No. 25-1311

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

EPIC GAMES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FORMER FEDERAL ANTITRUST ENFORCERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former government officials with significant experience enforcing federal antitrust laws on behalf of the United States Department of Justice and/or the Federal Trade Commission. *Amici* are leading voices in the antitrust field; they have testified as experts before Congress, taught at top-tier educational institutions, published leading antitrust articles, and been cited in federal antitrust decisions.

In their capacity as former enforcement officials—and as antitrust practitioners, academics, and economists—*amici* have a substantial interest in the consistent enforcement, coherent interpretation, and predictable application of antitrust laws. Background details for each of the *amici* are set forth in an Addendum to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has emphasized that "caution is key" "[w]hen it comes to fashioning an antitrust remedy." *NCAA v. Alston*, 594 U.S. 69, 106 (2021). Caution is necessary because even well-intentioned judicial activity can have unintended anticompetitive consequences that undermine the purpose of our antitrust laws. As a result, "markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare." *Id.*

Here, the Ninth Circuit failed to heed that caution. Believing that Apple should be held in contempt for

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[1] Pursuant to Rule 37.6, *amici curiae* state that no party or counsel for any party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation and submission.

violating the "spirit" of an injunction, the court "recommend[ed] some possible courses of action" for the district court to consider when "modif[ying]" the contempt order on remand. Pet. App. 35a. The court set out specifics absent from the text of the injunction itself: it indicated, for instance, that Apple could charge a commission *only* to recover the direct costs of implementing linked-out purchases, even if a higher commission would not be "prohibitive." *Id.* at 34a-36a. These instructions—providing terms the injunction did not contain—thus confirm that the injunction itself did not forbid Apple's conduct, notwithstanding the court's finding of contempt. And because the Ninth Circuit's contempt ruling cannot stand, its remand instructions cannot stand either.

The Ninth Circuit's approach would promote the abuse of a court's contempt power, and left standing, its remand instructions would also run counter to principles of sound antitrust enforcement. Those instructions improperly seek to micromanage private business dealings, despite clear evidence that courts are ill-equipped to regulate prices and that their doing so can chill innovation by reducing and even eliminating businesses' ability to earn a return on innovations. If the Ninth Circuit's guidance about appropriate commissions were implemented by the district court, such an order would deny Apple compensation for its enormous investments in developing the App Store and other benefits to developers. And it would risk discouraging Apple and other technology companies from innovating, in contravention of the public interest.

Moreover, Epic may not obtain such rate regulation through the "modification" of the district court's contempt order. While an injunction may be modified when "necessary … to achieve the result" the initial injunction was designed to achieve, *United States v. United Shoe Machinery Corporation*, 391 U.S. 244, 252 (1968), the injunction in this case addressed a different issue. The injunction arose from the district court's finding that Apple's in-app purchasing (IAP) requirements inflicted "*informational* harm" on consumers who seek information about purchase options. Pet. App. 34a n.9 (emphasis added). But commissions are entirely separate from IAP, and regulating them does not address the harm the court identified. A court may not use "modification" to grant relief beyond the underlying claim and legal violation it found.

The Ninth Circuit's understanding of the judiciary's role in identifying and remedying allegedly anticompetitive conduct would, if accepted, disrupt the efficient enforcement of the antitrust laws and reduce the "incentive to innovate" that those laws are designed to "safeguard." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). This Court should reverse.

ARGUMENT

The Ninth Circuit held that Apple could be found in civil contempt for violating the "spirit" of an injunction whose text "does not address commissions at all." Pet. App. 12a, 34a n.9. As Apple has explained, that rule cannot be reconciled with the "explicit notice" this Court requires before a party is held in contempt. *Taggart v. Lorenzen*, 587 U.S. 554, 561 (2019) (citation omitted). But in describing how the district court should "modif[y]" its injunction on remand, the Ninth Circuit made matters worse. Pet. App. 35a; *see id.* at 34a-36a. In conflict with core antitrust principles, the

Ninth Circuit prescribed the minutiae of how Apple should set its prices and deal with customers. That approach invites exactly the kind of judicial rate-setting and micromanagement of business conduct that this Court has long rejected.

A. Courts Should Avoid Dictating Businesses' Prices and Terms of Dealing

"As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009). For that reason, the Sherman Act "does not restrict the long recognized right" of a "private business[] freely to exercise [its] own independent discretion as to parties with whom [it] will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Nor does the Sherman Act mandate that a private business charge only a "fair" or "reasonable" price. *Town of Concord v. Bos. Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.). To the contrary, "possession of monopoly power, and the concomitant charging of monopoly prices" is "not unlawful" and "is an important element of the free-market system," because "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place." *Trinko*, 540 U.S. at 407.

Those principles accord with "the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013). If firms were compelled to "share the source of their advantage" or to charge less than the market would accept, then they would have reduced incentives to invest in future innovation. *Trinko*, 540 U.S. at 407-08; *see also Ohio v. Am. Express Co.*, 585 U.S. 529, 551 (2018) (recognizing that undermining a firm's ability to monetize its platform "discourages investments"). And critically here, intrusive judicial remedies can be particularly damaging to "technological markets, where innovation 'is essential to economic growth and social welfare' and 'an erroneous decision will deny large consumer benefits.'" *FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020); *cf.* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 1739f4(C) (2d ed. 2017) ("[I]ntellectual property is often characterized by large upfront costs, and the IP holder must earn enough to cover these as well as marginal costs.").

The foregoing principles also reflect that "judges make for poor 'central planners' and should never aspire to the role." *Alston*, 594 U.S. at 103. "[A]s generalists, as lawyers, and as outsiders," courts should remain cognizant of "their limitations" when "trying to understand intricate business relationships," *id.* at 106—"*especially* in technology markets," *Qualcomm*, 969 F.3d at 990. Judges should "avoid direct price administration" in particular because it is largely impossible to "determine a 'fair price'" "without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years." *Town of Concord*, 915 F.2d at 25. Indeed, "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (alteration omitted).

B. The Ninth Circuit's Remand Instructions Improperly Interfere with Market Prices and Terms of Dealing

The court of appeals flouted the foregoing principles. After affirming a finding of contempt for violating the "spirit" of the injunction, the court remanded with a list of granular "courses of action" to regulate Apple's commission rates. Pet. App. 35a-36a. As Apple has explained, that approach conflicts with this Court's precedent governing judicial contempt powers—it would allow a court to hold a party in contempt for prior conduct that violates an as-yet-unwritten order. *See* Pet'r Br. 18-31. And there is no basis for any remand if this Court concludes that the Ninth Circuit erred in holding Apple in contempt as to the commission in the first place. But beyond that, the Ninth Circuit's remand instructions are fundamentally inconsistent with established antitrust principles. Pet. App. 35a.

1. In remanding this case to the district court with proposed "courses of action," Pet. App. 35a, the Ninth Circuit took it upon itself to micromanage granular details of Apple's dealings with developers. That included, for instance, addressing whether Apple could restrict the use of "more prominent fonts" or "larger sizes" in developers' "buttons, links, or other calls to action" for outside purchasing mechanisms. *Id.* The court also restricted Apple's commission rate to "the costs that are genuinely and reasonably necessary for its coordination of external links for linked-out purchases, but no more." *Id.* And the Ninth Circuit further specified that the "calculation of [Apple's] necessary costs for external links should not include the cost associated with the security and privacy features it offers with its IAP"—even if a higher rate

were necessary to fully compensate Apple for the use of its intellectual property. *Id.* at 35a-36a. The Ninth Circuit took these steps even though Apple's specific practices for outside-app purchases had hardly been scrutinized, let alone deemed unlawful.

Although the Ninth Circuit did not accept the district court's complete ban on commissions, Pet. App. 33a-35a, its recommended "courses of action" on remand raise significant problems of their own. For example, the court's opinion could potentially be read to bar all commissions above a *de minimis* level, disregarding the value of Apple's innovation and intellectual property and effectively restoring the district court's zero-commission rule. *See id.* That is precisely the type of "direct price administration" that "antitrust courts normally avoid." *Town of Concord*, 915 F.2d at 25.

Moreover, the Ninth Circuit's approach to rate regulation raises serious administrability concerns. In setting a permissible commission rate, it is far from clear how Apple—or a court—should determine which costs are "genuinely and reasonably necessary," or which intellectual property is "directly used," in facilitating linked-out purchases. Pet. App. 35a-36a. As one example, the App Store provides visibility and distribution services for the apps it features, which it has monetized through its commissions on app store purchases. Under the Ninth Circuit's logic, must the costs of developing those services somehow be apportioned to all apps when calculating commissions on linked-out purchases? And costs change frequently. Does a permissible commission rate suddenly become impermissible when Apple reduces one cost involved in purchases? The Ninth Circuit provided no guidance, and its amorphous standard only underscores the extent to which "identifying the proper price, quantity, and other terms of dealing" is "a role for which [courts] are ill suited." *Trinko*, 540 U.S. at 408.

More fundamentally, if left intact, the Ninth Circuit's proposed approach could force Apple to share the fruits of its labor with developers at little to no cost and minimize incentives for further investments. Millions of consumers and developers benefit from the App Store, and Apple incurred significant costs to develop it. Apple has historically monetized the App Store through its commissions, given the wide variety of developers who use the App Store. Commissions on outside-app purchases are necessary to prevent free-riding and to allow Apple to earn a return on its substantial investments in its intellectual property and other benefits for developers.[2]

Courts and antitrust enforcers have long understood the dangers of forced-sharing remedies like the one that the Ninth Circuit appeared to envision here. Such obligations are in "tension with the underlying purpose of antitrust law, since [they] may lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities." *Trinko*, 540 U.S. at 407-08. There is no "guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage

[2] As scholars have noted, an injunction compelling a business like Apple to share access to its proprietary platforms without receiving adequate compensation in return raises significant constitutional questions, as such access resembles the sort of permanent physical invasion of property the Takings Clause prohibits. *See* A. Lipsky & J. Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187, 1225-31 (1999).

deriving from those innovations will be dissipated by the sharing requirement." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring in part and dissenting in part). That is why "[e]ven a monopolist generally has no duty to share (or continue to share) its intellectual or physical property with a rival." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074 (10th Cir. 2013) (Gorsuch, J.). Thus, whether viewed as price setting or compulsory sharing, the Ninth Circuit's apparent approach to commissions is antithetical to the goals and principles of antitrust law. For that reason, the relief envisioned by the court would be contrary to "the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 32 (2008).

If implemented, the Ninth Circuit's proposed "courses of action" could also have harmful practical consequences. Apple made significant investments to create the iPhone and develop the iOS ecosystem. Forcing Apple to give developers access to its intellectual property without adequate compensation invites free riding and reduces incentives to engage in the type of "risk taking that produces innovation and economic growth." *Trinko*, 540 U.S. at 407. If the Ninth Circuit's reasoning were widely accepted, would-be developers may rationally decide not to invest in new technology since there would be no clear path to monetizing it. And when the law discourages innovation, the ultimate losers are consumers. *See Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1026 (9th Cir. 2013) (observing that "free-riding could ultimately hurt consumers").

The Ninth Circuit's decision to "recommend," Pet. App. 35a, judicial oversight of the way Apple sets prices and deals with developers is inconsistent with these critical antitrust principles. And the posture of the case—reviewing a contempt finding, based upon a violation of an injunction's "spirit" rather than its letter—exacerbated the court's error. If left intact, the decision below would suggest that a court could issue open-ended orders, hold businesses like Apple in civil contempt for violating their "spirit," then impose a variety of detailed prescriptions—including about the prices a business may set. That type of judicial oversight is unpredictable and unwarranted, and this Court should reject it.

C. Epic May Not Obtain Rate Regulation Through "Modification" of the Injunction

Epic suggests that, even if the Ninth Circuit's contempt finding was erroneous, the district court could achieve the same result by simply "modify[ing]" its injunction. Br. in Opp. 25-26 (citation omitted). But the Ninth Circuit's order directs modification of the contempt order, and if the court's contempt finding does not stand, there is no basis for remand. In any event, Epic's use of the "modification" label as an end-run around the permissible remedies in this case should be rejected.

This Court has long made clear that modification to an order is permissible only when "necessary … to achieve the result" that the initial order was designed to achieve. *United States v. United Shoe Machinery Corporation*, 391 U.S. 244, 252 (1968). And in those circumstances where modification has been allowed, courts have demanded that the modification itself be "[c]onsistent with the original holding of the district court" and "necessary to accomplish the remedy sought by the original equitable decree." *United States v. Local 560 (I.B.T.)*, 974 F.2d 315, 333 (3d Cir. 1992).

These standards for permissible modification have not been satisfied here. Epic seeks to obtain rate regulation through "modification" of an injunction about a different issue. Epic brought this action to challenge Apple's IAP requirements—conduct unrelated to commissions. As the Ninth Circuit recognized, the district court's injunction was limited to remedying "*informational* harm"—ensuring access to information about where items could be purchased, not regulating commission rates. Pet. App. 34a n.9 (emphasis added); *see also id.* at 33a n.8 (describing the UCL violation as "preventing informed choice among users of the iOS platform"); Pet'r Br. 33, 48-49. The order restrained Apple from "prohibiting developers from ... including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to In-App Purchasing." Pet. App. 166a. The subject of the injunction was thus informational in nature: it addressed what developers could *say* to consumers and what *tools* (whether buttons, links, or calls to action) they could use to convey that information. But the injunction did not address anything about commissions or the terms by which Apple licenses its intellectual property.

And that makes any claim of a rate-setting "modification" untenable. No court has found that Apple violated the UCL or any other law by charging a commission on link-out purchases, or that regulating Apple's commission rates was relevant to remedying the "informational harm" that the injunction sought to address as to Apple's IAP requirements. Nor did the court of appeals find that Apple's commission rates were themselves unlawful. If anything, modifying the injunction to regulate rates would be *inconsistent* with the district court's original holding, which found no antitrust violations and fashioned the injunction to resolve informational harm unrelated to commissions. *See* Pet. App. 3a.

Allowing such a "modification" of an earlier injunction would be particularly problematic in practice. Parties like Epic would have every reason to seek to expand injunctions to cover additional conduct once a party has been found to have committed any violation—an end-run around the proper process for adjudicating antitrust claims. They could also seek modifications that grant relief they were previously denied—even an injunction against conduct the court has found lawful. In short, they could use the "modification" label to seek a second bite at the apple and, as this case illustrates, to demand remedies—like rate-setting—that exceed the limits of courts' usual equitable authority. This Court should reject that approach.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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