role private litigants play in enforcing federal antitrust laws. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *Memorex Corp. v. Int'l Bus. Machines Corp.*, 555 F.2d 1379, 1383 (9th Cir. 1977) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.") (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968)).

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[1] The Parties have agreed to a blanket consent to the filing of amicus briefs by interested parties.

The Committee to Support the Antitrust Laws ("COSAL") is an independent, nonprofit corporation devoted to preventing, remediating, and deterring anticompetitive conduct through the enactment, preservation, and enforcement of a strong body of antitrust laws.[2] COSAL submits this amicus brief because the goals of U.S. competition policy would be undermined if this Court does not clarify the proper scope of §§ 1 and 2 of the Sherman Act.

[2] Amicus states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity—other than COSAL—has contributed money that was intended to fund its preparation or submission. In addition, no COSAL member whose firm is counsel for a party had any involvement in the organization's decision to file this amicus brief.

Reasons for Granting En Banc Review

The Panel's decision upholding the district court's rulings that Epic had failed to show harm to competition rests on an erroneous understanding of the Rule of Reason's function and purpose. First, contrary to Supreme Court precedent, the Panel disavowed any requirement that courts applying the Rule of Reason actually balance the anti-competitive effects of challenged conduct against any pro-competitive justification to determine the net effect of the conduct on consumer welfare, and replaced it with a novel "balancing" test. Op. 66. Second, the balancing framework that the Panel devised is at odds with Supreme Court requirements. According to the Panel, "[i]n most instances, this will require nothing more than . . . briefly confirming the result suggested by" a plaintiff's failure to offer a less competitive alternative: "that a business practice without a less restrictive alternative is not, on balance, anticompetitive." Op. 67. That analysis is not correct.

I. The legal issues before this Court are important not only for this case, but for antitrust law as a whole.

This case is important. But far more important is the necessity of properly guiding lower courts in this Circuit in properly applying the Rule of Reason in all antitrust cases to which that standard applies, that is to say to "most conduct." Dkt. 52, 38 Professors (Carrier, Hovenkamp et al.) Br. 1. Epic's Petition asks the en banc court to resolve critical questions about how lower courts determine whether conduct is anticompetitive, a question of interest to the entire antitrust bar. The en banc Court should accept that invitation.

A. The balancing of anti-competitive harm and any pro-competitive justifications is the core of the Rule of Reason.

The Supreme Court declared that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). Consumer welfare is maximized when economic resources are allocated to their best use, and when consumers are assured competitive price and quality. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) (internal citation omitted). Put differently, consumer welfare is

harmed by conduct that "raises the prices of goods above competitive levels or diminishes their quality." *Rebel Oil Co.*, 51 F.3d at 1433; *see also Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (anticompetitive effects include "reduced output, increased prices, or decreased quality in the relevant market.").

The Rule of Reason exists to determine whether the effect of challenged conduct, on balance, is to harm competition or to further it. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (equating the rule of reason with "an inquiry into market power and market structure designed to assess [a restraint's] *actual effect*") (emphasis added); *see also California Dental Ass'n v. F.T.C.*, 224 F.3d 942, 947 (9th Cir. 2000) ("we must determine whether, on balance, CDA's restrictions on advertising are procompetitive or anticompetitive"); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1096 (N.D. Cal. 2019), *aff'd,* 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021) ("[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint").

Indeed, each step of the Rule of Reason analysis, as historically applied, was calibrated to answer that question and only that question. Under the first step, the plaintiff must show that there was some anticompetitive effect. The second and the third steps are designed to determine the proper magnitude of any pro-competitive benefit the court can balance against the anticompetitive effect demonstrated by the plaintiff. Only when the reviewing court understands *both* the nature and scale of the competitive harm *and* the nature and scale of any claimed pro-competitive benefit, does it have the information necessary to determine, in the fourth step, "whether, on balance, [the challenged] restrictions . . . are procompetitive or anticompetitive." *California Dental*, 224 F.3d at 947; *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990) ("*Per se* and rule-of-reason analysis are but two methods of determining whether a restraint is unreasonable, *i.e., whether its anticompetitive effects outweigh its procompetitive effects*") (emphasis added); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) ("courts routinely apply a . . . balancing approach" under which "the plaintiff must demonstrate that the anticompetitive

harm . . . outweighs the procompetitive benefit."). In sum, determining the net effect on competition is the *raison d'être* of the Rule of Reason, and balancing is how a court determines that net effect.

The district court did not conduct any such analysis. Instead, it found, under the first prong, that Apple possessed market power and that Apple's conduct harmed competition, but that under the second prong there was some offsetting pro-competitive benefit of Apple. *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1037–40, (N.D. Cal. 2021). The district court then found that Epic had not offered a less restrictive alternative ("LRA"), and so ended its inquiry without conducting any meaningful balancing—the court simply found that the procompetitive benefits offset *some portion* of the competitive harm caused by Apple's conduct. *Id.* at 1040–1041. That was an error. Even assuming the district court was correct in discounting Epic's proffered LRA, applying the Rule of Reason properly should have led the district court to balance the total anticompetitive effects of Apple's restrictions against the pro-

competitive benefit Apple proved to determine a net effect on competition.

Rather than reminding the district court of the core function of the Rule of Reason, on appeal the Panel improperly sanctioned the district court's failure to determine any overall effect on competition. While it held that the district court should have conducted the balancing to determine the overall effect on competition, the Panel expressed "skeptic[ism]" regarding the "wisdom" of attempting to assess a restraint's overall effect and questioned the very "value of a balancing step." Op. at *66.

Armed with its skepticism regarding the core purpose of the Rule of Reason, the Panel held that the balancing step could be conducted "[i]n most instances" via a single sentence recognizing that "a business practice without a less restrictive alternative is not, on balance, anticompetitive"—largely rendering the single most important step into a formalist triviality. *Id.* at *67. This approach turns the "less restrictive alternative" concept on its head, allowing the absence of such alternatives to uphold even the most anticompetitive of restraints, in contrast to this Court's previous

directive that even when the plaintiffs do not show "viable less restrictive alternatives," the court must "reach the balancing stage," which "must balance the harms and benefits" of the restraints "to determine whether they are reasonable." *County of Tuolomne v. Sonora Community Hospital,* 236 F.3d 1148, 1160 (9th Cir. 2001).

The Panel's rule that the absence of less restrictive alternatives obviates the need for any meaningful balancing would significantly harm competition and consumers. Even the most egregious of anticompetitive conduct—a category which unquestionably includes the conduct Apple was found to have engaged in here—would be allowed if the wrongdoer could offer even a minor, pretextual procompetitive benefit, including one invented on a post-hac basis. The Court should rehear this case en banc to ensure that antitrust enforcement remains robust in this Circuit going forward.

II. No other circuit court has adopted the type of formalistic Rule of Reason balancing approved by the Panel.

The Panel decision is an outlier with respect to the Rule of Reason. Other circuits require a robust balancing of the pro- and

anti-competitive effects of a restraint as part of the Rule of Reason, not the conclusory nod toward balancing approved by the Panel.

The First Circuit, for example, has described "the normal treatment afforded by the rule of reason" as requiring "a detailed depiction of circumstances and *the most careful weighing* of alleged dangers and potential benefits." *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993) (emphasis added). In contrast to the Panel's "skeptic[ism] of the wisdom of superimposing a totality-of-the-circumstances balancing step" on the Rule of Reason, Op. at 66, the First Circuit embraced that requirement. It explained that the ultimate goal of the Rule of Reason is to allow a court to conduct "an open-ended inquiry into competitive impact. What is required . . . is to determine the probable effect . . . on the relevant area of effective competition, taking into account . . . the probable immediate and future effects." *U.S. Healthcare, Inc.*, 986 F.2d at 595 (cleaned up).

Caselaw in the Second Circuit is similarly incompatible with the Panel's holding. Like the First Circuit, but unlike the Panel, the Second Circuit understands that the first three steps of the Rule of

Reason exist only to prepare the court to "engage in *a careful weighing* of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition." *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, 386 F.3d 485, 506–07 (2d Cir.2004) (emphasis added). It has similarly emphasized that where the "anticompetitive effects of restraints" are not intuitively obvious, "the rule of reason demands a more thorough enquiry into the consequences of those restraints." *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 318 (2d Cir. 2008).

The highest profile application of the balancing step of the Rule of Reason, however, was likely that of the D.C. Circuit in *United States v. Microsoft Corp.*, 253 F.3d 34, 59–80 (D.C. Cir. 2001). After establishing that the analysis under Section 2 of the Sherman Act mirrors the Rule of Reason analysis under Section 1, *id.* at 59, the court of appeals proceeded to apply the full Rule of Reason analysis to six separate claimed anticompetitive courses of conduct engaged in by Microsoft. *Id.* at 59–80. The analysis is thorough, and grapples

extensively with the likely anti- and pro-competitive effects of each, in far more than the single sentence the Panel here condoned. *Id.*

In contrast, amicus is unaware of any decision from another court of appeal that follows the Panel's opinion, rendering the balancing inquiry to an afterthought that can be accomplished by formalistically affirming that "a business practice without a less restrictive alternative is not, on balance, anticompetitive." Op. at 67. The Court should grant en banc review to conform its precedent with the more sound requirements embraced by other courts of appeals.

III. The court should grant rehearing en banc because the test adopted by the Panel conflicts with binding Supreme Court precedent.

The Court should grant rehearing en banc because the trivial test adopted by the Panel conflicts with binding Supreme Court precedent. Indeed, the Panel erroneously asserts that Supreme Court precedent does not "require" balancing of pro- and anti-competitive effects.

That understanding is incorrect. For years, the Supreme Court has again and again confirmed that, in Rule of Reason cases, "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." *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (emphasis added); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (same).

Until the Panel opinion here, this Court has itself uniformly recognized that courts applying the Rule of Reason necessarily balance competitive harms against competitive benefits. *E.g. L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1391 (9th Cir. 1984); *SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1120 (9th Cir. 2022). The Panel simply ignored those years of precedent recognizing the centrality of balancing.

In support of that position, the Panel relied almost entirely on the Supreme Court's recent decision in *Alston*. *Supra*. But that reliance is inapt, because the ultimate opinion largely rested on factors other than on balancing. Rather, as the Supreme Court noted, the NCAA largely failed to prove any pro-competitive benefit. "[T]he NCAA failed to establish that the challenged compensation rules . . . have any direct connection to consumer demand." *Id*. at

2162. To further emphasize the matter, the *Alston* Court explained that where a defendant fails to prove a pro-competitive benefit, there is no need for an LRA: a "legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative." *Id.* (quoting 7 Areeda & Hovenkamp ¶1505, p. 428).

A proper application of balancing, consistent with binding precedent, would require a "rigorous" analysis "whether, on balance, [the challenged] restrictions . . . are procompetitive or anticompetitive." *California Dental*, 224 F.3d at 947. The Court should grant en banc review to underscore that the Rule of Reason remained centered on the critical balancing inquiry.

The Panel opinion also conflicts with Supreme Court precedent in another manner, as highlighted by Judge Thomas in dissent. Specifically, Judge Thomas recognizes recent Supreme Court precedent holding that, to determine the competitive effects of a given restraint, a court "must first define the relevant market." *Am. Express*, 138 S. Ct. at 2285. "Without a definition of the market there is no way to measure the defendant's ability to lessen or

destroy competition." *Id.* (cleaned up) (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965)).

The Panel recognized that the district court "erred as a matter of law" in myriad ways while analyzing the relevant antitrust markets. Op. at 70. "First, the district court erred by imposing a categorical rule that an antitrust market can *never* relate to a product that is not licensed or sold—here smartphone operating systems." *Id.* at *35. Second, the district court improperly "concluded that [in-app purchasing ("IAP")] was not separate from app distribution because IAP is integrated into iOS devices." *Id.* at *70. "*Jefferson Parish* expressly rejects an approach to the separate products inquiry based on the functional relation between two purported products." *Id.* (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2466 U.S. 2, 19 (1984)). Finally, the Panel held that "the district court erred as a matter of law when it concluded that a product in a two-sided market can *never* be broken into multiple products." *Id.* at *71.

Given that the Panel acknowledges the district court erred in defining the market, the Court's holding in *American Express* should have led the Panel to remand. Because the district court defined and

analyzed an incorrect market, there is "no way" it could have properly "measure[d] [Apple's] ability to lessen or destroy competition." *Am. Express*, 138 S. Ct. at 2285. "In essence, any balancing done out of the context of a relevant market necessarily involves putting a thumb on the balancing scale." Op. at *90 (Thomas, J. Concurring in Part and Dissenting in Part).

The Court should agree to rehear en banc to clarify for lower courts that appropriate market definition is a condition precedent; the Rule of Reason cannot be properly applied "without an accurate definition of the relevant market." *Am. Express*, 138 S. Ct. at 2285.

Conclusion

Petitioner-Appellant's Petition for Rehearing En Banc should be granted.

Respectfully submitted,

June 20, 2023

By: */s/ Geoffrey H. Kozen*

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Certificate of Compliance

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

This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,864 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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June 20, 2023 */s/ Geoffrey H. Kozen*

Certificate of Service

I hereby certify that on June 20, 2023, I ensured the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

June 20, 2023 */s/Geoffrey H. Kozen*