No. 23-337

In the Supreme Court of the United States

EPIC GAMES, INC., PETITIONER

v.

APPLE INC., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The courts below concluded that petitioner failed to prove its antitrust claims under the three-step "rule-of-reason" framework repeatedly endorsed by this Court. *See*, *e.g.*, *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). After a trial on the merits, the district court made factual findings that the challenged conduct has some anticompetitive effects (step one); that the challenged conduct has many procompetitive benefits (step two); and that there are no less restrictive alternatives to the challenged conduct (step three). The district court further found that the benefits of the challenged conduct offset any harm. The court of appeals affirmed all of these factual findings.

The petition sets forth two questions regarding the rule-of-reason framework (although neither is properly presented for this Court's review):

I. Whether a court must, as a matter of law, ignore the costs of proposed alternatives at step three; and

II. Whether a court must, as a matter of law, undertake a fourth step of "balancing" competitive effects.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rules 14(1)(b)(ii) and 29.6, respondent states that it has no parent company and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Petitioner Epic Games, Inc. lost this case because it "failed to demonstrate," "failed to convince," "failed to produce," "failed to present," "failed to show," "failed to persuade," and "failed to prove" essential elements of its antitrust claims against respondent Apple Inc. at trial. *See* Pet. App. 18a, 22a, 37a, 59a, 79a, 80a, 186a, 189a, 338a, 351a, 371a, 381a, 382a, 394a.

In its petition, Epic does not dispute that it failed to prove its case under the "rule-of-reason" framework applicable to most antitrust claims, as articulated by this Court and faithfully applied by the courts below. Instead, Epic seeks to *change* two aspects of that legal framework. Pet. i. But neither request is properly presented for this Court's review; in any event, Epic's arguments—even if accepted—would not change the outcome in this case. Accordingly, Epic's petition for a writ of certiorari should be denied.

STATEMENT

1. Apple's iOS App Store is a two-sided transaction platform that connects app developers with iPhone users through simultaneous transactions. Pet. App. 386a–387a. Consumers can download a variety of apps on the App Store, most of which are free. Pet. App. 98a. Some apps allow users to purchase digital goods and services within the app. Pet. App. 153a–154a. Developers pay a commission to Apple when consumers download paid apps and or make in-app purchases of digital goods and services. Pet. App. 7a.

Developers who use Apple's proprietary tools to develop and distribute iOS apps must enter into a license agreement (the DPLA), which contains a number of requirements. Epic is a developer that challenged two of those requirements in this lawsuit: *First*, iOS apps must be distributed through Apple's curated App Store; and *second*, iOS apps that offer digital goods and services for purchase within the app must use Apple's in-app purchase system (IAP). Pet. App. 9a.

As relevant here, Epic claimed that the distribution and IAP requirements constituted unreasonable restraints of trade in violation of the Sherman Act. *See* 15 U.S.C. §§ 1–2. Epic's federal antitrust claims were analyzed under the "rule-of-reason" framework, which this Court has summarized as follows:

> To determine whether a restraint violates the rule of reason, . . . a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the de-

> fendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Ohio v. *Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (citations omitted).

2. After a 16-day bench trial, with 26 witnesses and 520 exhibits, the district court rejected Epic's antitrust claims. Pet. App. 5a. The court issued a 180-page decision, with a "heavily *factual*" analysis in support of its ultimate finding that Epic had failed to prove essential elements of its antitrust claims. Pet. App. 14a, 100a. The decision included 666 footnotes citing to the record evidence and trial testimony. Pet. App. 96a–444a.

Among other things, the court found that the testimony of Epic's experts and witnesses was "suspect," "bias[ed]," and "internally inconsistent," and "lack[ed] credibility." Pet. App. 122a–123a, 241a n.408, 319a, 197a. The court also found that there were "fundamental factual flaws with Epic Games' [proposed] market structure." Pet. App. 329a. The court went on, however, to consider Epic's claims on the merits.

a. The district court analyzed Epic's claims under the three-step "rule-of-reason" framework. Pet. App. 363a–376a. At step one, the district court found that the challenged limitations had "*some* anticompetitive effects." Pet. App. 365a. At step two, the court found that Apple had proven many legitimate procompetitive justifications for the challenged requirements, including security, privacy, and the efficient collection of Apple's commission. Pet. App. 367a–371a. At step three, the court found that Epic "ha[d] not sufficiently developed" its proposed less restrictive alternatives and could not

prove that its proposals either would be "virtually as effective" at promoting competition as Apple's rules or could be implemented "without significantly increased cost." Pet. App. 375a (citing *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1260 (9th Cir. 2020) (quoting *O'Bannon* v. *NCAA*, 802 F.3d 1049, 1074 (9th Cir. 2015))). The district court also "carefully considered the evidence in the record" and made the factual finding that the challenged rules have "procompetitive effects that offset their anticompetitive effects." Pet. App. 392a.

b. In the district court, Epic conceded the first question presented in its petition and all but abandoned the second.

With respect to the third step of the rule-of-reason analysis, which requires the plaintiff to prove that less restrictive alternatives are available, Epic acknowledged that "to be viable . . . an alternative must be 'virtually as effective' in serving the procompetitive purposes of the [challenged restraints], and '*without significantly increased cost.*'" D.C. Dkt. No. 276, at 32 (quoting *O'Bannon*, 802 F.3d at 1074 (emphasis added)).

And when asked at the conclusion of trial whether it was "equating . . . balancing with [the] least or less restrictive alternative [step]," Epic responded:

> Your Honor, I think they are largely the same. I know the courts have talked about them as different things, but I think in practice if what you are doing is you are looking to assess whether the restraint at issue is on balance a problem, one of the things that clearly you would do in making that judgment is think about what the alternatives are to achieving the procompetitive benefit that the defendant claims

> is the basis for the challenged restraint. So, although . . . there are cases that describe each of them[,] I think ultimately the inquiry . . . largely collapse[s].

2-ER-493–94.

3. The Ninth Circuit affirmed the judgment against Epic on its antitrust claims. Most of the court's opinion was devoted to confirming that the district court's factual findings were supported by substantial evidence in the trial record. Pet App. 22a, 37a–38a, 48a, 59a–69a.

a. Under the rule-of-reason framework, the court of appeals ruled that Epic produced sufficient evidence of anticompetitive effects from Apple's distribution and IAP requirements to satisfy its burden at step one. Pet. App. 45a. At step two, the Ninth Circuit recognized that "[t]he district court correctly held that Apple offered non-pretextual, legally cognizable procompetitive rationales for its app-distribution and IAP restrictions." Pet. App. 49a. These included providing Apple compensation for use of its intellectual property (Pet. App. 50a–51a) and protecting user security and privacy (Pet. App. 52a–57a). More broadly, the court recognized that "Apple's restrictions create a heterogen[e]ous market for app-transaction platforms which, as a result, increases interbrand competition—the primary goal of antitrust law." Pet. App. 53a. And at step three, the court of appeals ruled that "[t]he district court did not clearly err when it held that Epic failed to prove the existence of substantially less restrictive alternatives (LRAs) to achieve Apple's procompetitive rationales." Pet. App. 59a.

b. In the court of appeals, Epic again conceded the first question presented in its petition: Epic acknowl-

edged that it was "require[d]" to prove "that an alternative is 'virtually as effective' in serving the legitimate objective 'without significantly increased costs.'" Epic C.A. Br. 39–40 (quoting *O'Bannon*, 802 F.3d at 1074) (emphasis omitted). As in the district court, Epic did not take issue with this legal standard but rather argued that it was satisfied on the facts. *See* Epic C.A. Br. 39–44; Epic C.A. Reply Br. 44 (arguing that the record "does not support the [district] court's conclusion that Epic failed to show alternatives could be implemented 'without significantly increased cost'" (quoting 1-ER-152) (emphasis omitted)).

As to the second question presented in the petition, Epic argued on appeal that the rule of reason "requires 'a balancing of the arrangement's positive and negative effects on competition.'" Epic C.A. Br. 48 (quoting *L.A. Mem'l Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1391 (9th Cir. 1984)). The Ninth Circuit ultimately *agreed* with Epic that circuit precedent requires courts to "proceed to [a] fourth [balancing] step where, like here, the plaintiff fails to carry its step-three burden of establishing viable less restrictive alternatives." Pet. App. 66a (citing *County of Tuolumne* v. *Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001)). But the Ninth Circuit further ruled that the district court had indeed satisfied this requirement when 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.'" Pet. App. 69a.

REASONS FOR DENYING THE PETITION

Epic failed to prove its antitrust claims under the rule-of-reason framework that this Court has repeatedly approved. *See*, *e.g.*, *NCAA* v. *Alston*, 141 S. Ct.

2141, 2160 (2021); *Am. Express*, 138 S. Ct. at 2284. In this Court, Epic does not directly challenge the factual findings made by the district court and affirmed by the court of appeals, nor could it. *See Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (explaining that this Court "'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error'" (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949))).[1]

In its petition, Epic asks the Court to *change* the rule-of-reason framework by (I) requiring courts to disregard the costs of proposed alternatives at the third step, and (II) requiring courts to engage in a fourth step of "balancing" competitive effects. Neither question, however, is properly presented for this Court's review—Epic conceded the first and prevailed on the second. Moreover, Epic's arguments, even if accepted, would not change the outcome. In addition, (III) this case is a poor vehicle for examining the rule-of-reason framework because Epic failed to prove its proposed product market, a necessary predicate to its antitrust claims. Accordingly, the petition for a writ of certiorari should be denied.

I. The Question Whether Courts Must Disregard Cost In Evaluating Less Restrictive Alternatives Does Not Warrant Review

Epic's principal submission is that the Ninth Circuit erred in "holding that a 'less-restrictive alternative' may

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[1] Epic's petition contains a number of factual assertions that are either unsupported by or directly contrary to the findings made or affirmed by the courts below. Pursuant to this Court's Rule 15.2, Apple notes herein the misstatements that bear most directly on the two questions presented and reserves the right to challenge others in the unlikely event review is granted.

not impose an additional burden or cost on the defendant," and that this approach conflicts with decisions of this Court and other courts of appeals. Pet. 11. Not so.

A. Epic Conceded The Cost Issue

Epic's first question presented posits that courts must, as a matter of law, ignore the costs of implementing a proposed less restrictive alternative at the third step of the rule-of-reason framework. *See* Pet. i, 11. Epic took the opposite position, however, in both the district court and the court of appeals, acknowledging in both courts that costs may be considered at the third step of the rule-of-reason framework. Epic's express concession precludes this Court's review of the first question presented.

At the district court's request, Epic and Apple filed a joint statement of the "[u]ndisputed [p]rinciples" of law governing the case. D.C. Dkt. No. 276. This document was the subject of extensive negotiation, and where the parties were unable to come to agreement, they reserved their respective rights. *Id.* at 2; *see also*, *e.g.*, *id.* at 10–13, 13–16, 18–20 (disputes over the legal frameworks for market definition, single-brand markets, and two-sided markets).

There was no disagreement on the relevant aspect of the third step of the rule of reason. The parties *agreed* that:

> "[T]o be viable . . . an alternative must be 'virtually as effective' in serving the procompetitive purposes of the [challenged restraints], and '*without significantly increased cost*.'" *O'Bannon*, 802 F.3d at 1074 (quoting *Cty. of Tuolumne*, 236 F.3d at 1159).

D.C. Dkt. No. 276, at 32 (emphasis added); *see also ibid.* ("Epic believes the Undisputed Principles above lay out

the 'unencumbered legal framework' . . . ."). Epic reiterated this exact position on appeal, asserting that a less restrictive alternative must be "'virtually as effective' in serving the *legitimate* objective '*without significantly increased costs*.'" Epic C.A. Br. 39–40 (quoting *O'Bannon*, 802 F.3d at 1070) (second emphasis added); *accord* Epic C.A. Reply Br. 44.

In its petition, Epic identifies two Ninth Circuit cases—*O'Bannon* and *County of Tuolumne*—as ruling that a less restrictive alternative must not impose "significantly increased cost" on the defendant, and then complains that "[t]his case is the perfect example of the Ninth Circuit's rule in operation." Pet. 11–12. But in both the district court and the court of appeals, *Epic itself* cited and relied on *O'Bannon* and *County of Tuolumne*—including the "significantly increased cost" language—as reciting the correct and controlling standard for the third step of the rule-of-reason framework. D.C. Dkt. No. 276, at 32.

At no time in the lower courts did Epic object to the application of these Ninth Circuit precedents. Epic (which was represented by experienced counsel at both trial and on appeal) filed some 551 pages of legal briefing in the district court, and another 227 pages in the Ninth Circuit; moreover, ten *amici* supported Epic in the court of appeals. In all of those pages of briefing, Epic *never* made the argument that it now asks this Court to address—i.e., that the costs of proposed less restrictive alternatives are legally irrelevant. Epic cannot come to this Court and accuse the lower courts of error when it acquiesced in the legal standard they both applied. *See United States* v. *Williams,* 504 U.S. 36, 44–45 (1992) (the Court does not exercise discretion to review

precedent if the petitioner "concede[d] . . . the correctness of that precedent").

In these circumstances, the first question presented by Epic is not properly presented for this Court's review. *See Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645–46 (1992) (to "maintain the integrity of the process of certiorari," this Court ordinarily "does not decide questions not raised or resolved in the lower courts" (citation omitted)); *see also, e.g.*, *Rita* v. *United States*, 551 U.S. 338, 360 (2007); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Review should be denied on the basis of Epic's concession alone.

B. There Is No Decisional Conflict On The Cost Issue

Even were the first question properly presented, Epic is wrong that there is any dispute in the caselaw about whether cost may be considered in analyzing less restrictive alternatives.

This Court has held that "courts must give wide berth to business judgments before finding liability," because "[c]osts associated with ensuring compliance with judicial decrees may exceed efficiencies gained." *Alston*, 141 S. Ct. at 2163. Consistent with that admonition, this Court in *Alston* affirmed the judgment in a case in which the plaintiffs carried their burden specifically by proving the alternatives were *not* costly. *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1090, 1104 (N.D. Cal. 2019); *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d at 1260. This Court found "nothing about the district court's analysis that offends the legal principles the NCAA invokes." *Alston*, 141 S. Ct. at 2162.

Moreover, as Epic concedes, the Ninth Circuit derived its articulation of the third step from the leading treatise on antitrust law. Pet. 13. The current version

of that treatise explains: "[T]he rule of reason plaintiff bears the burden of persuading the tribunal that an alternative is substantially less restrictive and is virtually as effective in serving the legitimate objective *without significantly increased cost*." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1760d (4th and 5th ed. Aug. 2023 update) (emphasis added). The treatise does not suggest that this is a debatable proposition; nor does it identify any contrary authority. This Court has repeatedly relied on the same treatise for fundamental principles of antitrust law. *See, e.g.*, *Am. Express*, 138 S. Ct. at 2284; *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 766 n.12 (1984).

Epic erroneously suggests that "[t]he ruling below . . . conflicts with the precedent of the Second, Third, and Fifth Circuits." Pet. 16–17. Having acquiesced in the Ninth Circuit's rule, this argument is not available to Epic. In any event, not one of the cases that Epic cites holds—or even suggests—that it is legally impermissible for a trial court to consider costs at step three. In fact, they affirmatively undermine Epic's position.

In one of Epic's cases, for example, the district court relied on the Ninth Circuit's decision in *O'Bannon* for the rule that a less restrictive alternative cannot have "significantly increased cost" and held that the plaintiff failed to meet its burden at step three. *N. Am. Soccer League, LLC* v. *U.S. Soccer Fed'n, Inc.*, 296 F. Supp. 3d 442, 474 (E.D.N.Y. 2017). The Second Circuit affirmed, finding the district court "properly applied the three-step rule-of-reason framework." *N. Am. Soccer League, LLC* v. *U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 42–45 (2d Cir. 2018).

Epic's other cases likewise endorse judicial consideration of the "practical implications" and the "economics"

of the plaintiff's proposed alternatives. *See 1-800 Contacts* v. *FTC*, 1 F.4th 102, 121–22 (2d Cir. 2021) (FTC's proposed alternative failed because of "the practical implications of [its] proffered alternatives on the parties' ability to protect and enforce their trademarks"); *Impax Lab'ys, Inc.* v. *FTC*, 994 F.3d 484, 497 (5th Cir. 2021) (FTC's findings at step three were supported by substantial evidence, including expert testimony of industry studies and practices, as well as "economics"). And the case from the Third Circuit remanded to the trial court to consider whether the plaintiff's proposed alternatives were "reasonable" and "viable," without ever suggesting that the consideration of costs would be inappropriate. *See United States* v. *Brown Univ.*, 5 F.3d 658, 679 (3d Cir. 1993).

In short, Epic does not cite a single case—in this Court or any other—that supports its legal argument that costs are legally irrelevant at step three. Nor could it: An antitrust plaintiff cannot carry its burden by proposing wildly expensive alternatives that marginally enhance competition. If the alternative is prohibitively costly, competition would not be advanced by implementing it. Epic's proposal makes no practical or economic sense. *See United States* v. *Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990) ("[L]ike all antitrust cases, this one must make economic sense."). Perhaps that is why Epic did not raise this argument in the lower courts.

C. The Cost Issue Is Not Outcome-Determinative Here

Epic asserts that the courts below accorded "talismanic significance to the 'cost' of a proposed alternative," such that resolution of the first question presented—had it not been conceded in both courts below—

would be "outcome determinative." Pet. i, 15. Epic is wrong again.

As Epic recognized below, a plaintiff's proposed alternative cannot satisfy step three unless it is *both* "'virtually as effective' in serving the procompetitive purposes of the [challenged restraints], *and* 'without significantly increased cost.'" D.C. Dkt. No. 276, at 32 (quoting *County of Tuolumne*, 236 F.3d at 1159); *see also* Epic C.A. Br. 39–40. This standard is framed in the conjunctive—a plaintiff must prove both aspects of it. *See also* Pet. App. 60a ("We review a district court's findings on the existence of substantially less restrictive means for clear error. This includes *both* the 'virtually as effective' *and* 'significantly increased cost' components encompassed in that finding" (emphasis added) (citations omitted)).

Contrary to Epic's mischaracterization (*see* Pet. 11–12), the lower courts ruled against Epic under *both* prongs—indeed, the court of appeals referred to the virtually-as-effective prong at least seven times. *See* Pet. App. 60a, 63a, 64a, 65a & n.18. Thus, even if Epic were correct that costs must be ignored, the judgment would still have to be affirmed because Epic failed to prove any alternative that would be "virtually as effective" as the challenged restraints, regardless of cost.

First, the lower courts agreed that Apple showed that both of the challenged requirements were justified on security and privacy grounds. The district court found that the App Store's human review process for app distribution "provides most of the protection against privacy violations, human fraud, and social engineering" (Pet. App. 374a), and that the IAP requirement promotes "Apple's competitive advantage on security issues" (Pet. App. 378a). With respect to both rules, the

district court found that Epic had failed to show that any of Epic's inadequately developed alternatives would be "virtually as effective" in achieving Apple's procompetitive goals. Pet. App. 375a–376a, 378a.

The Ninth Circuit affirmed the district court's conclusion that Epic failed to show that its proposed alternative model for app distribution "would be 'virtually as effective' in accomplishing Apple's procompetitive rationales" related to "user security and privacy." Pet. App. 63a; *see also* Pet. App. 52a–53a. And it did not disturb the district court's ruling regarding the IAP requirement, because Epic's less restrictive alternative "fail[ed] on the IP-compensation aspect." Pet. App. 65a & n.18. Epic does not challenge the district court's ruling in this respect in its petition.

Epic incorrectly suggests that the Ninth Circuit rejected Apple's privacy and security rationales. *See* Pet. 1–2, 7, 25 (arguing that it "should have" prevailed at step two because of Apple's supposed "failure of proof"). After holding that Epic had waived its legal challenge to these justifications, the Ninth Circuit squarely held that they *are* cognizable and *were* in fact proven at trial. *See* Pet. App. 52a–57a ("[T]hroughout the record, Apple makes clear that by improving security and privacy features, it is tapping into consumer demand and differentiating its products from those of its competitors").

Second, the lower courts also agreed that Apple was entitled to collect "*some* compensation" for developers' use of the iOS platform and tools, another "cognizable procompetitive rationale." Pet. App. 50a–51a. Contrary to Epic's submission, the Ninth Circuit did not describe Apple's IP-compensation rationale as "nebulously defined and weakly substantiated" (Pet. 2, 7, 9, 15)—it

used that phrase to characterize the defendant's "amateurism-as-consumer-appeal" rationale in *Alston*. Pet. App. 51a. In comparing this case to *Alston*, the court of appeals merely recognized that Epic had some "flexibility" at step three to fashion an alternative (Pet. App. 51a), yet Epic still failed to carry its burden. Both courts below recognized that Apple was entitled to compensation for the use of its platform and tools, that the challenged rules promoted efficient collection of Apple's commission, and that Epic's proposed alternatives did not take into account Apple's legitimate interest in compensation. Pet. App. 50a–51a, 63a–66a & n.18, 371a, 374a–375a, 377a–378a.

The Ninth Circuit affirmed the district court's conclusion that Epic had failed to "develop how Apple could be compensated" under any alternative app distribution model (Pet. App. 63a–64a), and that Epic's proposed alternative for the IAP requirement likewise "suffers from a failure of proof on how it would achieve Apple's IP-compensation" (Pet. App. 65a–66a). Epic's proposed alternative thus failed the "virtually as effective" requirement, irrespective of cost.

Epic's first question presented regarding "additional costs," even if it could be answered in Epic's favor, would not affect the outcome in this case. As the Ninth Circuit held, Epic failed to prove that its proposed alternatives were "virtually as effective" in advancing Apple's procompetitive justifications. *See* Pet. App. 59a. Epic does not challenge these dispositive findings and thus cannot prevail under any articulation of the third step of the rule-of-reason framework.

II. The Question Whether Courts Must "Balance" Competitive Effects Does Not Warrant Review

This Court has repeatedly and consistently articulated the "three-step, burden-shifting framework" for assessing antitrust claims under the rule of reason. *Am. Express*, 138 S. Ct. at 2284. That framework is the well-established "means for distinguishing between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Alston*, 141 S. Ct. at 2160 (citation omitted).

Where, as here, the plaintiff proves some anticompetitive effects at step one; the defendant proves procompetitive benefits at step two; and the plaintiff fails to prove less restrictive alternatives at step three, the judicial inquiry is at an end. The plaintiff has failed to prove that the restraint is "unreasonable" within the meaning of the antitrust laws. *See*, *e.g.*, *Alston*, 141 S. Ct. at 2162.

The second question presented by Epic is whether the Court should modify the rule-of-reason framework to *also* require courts to "balance" the competitive effects of a challenged restraint. This Court has never required such a fourth step in the rule-of-reason framework, and for good reason: "[T]he balancing occurs at each preceding step of the analysis, rather than at the end." William Kolasky, *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, 22 Antitrust 85, 87 (2008). Regardless, this case does not present the Court with the opportunity to decide whether there is a fourth "balancing" step.

1. The Ninth Circuit ultimately *agreed* with Epic on the legal issue presented in the second question. The

court of appeals questioned the wisdom of a fourth "balancing" step, but it concluded that it was bound by circuit precedent "to proceed to [a] fourth step where, like here, the plaintiff fails to carry its step-three burden of establishing viable less restrictive alternatives." Pet. App. 66a. Under that step, the court must "balance the restriction's anticompetitive harms against its procompetitive benefits." Pet. App. 68a. The district court's only "error," according to the Ninth Circuit, was not to "explicitly" or "expressly reference" a fourth balancing step as such; but that was a mistake of mere "label[ing]"—and thus harmless. Pet. App. 69a.

The Ninth Circuit thus adopted the exact legal rule Epic asked for on appeal. Pet. App. 68a–69a. In its petition, though, Epic does not acknowledge the Ninth Circuit's holding in this respect. Instead, Epic complains about the legal rule that *Apple* unsuccessfully urged in its brief on appeal. Pet. 21 (citing Apple C.A. Br. 86). Having won on the legal question it raises here, Epic cannot seek review in this Court.[2]

The only appellate decision cited by Epic in which a balance was actually struck was *County of Tuolumne*. And there, the court conducted the "balancing" in terms *identical* to what the district court used here. *Compare* 236 F.3d at 1160 ("We must balance the harms and benefits of the privileging criteria to determine whether they are reasonable. In this case, any anticompetitive harm is offset by the procompetitive effects of [the challenged conduct]"), *with* Pet. App. 392a ("[T]he Court has

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[2] To be clear, Apple continues to disagree that a fourth "balancing" step is required where, as here, the plaintiff fails to carry its burden of proof under the three-step rule of reason articulated in this Court's cases. That issue, however, is not properly presented in this case for the reasons set forth in the text.

carefully considered the evidence in the record and has determined, based on the rule of reason, that the DPLA provisions at issue in Counts 3 (app distribution) and 5 (IAP) have procompetitive effects that offset their anti-competitive effects"). Epic cites some other cases that refer to "balancing," but none of them actually required (or conducted) a balancing inquiry. *See, e.g.*, *United States* v. *Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

The paucity of "balancing" authority should not surprise. As one scholar has noted, "[r]ule of reason balancing is perhaps the greatest myth in all of antitrust law." Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. Cal. L. Rev. 733, 761 (2012) (citation omitted). Even one of the academic champions of balancing admits that courts "almost never balance." Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 837 (2009); *see also* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 Antitrust L. J. 713, 745 (2014) ("[C]ourts have avoided explicit balancing, and have never even explained how they could do it"). That is because decades of antitrust litigation have shown "balancing to be unworkable." Herbert J. Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 131–32 (2018); *see also* Areeda & Hovenkamp, *supra*, ¶ 1507.

Here, the district court *did* weigh the effects and benefits of the challenged rules, finding that the balance favored Apple, and the court of appeals agreed. As the Ninth Circuit explained, the district court "'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.'" Pet. App. 69a. That finding was supported by ample evidence in the record—the minimal anticompetitive effects shown by Epic (on only one side of the platform) were easily outweighed by the ample procompetitive benefits (on both sides of the platform) demonstrated by Apple. Pet. App. 364a–365a, 367a–371a. Epic is therefore simply wrong to assert that the district court ruled that "it made no difference if the restraints' harm to competition was vastly greater than any benefit" (Pet. 5) and that the Ninth Circuit "reason[ed] that it was not necessary to separately balance the restraints' pro- and anti-competitive effects" (Pet. 2). In reality, both courts conducted precisely the balancing that Epic requested.

2. Epic's disagreement with the decisions below is not legal, but factual. For example, Epic asserts that the anticompetitive harms of Apple's rules "dwarf" their procompetitive benefits and that Apple's conduct is "clearly anticompetitive overall." Pet. 17; *see also* Pet. 1, 4 (referring to "massive" and "*enormous*" anticompetitive effects). But the district court found only that Epic had established "*some* anticompetitive effects" at step one (Pet. App. 365a)—which did *not* include proof of either increased prices for consumers or decreased output, the primary concerns of antitrust law. Pet. App. 276a, 278a. And the court found *multiple* pro-competitive benefits, including several that directly benefit consumers. Pet. App. 293a, 296a–298a, 308a–313a, 367a–371a.

Indeed, the district court expressly found that Apple's conduct in fact was "more than 'not anticompetitive' but potentially beneficial to consumers." Pet. App 404a; *see also* Pet. App. 392a. Those benefits include enhanced interbrand competition through Apple's ability to differentiate its ecosystem from competitors':

"Even Epic's CEO testified that he purchased an iPhone over an Android smartphone in part because it offers 'better security and privacy.'" Pet. App. 53a.

The district court's findings, affirmed on appeal, dispose of Epic's assertion that "[a]ny rigorous inquiry into the balance . . . would easily find in Epic's favor." Pet. 17. The district court *did* conduct a rigorous inquiry—after a 16-day bench trial, it issued a lengthy order with numerous subsidiary findings supporting its ultimate finding that the balance favored Apple. Pet. App. 392a–393a. Apple's conduct is good for competition and good for consumers, as the district court found and the Ninth Circuit affirmed. Accordingly, the second question presented by Epic cannot be answered in a way that would change the outcome below.

III. This Case Is A Poor Vehicle To Decide Either Question Presented By Epic

This is a complex case that generated a 180-page district court order and a 91-page appellate opinion. The courts below resolved a host of legal and factual issues, all of which are bound up in the judgment. While Epic has extracted two "legal issues" to present in its petition, neither is properly presented and neither would lead to reversal even in the unlikely event that the Court were to grant review and agree with Epic's position on either or both of them. In addition to the points summarized above, there are a number of *other* grounds for affirmance. *See* Stephen M. Shapiro et al., Supreme Court Practice ch. 4, § 4.4(E) (11th ed. 2019) ("If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review.").

Most significantly, "Epic failed to establish—as a factual matter—its proposed market definition." Pet. App. 21a; *see also* Pet. App. 22a ("[T]he district court proceeded to analyze Epic's evidence pursuant to the proper legal framework and did not clearly err in rejecting Epic's proposed relevant markets"). That was no surprise: Epic proposed a product market *limited to iOS* so as to exclude its own owners and business partners, who engage in similar conduct. Pet. App. 97a (Epic "structured its lawsuit to argue that Apple does not compete with anyone; it is a monopoly of one"); *ibid.* (Epic "alleged an antitrust market of one"). But it failed to prove the necessary factual predicates to a single-brand product market. Pet. App. 36a–38a ("Epic cannot establish its proposed aftermarkets on the record before our court"); *see also Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 486 (1992).

Epic's failure to prove its proposed market is significant, because "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market." *Am. Express*, 138 S. Ct. at 2285. In a civil antitrust case subject to the rule of reason, market definition is an essential element of the plaintiff's claim. *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 385 (9th Cir. 1978) ("[T]he fact that the conduct restrained trade in a relevant market is an essential part of a plaintiff's case . . . and the burden of establishing it lies on him"). Concomitantly, such a plaintiff's failure to prove its proposed market "defeats" its claim. *Deutscher Tennis Bund* v. *ATP Tour, Inc.*, 610 F.3d 820, 833 (3d Cir. 2010).

The Ninth Circuit disagreed that a plaintiff's failure to prove its alleged market forecloses a rule-of-reason claim, purporting to follow a single circuit precedent.

Pet. App. 32a–33a n.9. But numerous courts have reached the opposite conclusion, dismissing antitrust claims for failure to plausibly allege or to prove at trial the alleged market. *See, e.g.*, *Shah* v. *VHS San Antonio Partners, L.L.C.*, 985 F.3d 450, 454 (5th Cir. 2021); *Deutscher Tennis Bund*, 610 F.3d at 833; *Chapman* v. *N.Y. State Div. for Youth*, 546 F.3d 230, 238 (2d Cir. 2008); *Campfield* v. *State Farm Mut. Auto. Ins.,* 532 F.3d 1111, 1118 (10th Cir. 2008). So has the Ninth Circuit, in a decision the panel studiously ignored. *M.A.P. Oil Co.* v. *Texaco Inc.*, 691 F.2d 1303, 1306–08 (9th Cir. 1982). Even in the case on which the Ninth Circuit did rely, the plaintiff's "fail[ure] to demonstrate its proposed definition of the relevant market" was "not fatal" only because the plaintiff had "[i]n the alternative" claimed that the defendant "would have significant market power" in a different market. *Rebel Oil Co.* v. *Atl. Richfield Co.*, 51 F.3d 1421, 1437 (9th Cir. 1995). Epic made no such alternative claim here: It staked everything on the single-brand market definition it was unable to prove.

Epic's failure to prove its own proposed relevant product market provides an alternative ground for affirmance of the judgment and, because market definition is a predicate element, would preclude the Court from reaching (or resolving) either of the questions presented by Epic. It therefore presents yet another reason to deny the petition for a writ of certiorari.

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Having failed to prove its case at trial, Epic has manufactured two legal disputes that are not properly presented for this Court's review and that, even if answered in Epic's favor, would not change the outcome. Both of

Epic's questions presented are divorced from the findings and rulings made by the courts below on a full evidentiary record. One private litigant's failure of proof after a lengthy trial under a well-established legal framework does not warrant this Court's review.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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[3] Unlike Epic's petition, which presents fact-bound questions relevant only to this case (as confirmed by the absence of any *amicus* support), Apple's petition for a writ of certiorari in No. 23-344 raises a legal issue that is squarely presented by a different part of the judgment and affects literally millions of non-parties, as well as the Article III constraints on equitable relief (as multiple *amici* attest).