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 THE CORING COMPANY, CORONAVIRUS REPORTER CORPORATION, GREENFLIGHT VENTURE CORPORATION, AND JEFFREY D. ISAACS, M.D.,

AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici develop software. The Coring Company proposes an iPhone app store whose developers would publish their source code or submit it to independent audit. Coronavirus Reporter Corporation built a free app in February 2020 for reporting COVID-19 symptoms to researchers; Apple rejected it. Greenflight Venture Corporation publishes caller identification software used by two-hundred million users. Jeffrey D. Isaacs is a co-founder and framed the tying claim they have pressed since 2021.

Amici write chiefly to bring one precedent to the Court's attention. *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922), discussed at pages 4 to 8, bears directly on the United States' argument that Apple's commission did not "prohibit" what the injunction protected. The brief then sets that case in a line of this Court's decisions, a century old and seldom cited in digital market disputes, that closely fits Apple's control of the iPhone: *Henry v. A. B. Dick Co.*, 224 U.S. 1 (1912) (the mimeograph), and *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917) (the film projector). They are the legal ancestry of comparisons amici have long pressed: the iPhone as a VCR that bills for each playing, the App Store as a printing press with one owner.

Amici were the first, to their knowledge, to plead that Apple unlawfully ties the iPhone to its App

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution intended to fund its preparation or submission.

Store, and no court has decided whether that tie is lawful. Two of them have filed a notice of appeal seeking review of the dismissal of the suit that pleads it; The Coring Company has deferred refiling its own. Amici ask that the Court's opinion leave that question open. A company that can admit or exclude any app holds power over a democracy's culture and public debate; the loss is counted in freedom as well as money.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici support affirmance, on a ground the parties do not develop. The injunction forbids Apple from "prohibiting" developers' links. Apple allowed the links and charged a 27% commission that its projections showed would leave them unused. Pet.App.77a, 115a. The government concedes that a commission can be "the functional equivalent of a prohibition" but argues that Apple's was "different not just in degree, but in kind." U.S.Br.23. This Court rejected that distinction in 1922. Where a statute barred leases conditioning use on not employing a competitor's machines, a lease imposing, among other terms, a punitive royalty on work performed on rival machines violated the ban by its "practical effect." *United Shoe*, 258 U.S. at 457–58. In competition law a company prohibits what it prices out of use. No doctrine of "spirit" is needed, and no inquiry into anyone's motives.

Respondent is right on the question presented, and calls Apple's commission "a toll Apple extracted by virtue of its gatekeeping power." Resp.Br.7. Amici's subject is the gate which allows that toll. To that extent, this brief is a primer on what the parties

do not supply: the history behind the question presented and the future of software distribution that its answer will shape. Sup.Ct.R. 37.1.

The long argument over what percentage Apple may charge is a straw man. For six years courts have been asked what Apple may charge: 30%, 27%, or a "reasonable fee" to be set on remand. Pet.App.36a. The number stands in for a larger question: whether Apple, paid in full for an iPhone, may keep deciding what software it runs and keep charging for its use. The United States has charged Apple with monopolizing the American smartphone market. Apple is the largest monopoly and corporate entity in world history.

This Court met the larger question in 1917, when it refused to let the maker of a film projector, already paid, dictate what films it showed and collect while it ran. *Motion Picture Patents*, 243 U.S. at 518–19. The iPhone carries two restraints of the same kind: a gate, which amici contend is an unlawful tie, and a toll. Apple calls the toll compensation for its IP. Pet.Br.3. That argument is part of the straw man: grant it, and only the number remains. But Sony was paid for its inventions once, in the price of the VCR, and the VCR played whatever tape its owner chose. Apple can collect the commission because it keeps the gate, and no court has decided whether the gate is lawful.

Apple, a great inventor, has mastered a chess game. In Europe, Korea, Japan, Brazil, and here, each move to open the iPhone has been drawn, in lockstep, into an argument about the size of a "Core Technology Fee" or like charge. Each toll accepted becomes a premise in the next forum, until a

machine sold once, at a price, yields a lifelong revenue stream.

More than money is at stake: software is made safe as medicine is, by publication and independent review. Then, there is the censorship angle: the iPhone is also its owner's printing press.

The opinion should reserve, not presume, whether Apple is owed anything after the sale, and leave to later cases the question respondent's pioneering case did not present. As amici read Apple's "precise conduct" rule, Pet.Br.i, an order opening the iPhone could be answered with a toll it did not name; an affirmance keeps such an order enforceable.

ARGUMENT

I. THE QUESTION PRESENTED HAS AN OLD ANSWER: A COMPANY PROHIBITS WHAT IT PRICES OUT OF USE.

A. The injunction's own words reach the 27% commission.

The injunction forbids Apple from "prohibiting developers from" including in their apps "buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to In-App Purchasing" (IAP), Apple's payment system. Pet.App.2a, 166a. Apple permitted the developer's link and charged a 27% commission (12 for some developers and transactions) on what a customer buys on the developer's website within seven days after following it. *Id.* at 84a; Pet.Br.12.

The government argues that the injunction gave no "explicit notice" about commissions. U.S.Br.22. It grants that a commission "so exorbitant," say 300%, would be "the functional equivalent of a prohibition,"

and that reading the injunction to permit one "might even be 'objectively unreasonable.'" *Id.* at 23. But 27%, it says, "is different not just in degree, but in kind," because it was found prohibitive "based solely on the difference between" it and the 30% Apple takes on in-app purchases. *Ibid.*

The 27%, which the government calls a "discount," U.S.Br.24, 26, was on linked purchases a new charge: "no commissions had ever existed on external link-out purchases. That is undisputed." Pet.App.134a. The district court found that it "renders every linked-out transaction more expensive to a developer than an IAP transaction at 30% commission." *Id.* at 82a. The injunction's text makes that comparison: it protects links to purchasing mechanisms "in addition to In-App Purchasing," and a commission that makes the linked purchase the costlier of the two defeats the alternative the text names.

Once the government concedes that "prohibiting" bars a 300% commission, the injunction's silence on commissions is beside the point. No rational developer will use an external link that costs more than Apple's 30% in-app system. At 300%, that deterrent is obvious; at 27%, Apple's financial models proved it. The difference is one of degree.

Competition law supplies a precedent. Section 3 of the Clayton Act reaches a lease that may substantially lessen competition and is made on condition that the lessee "shall not use" a competitor's machinery. 15 U.S.C. §14. The decree in *United Shoe* enjoined seven lease clauses, among them "the factory output clause, which requires the payment of a royalty on shoes operated upon by machines made by competitors." 258 U.S. at 456–57.

This Court affirmed: "While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use." *Id.* at 457.

Though a Clayton Act decision rather than a contempt case, *United Shoe* shows that a lessor may "prevent such use" without forbidding it, and to prohibit is to "prevent." Pet.App.19a. The shoe factory paid on every shoe a competitor's machine operated upon; the developer pays on every sale made through its link. In competition law a company prohibits what it prices out of use.

By Apple's account the commission is a condition on the link: a purchase carries none if the customer came "via a text or email from a developer, instead of via an in-app link-out." Pet.Br.12. The phone, operating system, and app are the same; what differs is the in-app link, the communication the injunction protects.

Contempt cannot add a duty to a decree: "the facts found must constitute a plain violation of the decree so read." *Terminal R.R. Ass'n of St. Louis v. United States*, 266 U.S. 17, 29 (1924). This contempt adds no duty. The duty not to prohibit the link is the injunction's own word, enforced on its "express terms, reasonably construed in context," the government's standard, U.S.Br.11, with no doctrine of "spirit."

B. Apple had no fair ground of doubt about what the injunction covered or what its commission would do.

Civil contempt must be shown by clear and convincing evidence, Pet.App.19a, and requires "no

fair ground of doubt as to whether the order barred" the conduct. *Taggart v. Lorenzen*, 587 U.S. 554, 557 (2019).

What the order covered. Apple relies on the district court's 2021 statement: "Apple is entitled to some compensation for use of its intellectual property." JA348; see Pet.Br.33–35. The Ninth Circuit answered that the language Apple quotes "is pulled from its discussion of in-app purchases," and that the district court "did not mention a commission for linked-out purchases." Pet.App.21a–22a & n.3. A general statement that Apple may be compensated did not authorize a commission that prohibits the link: "Apple did not charge any commission; it charged a prohibitive commission." *Id.* at 22a.

Apple had seen the question: its notes, the district court found, "reflect uncertainty about whether it could in fact impose a commission without violating the Injunction." *Id.* at 77a. Internal doubts about whether a workaround will pass muster do not create a "fair ground of doubt" under *Taggart*; enjoined parties that test a decree's boundaries without seeking clarification act "at their peril." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949).

What the commission did. The district court found, and the Ninth Circuit agreed, that Apple "set a commission rate that in practice made all alternatives to IAP economically non-viable." Pet.App.136a; see *id.* at 20a. Apple's chart said that at 27% it "[m]ight not be economically viable for developer to shift," *id.* at 77a; Apple "knew of the virtually nonexistent adoption rates" of its similar programs in the Netherlands and Korea, where as of October 2022, its witness agreed, "only one developer had signed up" across the two, *id.* at 76a n.22; and as

of the May 2024 hearing 34 of about 136,000 developers had applied to use the link. *Id.* at 114a.

Apple would require an order that "clearly and unambiguously proscribes the precise conduct at issue." Pet.Br.i. As amici read that rule, it would place beyond contempt the conduct the Federal Court of Australia found: Apple answers constraints "that are anything other than detailed, prescriptive and precise" with "practices that seek to circumvent the practical effects of those constraints." Austl. J. ¶448. This Court has called immunity for conduct "not specifically enjoined" an "impetus to the program of experimentation with disobedience of the law." *McComb*, 336 U.S. at 192.

The standard is "generally an objective one," *Taggart*, 587 U.S. at 561. Intent is not always irrelevant and may bear on the sanction, *id.* at 561–62, but civil contempt is remedial: "it matters not with what intent the defendant did the prohibited act." *McComb*, 336 U.S. at 191. On what the injunction said and what the commission did, there was no fair ground of doubt.

That answer is narrow; the rest of this brief concerns the gate that makes the commission possible.

II. THE ENDURING QUESTION IS WHETHER A MANUFACTURER MAY CONTROL A DEVICE, AND TAX ITS USE, AFTER THE SALE.

A. The terms of this dispute.

Apple sells a *device*, the iPhone: a general purpose computer that belongs to its buyer and whose usefulness depends on software other people write. Pet.Br.5. Apple keeps a *gate*: in this country

its guidelines "prevent developers from distributing iOS apps through any marketplace other than the App Store," Pet.Br.6, and even where rival stores are admitted, as in Brazil, it requires its approval of each app, called "Notarization."[2]

A *tie*, or tying arrangement, is the sale of one product (the tying product) on condition that the buyer get a second (the tied product) from the seller alone; a claim must show distinct products, forcing, and *market power* in the tying product. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 461–64 (1992); *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 12–18 (1984). Amici contend the gate is a tie of software distribution to the iPhone.

At the gate Apple collects a *toll*: 15% to 30% on paid apps and in-app purchases, and here a "link-out" commission of up to 27%. Pet.Br.6, 12. Gate and toll, following the iPhone after its sale, are *post-sale restraints*.

Apple's *IP argument* defends the toll as "compensation for the use of its IP-protected tools, technologies, and services, and for affording developers access to its vast user base." Pet.Br.3. As amici read it, the argument supposes, continuing services aside, that the iPhone's price did not pay for Apple's inventions. The *straw man* is the question what percentage Apple may charge, argued in place of whether it may keep the gate.

Open source software has its code published for anyone to inspect, correct, and reuse; *independently reviewed* software keeps its code private but is

[2] Apple Inc., *Changes to iOS in Brazil*.

examined and reported on by human or artificial intelligence reviewers other than its seller.

B. Apple sells a general purpose computer, but locks out rival software, hence it keeps the keys.

The iPhone is one of the great inventions of the age: the computer on which Americans bank, work, read the news, and see their doctors. The buyer takes the computer home, and Apple keeps the keys. Not so on the Macintosh, whose operating system underlies the iPhone's: Apple's store "is not the exclusive means for macOS users to download apps." JA274, 466. The government alleges that developers there may distribute directly "without paying Apple app store fees." DOJ Compl. ¶142. If that is so, where Apple keeps no gate it collects no toll. Apple, the United States alleges, rose on a field the government's "path-clearing" case against Microsoft had opened; those who come after have the iPhone for a field, and the iPhone has a gate. DOJ Compl. ¶¶2, 26.

C. This Court met the question a century ago, in the cases of the printing machine and the film projector.

Imagine a VCR that would not play a tape until its maker had approved the film, and that billed its owner for each playing. Imagine a country whose every printing press answered to one company. The VCR Americans bought played any tape made for it, and its maker, paid at the counter, sent no bill when the owner pressed play.

An early test of that understanding came on a mimeograph, an office printing machine sold under a notice that it "may be used only with the stencil

paper, ink and other supplies made by A. B. Dick Company." In 1912 this Court enforced the notice against a dealer who sold one owner a can of ink, over Chief Justice White's dissent. *A. B. Dick*, 224 U.S. at 11, 49. Two years later Congress "endorsed Chief Justice White's disapproval of tying arrangements, enacting §3 of the Clayton Act." *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 33–34 (2006).

The film projector followed in 1917, sold bearing a plate: the sale "gives only the right to use it solely with moving pictures" the patent owner had licensed, "and upon other terms to be fixed by the Motion Picture Patents Company," a royalty paid "while in use." *Motion Picture Patents*, 243 U.S. at 506–07. The plate was a gate and a toll. Under the patent laws the Court overruled *A. B. Dick* and refused to let the company collect again "for the use of this same invention, after its machines have been sold and paid for"; a restriction giving it "such a potential power for evil over an industry" was "plainly void." *Id.* at 518–19.

Today the rule is *exhaustion*: a sale ends the seller's patent rights in the thing sold, because the patentee "has received his reward," though it does not alone bar every later contract or charge. *Impression Products, Inc. v. Lexmark Int'l, Inc.*, 581 U.S. 360, 366, 371, 374 (2017) (citation omitted).

Nor would copyright assist. In a 2010 rulemaking exempting from the copyright statute's circumvention ban the "jailbreaking" of a phone to run lawfully obtained apps its maker had not approved, the Register of Copyrights found "no basis for copyright law to assist Apple in protecting its restrictive business model." 75 Fed.Reg. 43,825,

43,828–30 (July 27, 2010). Sixteen years later, no court has decided whether the tie is lawful, and the question before this Court is the price of a link. However the Court decides it, the principle of the mimeograph and the projector remains: a machine once sold is its owner's to use, with open source software as with any other, and a maker who claims more must show the right.

III. DEBATING THE SIZE OF APPLE'S COMMISSION IS A STRAW MAN THAT PRESUMES APPLE IS OWED A POST-SALE TOLL.

A. The retail price of the iPhone already pays for Apple's intellectual property.

A court cannot set Apple's percentage without first assuming that one is owed. Apple's IP argument supplies the assumption: Epic's customer "plays Fortnite on a device Apple invented, running an operating system Apple created and maintains," and Epic reaches Apple's users with Apple's tools and store. Pet.Br.3, 33–34. But Apple sold the device, and its annual report says what the price chiefly buys: "the hardware and bundled software delivered at the time of sale." 2026 Form 10-K 38. Those sales yielded a Products gross margin of $139.7 billion in fiscal 2026. *Id.* at 27.

Amici's position is that the price of the product pays for the invention in it. Once the device is sold, any post-sale charge requires an independent legal justification, which Apple must prove and a court must never presume. The district court's passing 2021 remark that Apple was entitled to "some compensation" for its IP, JA348, never considered patent or copyright exhaustion. A commission on

what an iPhone's owner buys years later is a VCR charging for playback ten years after purchase.

B. Apple's own conduct shows that the commission is a toll and not a royalty.

A royalty follows the use of the property licensed. Apple's commission does not. At trial in 2021 more than 80% of App Store apps were free; their developers paid only a $99 annual fee. JA294; Pet.Br.6. Free apps "do not generate any revenue for Apple," though "some developers monetize their free app with advertising." JA136. Apple takes no commission on physical goods. Pet.App.3a n.1. The district court found the 30% commission "was not tied to the value of its intellectual property," and the 27% "again tied to nothing." *Id.* at 51a. The same tools, store, and users serve the developer who pays no commission; the commission falls only where digital goods are sold. A charge that follows the sale, and not the use of the property, is a toll. Apps that pay no commission use the same Apple technology, so the commission is not a payment for that technology.

C. Tying law exists to end debates of this kind.

Without the IP label, the commission is a contract term that developers accept because the gate leaves them no other marketplace. Amici contend the gate is a tying arrangement. A tie is unlawful per se when a seller with market power forces a separate product on its buyers, *Jefferson Parish*, 466 U.S. at 12–18, a rule that "avoids the necessity for an incredibly complicated and prolonged economic investigation." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

That rule governs the tie of the iPhone to the App Store. Apple's repeated answer is an exception for software, and the exception does not apply. The court that wrote it said its judgment "is confined to the tying arrangement before us, where the tying product is software whose major purpose is to serve as a platform for third-party applications and the tied product is complementary software functionality." *United States v. Microsoft Corp.*, 253 F.3d 34, 95 (D.C. Cir. 2001) (en banc). The Ninth Circuit applied it here to a tie between two functions of a software platform, app distribution and payment processing. JA479–81. The iPhone is not software. It is a physical device, and Apple said so in this very case: citing Mr. Cook's testimony, it told the district court that it "does not sell 'smartphone operating systems'" and that "Apple sells devices, which are fully integrated into the iOS ecosystem and include the operating system and App Store." Apple's Proposed Findings of Fact ¶393, D.Ct. ECF 410. The district court agreed that "[c]ompetition exists for smartphones which are more than just the operating system." JA158. Apple has nonetheless raised the software exception against amici's tie at least five times since 2021, the last time adding "whether integrated into other software or a hardware device," words that appear in neither decision. Each time amici answered that the tying product is the device; in their words to this Court, "the tying product in our case is hardware, not software."[3] No court has ruled

[3] Apple: Mot. to Dismiss 16, No. 3:21-cv-05567 (N.D. Cal.), ECF 45; Answering Br. 40, No. 22-15166 (9th Cir.), DktEntry 33; Letter 1–2, *id.*, DktEntry 66-1; Mot. to Dismiss 20, No. 3:24-cv-08660 (N.D. Cal.), ECF 62; Reply 12–13, *id.*, ECF 64. Amici: Opp. 13, No. 3:21-cv-05567, ECF 55; Reply Br. 8–10, No. 22-15166, DktEntry 52; Pet. for Cert. 22–24,

on that answer. An exception written for platform software does not excuse the tie of a physical device to the entire universe of software that runs on the device. That is an absurd extension of *Microsoft*.

Six years into respondent's pioneering case the courts are still asked what Apple may charge for its IP. Pet.App.35a–36a. In amici's view that inquiry is the straw man. The district court found, of the commission and not of any tie, that "Apple's maintenance of its commission rate stems from market power." JA336. A court asked to enforce an order against that price should not slide into setting its rate.

Epic pleaded neither amici's tie nor the smartphone as the *foremarket*, the market for the durable product. Epic "did not explicitly use the terms 'foremarket' and 'aftermarket' in its complaint," and the foremarket it offered at trial, smartphone operating systems, the district court called "entirely litigation driven." JA157–58. The court found its own market, "digital mobile gaming transactions," JA84, though "neither party explored mobile gaming." JA326. The lack of a properly defined foremarket led this case down the rule of reason rabbit hole. Amici's tie, with the smartphone as foremarket, has been pleaded since 2021. Their cases, on appeal or awaiting refiling, and others in the pipeline such as *Proton* likely have the benefit of the per se rule, or of streamlined factfinding under *Jefferson Parish*. This case, six years old and not yet over, is proof enough that a rule of reason trial can become a labyrinth lasting decades. A precise tying claim, with the foremarket properly defined, could be

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40–41 & App. 87, No. 23-1089; Opp. 15–16, No. 3:24-cv-08660, ECF 63.

resolved in as little as a month by an appropriate injunction. For that reason, and given Apple's discovery ambush in the government's New Jersey case (subpoenas to fourteen federal agencies, the CIA among them), amici are simultaneously referring this brief to the Department of Justice. Letter 13 & n.7, D.N.J. ECF 422. That case pleads the same U.S. smartphone foremarket and Apple's exclusive control of software distribution, DOJ Compl. ¶¶134, 212, so the Department is still in a posture to seek, separate from any rule of reason trial, expedited injunctive relief that resolves this regulatory dilemma in weeks, not decades.

A free app, open source or not, has no price, and Apple cannot take 27% of nothing. With free or open source software, there is no payment to process and no commission to split: only a developer, a willing iPhone owner, and a blocked distribution channel. Lowering Apple's commission rate does nothing for an app that Apple refuses to carry; conversely, opening the iPhone to direct installation of free software opens the door to rival stores where competition, not judicial rate setting, governs prices. Whatever the Court decides about the commission should leave that road open.

IV. THE COMMISSION RATE IS A SYMPTOM OF AN UNADJUDICATED TYING ARRANGEMENT.

A. Apple set a prohibitive link commission only because its App Store tie remains intact. Mr. Cook chose a percentage while the greater question stood undecided.

Competition did not set the 27% commission. The district court found Tim Cook "was the tie-breaker" on the rate and "chose poorly." Pet.App.84a, 52a. He selected that rate while the underlying App Store tie remained unexamined; and even if he subjectively believed Apple had the right to set an off-app toll, a subjective belief is ordinarily no defense where the resulting compliance is "objectively unreasonable." *Taggart*, 587 U.S. at 561; Pet.App.15a.

Whatever number Mr. Cook chose, the iPhone would be as closed today. In August 2021 he sat in the East Room at the President's cybersecurity meeting; that day the Administration announced a planned guideline on how to "assess the security of technology, including open source software."[4] The following January Apple joined a White House meeting "to discuss initiatives to improve the security of open source software."[5] Yet the iPhone stays closed to the direct distribution of such software, Pet.Br.6; that, far more than any commission rate, is the right focus for the antitrust laws.

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[4] The White House, Fact Sheet and Pool Reports (Aug. 25, 2021).

[5] The White House, Readout (Jan. 13, 2022).

In April 2026 Apple announced that he would become executive chairman, "engaging with policymakers around the world."[6] He has since represented Apple at White House state dinners attended by leaders of all three branches of government, members of this Court among them: for King Charles III in April 2026, and for the President of China in September 2026, where he was seated with the two presidents.[7] Apple plainly has access to kings, presidents, and the governments of nations to a degree unprecedented in history. The Sherman Act was written with such power in view: "If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life." 21 Cong.Rec. 2457 (1890) (statement of Sen. Sherman). And a monopoly, once entrenched, is especially hard to remove. The shoe machinery company against whose lease clauses this Court upheld an injunction in 1922 was held in 1953 to have monopolized its market, and a decade into that decree the United States reported that it "continued to dominate the shoe machinery market." This Court's answer: "A decade is enough." *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 245, 247, 252 (1968). Under his successor Apple defends the same commission here. The claim to a toll after the sale is thus the company's policy, pressed before governments here and abroad with the company's full support. That policy, and not Mr. Cook himself, is what the antitrust laws should reach. While amici do not excuse Mr. Cook's rate decision, his transition

[6] Press Release, Apple Inc. (Apr. 20, 2026).

[7] Johnson, Deadline (Apr. 28, 2026); Cheng, CNBC (Sept. 24, 2026).

to executive chairman illustrates why framing this dispute around one executive's state of mind misses the mark. His successor, John Ternus, is a hardware engineer never mentioned in the contempt order. The civil contempt here belongs not to an individual officer, but to Apple's corporate business model. Pet.App.141a. Behind Apple stand shareholders who value the company at $5.2 trillion,[8] a value that depends largely on what Apple collects after the sale. Services, the category that includes its commissions, supplied $93.9 billion of Apple's $233.6 billion gross margin in fiscal 2026. 2026 Form 10-K 27. It is the tax after the sale that must end, and the remedy must reach the company.

None of this makes light of Apple's contempt, which was not a victimless one. Respondent and its chief executive, Tim Sweeney, have carried this litigation for six years at heavy cost. Nine months before the contempt order, amici's second suit alleged that Apple was "in malicious compliance" with the injunction in this case. The district court held the suit barred by its 2021 judgment, which is an impossibility as Apple's conduct occurred in 2024; it then imposed Rule 11 sanctions in their case. They

[8] Apple Inc. market capitalization, $5.18 trillion (Nov. 13, 2026), https://stockanalysis.com/stocks/aapl/market-cap/.

have appealed.[9] The deterrent effect on others seeking to regulate the monopoly is significant.

B. Amici have pressed the tie since 2021, and no court has decided whether it is lawful.

To amici's knowledge, theirs was the first pleading in an American court to charge that Apple unlawfully ties the iPhone to its App Store. In 2021 they moved for a preliminary injunction on August 8 and renewed the motion on September 24 on a per se tying theory: "Apple has tied the App Store . . . to the smartphone." *Coronavirus Reporter v. Apple Inc.*, No. 3:21-cv-05567 (N.D. Cal.) (*CR-I*), ECF 50, at 2, 17 ¶¶38–39. When Apple gave notice that their suit was related to the developers' commission class action, amici answered that theirs concerned "free apps that were blocked from distribution," and Judge Gonzalez Rogers found the cases "not related."[10] That December The Coring Company sued to open the iPhone to an app store of its own, built on published or independently audited source code, and pleaded the tie in a separate count. Compl. ¶¶1, 4, 164–68, *The Coring Co. v. Apple Inc.*, No. 9:21-cv-82235 (S.D. Fla.), ECF 1 (Coring Compl.). After transfer Coring dismissed voluntarily and without prejudice,

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[9] Apple had asked for $400,000 and a "nationwide injunction" barring "Plaintiffs, Mathews, and Isaacs from suing Apple in any federal court," with "any entity owned by or affiliated with Isaacs." Mot. 34, No. 3:24-cv-08660 (N.D. Cal.), ECF 70. Dr. Isaacs, who framed the tying claim, was not a party to that suit. The court denied the injunction. Apple then sought over $700,000 in fees, and the court awarded $25,000, against counsel only. Order 9, 11–12, 14, *id.*, ECF 102; Fees Mot. 5, ECF 108; Notice of Appeal, ECF 124.

[10] *CR-I*, ECF 15, at 2; *Cameron v. Apple Inc.*, No. 4:19-cv-03074 (N.D. Cal.), ECF 368-1, at 4, 8; *CR-I*, ECF 21.

No. 3:22-cv-01044 (N.D. Cal. Mar. 28, 2022), ECF 49 (it "intends to refile this matter at an appropriate time"), and it has deferred refiling pending amici's appeals and the government's suit.

The courts decided *CR-I* on the pleading. On November 30, 2021, the district court recorded the tying count in amici's words, "Apple is able to unlawfully condition access to iOS device to the use of a second product—App Store app marketplace," dismissed the antitrust claims with prejudice for failure to plead a relevant market and antitrust injury, said that, "[a]s such," it "cannot and does not address" whether the complaint stated "substantive antitrust claims," and denied the injunction motions "as moot." CR App. 27, 33, 53, 60–61, 68. On appeal amici argued that tying "all smartphones to one single software store" is unlawful per se and, when Apple invoked the 2023 decision here, that "[o]ur tying product is a physical device." Opening Br. 17–22, *CR-I*, No. 22-15166 (9th Cir.), DktEntry 17; CR App. 85, 87. The Ninth Circuit affirmed on November 3, 2023, because amici had not defined a relevant market; its opinion does not use the word "tying." *Coronavirus Reporter v. Apple, Inc.*, 85 F.4th 948, 959 (9th Cir. 2023). On April 3, 2024, amici asked this Court whether "the tying of digital software distribution stores to the iPhone device by Apple Inc., represent[s] pernicious conduct subject to the per se antitrust rule" of *Northern Pacific*. Pet. for Cert. i, 20–26, No. 23-1089, cert. denied, 144 S.Ct. 2526 (2024).

Events abroad brought the question back. Apple answered Europe's Digital Markets Act (DMA) with a "Core Technology Fee" on installations and this case's injunction with its 27% commission. On April

12, 2024, more than a year before the contempt order, Dr. Isaacs moved to reopen *CR-I*. He recognized the fee and the commission as a unified effort to legitimize a toll, "a global pattern of malicious compliance," and answered that platform investment "is typically recouped through the sale of the hardware itself." *CR-I*, ECF 118, ECF pp. 12, 14–15. A new suit pleaded the tie again on July 26, 2024, likened Apple's model to "a hypothetical pay-per-view VCR that charges users each time they wish to play a movie," and alleged that Apple was "in malicious compliance" with this case's injunction through link charges that, "like the EU CTF, are only feasible and/or enforceable because of Apple's notary stamp padlock on iOS." First Am. Compl. ¶¶61, 223, 289, *Coronavirus Reporter Corp. v. Apple Inc.*, No. 3:24-cv-08660 (N.D. Cal.) (*CR-II*), ECF 30. Amici argued that Apple's later conduct was new and that Apple had permitted refiling when it told the court of appeals that, "[a]s far as Apple can tell, there is no actual 'Coronavirus Reporter' entity." *CR-II*, ECF 63, ECF pp. 7–9, 12–13; Apple's Answering Br. 7 n.4, No. 22-15166, DktEntry 33. On June 25, 2025, the new suit, by then transferred from Wyoming to California, was dismissed on claim preclusion. *CR-II*, ECF 82, at 3–5. Mandamus was denied, and an initial appeal was dismissed before merits briefing. Amici's notice of appeal of November 12, 2026, seeks review of the dismissal and sanctions.[11]

[11] Pet., No. 25-7761 (9th Cir.), DktEntry 1.1, ECF p. 9; Order, *id.*, DktEntry 9.1; Mot. 1–3, No. 25-8111 (9th Cir.), DktEntry 9.1; Notice of Appeal 1–3, *CR-II*, ECF 124. See also Pet. for Reh'g En Banc, No. 25-7761, DktEntry 10.1, ECF p. 15 (describing what the tying claim seeks as "analogous to the liberation of the printing press or the open standards of the

The claim was not thought small. Amici had put the damages at $200 billion, CR App. 29, and when Law360 named Apple's counsel a Competition Group of the Year, it reported first that the firm "got Apple out of [the *CR-I*] $200 billion lawsuit."[12]

In June 2025 a developer represented by Quinn Emanuel pleaded the same tie for a proposed class. Amici, in 2021: Apple "unlawfully tied its iOS devices in the US Smartphone device market [to] the use of its App Store." Coring Compl. ¶164. The class complaint, in 2025: "Smartphones and iOS app distribution are two separate services or products," and "Apple has conditioned the operation of its smartphones . . . on the use of its iOS app distribution service (the App Store)." Compl. ¶¶219, 221, *Proton AG v. Apple Inc.*, No. 4:25-cv-05450 (N.D. Cal.), ECF 1. The tying product, tied product, and market ("the U.S. smartphone market," *id.* ¶218) are those amici pleaded four years earlier. CR App. 24–25, 27. The district court here found a "global" market for digital mobile gaming transactions, JA84, 236; the government pleads a national market for smartphones and alleges harm to competition "amplified by Apple's decision to grant itself exclusive distribution rights to iPhone users through the Apple App Store," DOJ Compl. ¶¶134, 176; D.N.J. ECF 283 (denying motion to dismiss); that is the market in which the security of this country's software is at stake. *Proton* was related to this case when *CR-II* was not. D.Ct. ECF 1650; *CR-II*, ECF 102, at 4. No court has decided whether the tie is lawful, and the toll that depends on it should not be presumed.

VCR").

[12] Law360 (Feb. 2025).

V. ACROSS FOUR CONTINENTS, APPLE HAS DIVERTED EVERY MOVE TO OPEN THE iPHONE INTO A DISPUTE OVER NEW FEES.

A. In the United States, Apple's App Store monopoly has stood untouched for nearly twenty years.

The gate has stood since the iPhone appeared in January 2007, through a copyright exemption for jailbreaking (2010); an injunction (2021); a Senate bill to admit rival stores, reported from committee 20 to 2 and never voted on the floor, S. 2710, 117th Cong. (2022); a suit by the government (2024); and a contempt order (2025). What moved was the argument about the toll, in which the district court "concluded that delay equaled profits." Pet.App.67a.

B. Abroad, Apple has answered every regulatory move by substituting new post-sale fees.

On the other chessboards the legal mandates vary, but Apple's move never changes: it grants nominal compliance on paper while imposing a new fee that neutralizes the reform in practice.

Korea and the Netherlands required payment choice; Apple allowed it at commissions of 26% and 27%, and Australia's Federal Court found that Apple "had replaced a contractual tie with an economic tie." Pet.App.102a–103a n.41; Austl. J. ¶445. A contractual tie forbids the rival's product; an economic tie prices it out of use. The commission here moves in lockstep: allowing the alternative at a commission is, the district court found, "essentially the option Apple chose in Korea, the Netherlands, and in the United States." Pet.App.71a n.13.

Europe is the warning. Its DMA required Apple to admit rival app stores and to let developers steer customers "free of charge," and in April 2025 the Commission fined Apple €500 million under the steering rule. The White House had said the Act "will face scrutiny from the Administration," and on July 24, 2026, the President announced a trade investigation of Europe's penalties on American technology companies, Apple among them. On August 18, after what Apple called "close collaboration with the European Commission," Apple announced new terms: 15% on purchases that follow a link out of an app, and a 5% "Core Technology Commission" on digital sales in apps distributed outside its store, each of which Apple must still approve. The Commission said it "welcomes" the terms and would monitor them.[13] A rule that said free of charge has again become a negotiation. Japan and Brazil require rival stores too; Apple charges the same 5%, and Brazil's settlement "establishes the fee structure to be charged by Apple." Apple's developer pages each explain the 5% in its brief's phrase: "tools, technologies, and services."[14] Pet.Br.3.

A toll accepted in one forum becomes a premise in the next. The district court's 2021 sentence about "some compensation" is Apple's premise here, Pet.Br.34, and the question on remand is a "reasonable fee." Pet.App.35a–36a. That is the wrong focus. A consumer device should not have a core

[13] Press Release IP/25/1085, European Comm'n (Apr. 23, 2025); The White House, Fact Sheet (Feb. 21, 2025); CBS News (July 24, 2026); Press Release, Apple Inc. (Aug. 18, 2026); MacRumors (Aug. 19, 2026) (quoting the Commission's statement).

[14] Apple's developer pages for the European Union, Japan, and Brazil; Press Release, CADE (Jan. 5, 2026).

technology fee. Competition law calls it a post-sale restraint, and every bargain over its size concedes that the price of a personal computer, until now understood to be the whole price, is only a first installment.

C. Australia's recent decree shows that ending the tie eliminates the toll.

On a fifth continent, Australia's Federal Court asked whether Apple may keep the gate. Its orders of October 22, 2026, are, to amici's knowledge, the first to open the iPhone and forbid a charge for the opening. For users with Australian accounts and developers in Apple's program, Apple must open channels other than its store, "including via direct download and alternative app stores," to apps scanned and "notarised by Apple or a suitably qualified third party." Austl. J. ¶14, order 3. Apple may not "impose any fees or conditions for access to, or use of," those channels, where "Apple provides no distribution service." *Id.* order 5(a), ¶¶662, 665. It may still charge for its tools. *Id.* order 5(j), ¶649.

VI. APPLE'S GATEKEEPER MONOPOLY THREATENS NATIONAL SECURITY AND FREE EXPRESSION.

A. Apple's closed bottleneck blocks open source peer review and independent code auditing.

The gate decides more than a price. It decides how the software Americans depend on is made safe. Recent failures and breaches in systems used for finance, communications, and air travel have sharpened public concern about that dependence. Whatever the cause of each, society is now wholly dependent on software, in increasingly complex and

critical ways, and there is no excuse for stalling or hindering open source review of it. That is a matter of national security.

Open source software is to computing what peer review is to medicine: the work is published, and anyone may check it. In 2009 the Department of Defense wrote that "continuous and broad peer-review enabled by publicly available source code supports software reliability and security efforts."[15]

The iPhone takes the opposite course: Apple describes "a highly curated App Store where every app is reviewed by experts." JA1. In 2021 the district court credited that review yet agreed "that this process is imperfect": its "overall error rate," not a malware rate, "appears to be relatively small," at "around 15% in 2015" by testimony. JA264–65. No one would ask one medical institution, however distinguished, to peer review every medical advance of the last century; Apple's curation asks that of one company.

Amici propose two routes to trustworthy iPhone software. Open source programs would load directly from public repositories such as GitHub, where anyone may inspect their code. Proprietary software would go before independent reviewers, human auditors or impartial AI judges, that test adversarially whether it does what its maker says. App stores would compete on the quality of their review, as medical journals compete on their editorial boards.

Artificial intelligence is the reason to begin now. Open source versions of the products of large software companies are now appearing, built with

[15] Dep't of Def. CIO Mem. attach. 2, ¶2.b(1)(i) (Oct. 16, 2009).

AI, and are expected to be perfected within a year. Independent reviewers, AI among them, should be measured against App Review.

Apple's curation, however well meant, is becoming the rust in the gears of a free internet: the internet that American taxpayers first funded.

B. No single corporation should control the modern printing press.

Progress and democratic ideals both depend on open discourse and peer review: "Freedom to publish means freedom for all and not for some." *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (applying the Sherman Act).

One gatekeeper can make or break any app that might change internet culture. Parler "was removed from the App Store based on inadequate content moderation." JA273 n.541. Truth Social's app can reach iPhone owners only through that gate. Apple has had unequal power to decide which apps succeed and which do not, and that amounts to censorship on the largest scale in history.

Apple has its finger on the scales of democracy, as would any company that kept the only gate. History would not judge it well if a single company controlled every printing press. This case is the test of whether an order to open the iPhone could be enforced: the injunction freed one thing, the developer's link, and Apple's 27% commission left it all but unused. Pet.App.20a, 114a.

VII. THE COURT SHOULD AFFIRM ON THE INJUNCTION'S PLAIN TEXT WITHOUT PRESUMING THAT APPLE IS OWED A POST-SALE COMMISSION.

A. Apple's "precise conduct" rule would turn every antitrust decree into an endless game of evasion.

The standard announced here will govern any later order that opens the iPhone. Suppose one lets iPhone owners install software directly from its makers, and an open source project publishes a security fix. Apple could add a fee on each installation, a warning screen, or a wait for its approval. Apple grants that a broadly worded order can reach a practice it does not name, Pet.Br.25–26, but as amici read its "precise conduct" rule, none of these would be contempt until a second order named it, and the fix would wait.

An affirmance would not open the iPhone or speed any security fix; it would keep a later order to open it enforceable against a charge or condition that closed it again, without a second lawsuit. That is progress.

B. The Court should affirm based on the commission's practical effect while reserving whether any off-app fee is lawful.

The Court should affirm in Part I's two steps: the word "prohibiting," Pet.App.166a, leaves no fair ground of doubt that the order covered a charge pricing the link out of use, and both courts below found the commission did so. *Id.* at 20a, 136a. The findings of bad faith, *id.* at 14a–17a, confirm the result; amici submit it needs neither them nor a

doctrine of "spirit." The judgment should rest on what the commission did, not on who chose it. If the Court restates the standard, it should remand, Resp.Br.45, leaving standing the violations that hold under any standard, U.S.Br.27–28 ("plain buttons"), and the district court's power to modify an injunction that proves insufficient. Pet. 22.

The opinion should not presume the toll. The Ninth Circuit recommended for remand "a reasonable fee" that gives Apple "some compensation for the use of its intellectual property" directly used in linked purchases, Pet.App.35a–36a, on an issue Apple called "neither briefed nor argued on appeal." Pet. 12. Apple objects to courts in "the role of rate-inspector," Pet.Br.36; this Court has called them "ill suited" to "identifying the proper price, quantity, and other terms of dealing." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). But the way out of setting Apple's rate is not to presume that a rate is owed. Without a commission here, Apple's witness acknowledged, "it would be harder to justify a commission elsewhere in the world." Pet.App.73a n.16. If this Court's opinion presumes that Apple is entitled to an off-app toll, Apple will invoke that presumption around the world to turn the sale of every iPhone into a perpetual rent on its use. Judicial restraint counsels a single clarifying sentence: that this decision addresses only the enforcement of the anti-steering injunction and expresses no view on whether Apple is entitled to any compensation on off-app transactions, or whether its broader App Store tying restrictions violate the antitrust laws. That leaves to their own records the cases that plead the smartphone as tying

product. Nothing in this case requires the Court to say that Apple is owed a cent after the sale.

Whatever the Court decides, its opinion carries a responsibility: the computer in every pocket should run software made safe in the open and be a press with more than one owner. Congress freed the mimeograph in 1914. This Court freed the film projector in 1917. The machine that has replaced them both can be next.

CONCLUSION

The long argument over what percentage Apple may charge is the largest straw man argument in history, from the largest monopoly in history. The Court can answer the question presented without being drawn into it. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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