# Nos. 21-16506 & 21-16695

*In the*

# United States Court of Appeals

*for the*

# Ninth Circuit

EPIC GAMES INC. V. APPLE INC.

On Appeal from a Decision of the
United States District Court for the Northern District of California,
The Honorable Yvonne Gonzalez Rogers, No. 20-cv-05640

**Brief of *Amicus Curiae* TechFreedom in Support of Appellee/Cross-Appellant Apple Inc.'s Petition for Panel Rehearing or Rehearing En Banc**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus TechFreedom states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: June 20, 2023

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## INTEREST OF *AMICUS CURIAE*[1]

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. TechFreedom has an interest in ensuring that antitrust law promotes the public interest by protecting efficient and welfare enhancing conduct from liability under the antitrust and other competition laws.

Bilal Sayyed, Senior Competition Counsel for TechFreedom, served as Director of the Office of Policy Planning at the FTC from 2018 to 2021. "During his tenure, the Office of Policy Planning (OPP) initiated and managed the Chairman's *Hearings on Competition and Consumer Protection in the 21st Century*. . . . [U]nder Sayyed's leadership, OPP initiated the Commission's inquiry into over 500 acquisitions by Google, Facebook, Amazon, Apple, and Microsoft." FTC Chairman Simons Announces his Resignation and the Departure of Senior Staff, FTC (Jan. 19, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/01/ftc-chairman-simons-announces-his-resignation-departure-senior-staff.

Sayyed has continued to focus on the merger activity and conduct of companies operating as platforms as Senior Competition Counsel at TechFreedom. See, e.g., Bilal Sayyed, *Revival of the Essential Facility Doctrine Is Not Essential;*

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[1] No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief being filed.

*Joint Agency Guidelines Will Better Strengthen Monopolization Law*, in CPI ANTITRUST CHRONICLE (April 2023).

## INTRODUCTION & SUMMARY OF ARGUMENT

The district court found that Apple's anti-steering provisions did not violate the Sherman Act and were not unlawful under California's Unfair Competition Law (UCL). *Epic Games v. Apple*, 559 F. Supp. 3d. 898, 1052 (N.D. Cal. 2021). However, the district court found Apple's anti-steering provisions "unfair" under both the "tethering" and "balancing" tests of California's UCL. *Id.* at 1055-57. Having so found, the district court issued a nation-wide injunction prohibiting Apple's enforcement of its anti-steering provisions. A panel of this court rejected Apple's arguments and affirmed the district court's decision.

The district court and the panel of this court recognized that courts interpreting the scope of California's unfair competition law look to interpretations of Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition. 15 U.S.C. § 45. While the Supreme Court has held that Section 5 prohibits conduct beyond that prohibited by the Sherman Act, appellate courts and widely respected commentators have recognized that an expansive reading of the scope of Section 5's prohibition on unfair methods of competition would chill procompetitive conduct, may not protect competition, and may not establish adequate standards by which firms could order their business. Neither the district court nor the Ninth Circuit panel took account of these concerns, which apply

equally to expansive readings of California's UCL, in declaring illegal under the UCL conduct that it found not to be illegal under the Sherman Act.

The adoption of an overly broad interpretation of California's UCL will chill conduct that is ubiquitous, competitively neutral, or in many cases beneficial. The court's adoption of a nationwide injunction converts California's state UCL law into a federal prohibition, but without finding that any federal law had been violated.

Scholarly consensus finds the Sherman and Clayton Acts, as currently interpreted, already to be sufficiently encompassing to address nearly all matters that properly warrant competition policy enforcement. *See, e.g.,* Julian O. Von Kalinowski, Peter Sullivan & Maureen McGuirl, ANTITRUST LAWS AND TRADE REGULATION § 77.02 at 77-3 (2007) ("the prevailing view is that there are limitations on Section 5's applicability to conduct which stretches beyond the letter of [the Sherman or Clayton Acts]"); Philip Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 302(h) (2006) ("Apart from possible historical anachronisms in the application of those statutes, the Sherman and Clayton Acts are broad enough to cover any anti-competitive agreement or monopolistic situation that ought to be attacked whether 'completely full blown or not.'") That consensus on the FTC Act is applicable to this case and California's UCL. The Ninth Circuit should rehear this matter and reverse the district court and panel with respect to Epic's UCL claim against Apple.

## ARGUMENT

### I. The California Supreme Court Finds Interpretations of the Federal Trade Commission Act "More than Ordinarily Persuasive" in Determining Whether Conduct is "Unfair" Under California's Unfair Competition Law

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200.[2] Epic's charges to Apple's conduct raised only antitrust and competition concerns.

In *Cel-Tech Communications v. Los Angeles Cellular Telephone Co*., the California Supreme Court held that, where a plaintiff claims to have suffered injury from a direct competitor's unfair act or practice, "the word 'unfair' . . . means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." 973 P.2d. 527, 544, 20 Cal.4th 163, 186-187 (1999).

The court limited the scope of this broad interpretation, citing approvingly the U.S. Supreme Court's direction that "the antitrust laws . . . were enacted for the protection of *competition*, not *competitors*" (quoting *Cargill, Inc., v. Monfort of*

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[2] Conduct prohibited by Cal. Bus. & Prof. Code § 17500, False and Misleading Statements, is also prohibited as unfair competition, but not relevant here.

*Colorado, Inc.*, 479 U.S. 104, 115 (1986) (original italics)), recognizing that "[i]njury to a competitor is not equivalent to injury to competition" and that "only the latter is the proper focus of antitrust laws," *citing Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 344 (1990) and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 488-489 (1977). 973 P.3d at 544, 20 Cal.4th at 186.

In devising "a more precise test" for what is "unfair," the *Cel-Tech* court looked to Section 5 of the Federal Trade Commission Act because "'of the similarity of language and obvious identity of purpose of the two statutes.'" 973 P.3d at 564, 20 Cal.4th at 185. It recognized that "'decisions of the federal court on the subject [of what is unfair competition] are more than ordinarily persuasive.'" *Id*. Like the UCL, Section 5 of the FTC Act prohibits both unfair methods of competition and unfair or deceptive acts or practices. 15 U.S.C. § 45.

## II. The Federal Trade Commission Act's Prohibition on Unfair Methods of Competition is Broader Than, but Not Divorced From, the Sherman Act

The Supreme Court has recognized that the scope of Section 5's prohibition on unfair methods of competition reaches beyond other federal antitrust laws "to stop in their incipiency acts and practices which, when full blown, would violate those Acts." *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-395 (1953); see also *FTC v. Sperry & Hutchinson Co*., 405 U.S. 233 (1972) (holding that the FTC has the power to define and prohibit unfair competitive practices outside the letter or spirit of the antitrust laws).

Granted this authority, the FTC applied Section 5 broadly. In *FTC v. Brown Shoe*, the Commission challenged an arrangement under which Brown Shoe provided special business services to retail shoe stores in exchange for their promise to deal primarily in Brown Shoe shoes and not to handle directly competitive product lines. 384 U.S. 316 (1966). The Supreme Court found that the arrangement "foreclosed Brown's competitors from selling to a substantial number of retail shoe dealers" and thereby conflicted with the central policies of both Section 1 of the Sherman Act and Section 3 of the Clayton Act. *Id*. at 319, 321. The Court held that the FTC need not prove that the effect of the practice "may be to substantially lessen competition or tend to create a monopoly" because Section 5 empowered the agency "to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws." *Id*.

In time, the Commission's action against Brown Shoe, and the Supreme Court's opinion upholding the Commission, came to be heavily criticized as bad economics and as protective of competitors, rather than protective of competition. *See, e.g.,* Herbert J. Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 874-75 (2010) ("in the *Brown Shoe* decision, the Supreme Court upheld an FTC order . . . where there was no realistic expectation of harm to competition" and "the decision injured rather than benefitted consumers"); John

Peterman, *The Federal Trade Commission v. Brown Shoe Company*, 18 (2) THE JOURNAL OF LAW AND ECONOMICS 361 (1975); see generally, William E. Kovacic & Mark Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act,* 76 ANTITRUST L. J. 929, 941 (2010) ("The FTC's record of appellate litigation involving applications of Section 5 that go beyond prevailing interpretations of the other antitrust laws is uninspiring."). Indeed, the vertical contractual agreements at issue in *Brown Shoe* (and in this case) are now generally recognized as efficiency-enhancing regardless of whether a firm has market power. *See Leegin Creative Leather Products v. PSKS, Inc.,* 551 U.S. 877 (2007) (minimum vertical price agreements); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum vertical price agreements); C*ontinental T.V. Inc. v. GTE Sylvania, Inc*., 433 U.S. 36 (1977) (vertical territorial restrictions).

In the 1980s, two appellate courts (in three decisions) rebuked the Commission's efforts to expand the definition of unfair methods of competition beyond the Sherman Act. *Official Airlines Guides v. FTC* rejected the agency's claims under Section 5 where the effects of the challenged conduct were outside the market in which the respondent competed. 630 F.2d 920 (2nd Cir. 1980). The Second Circuit reviewed an FTC order requiring the sole provider of published airline flight schedule information to publish listings of connecting flights of commuter airlines. Agreeing that the failure to publish those listings was arbitrary

and had an adverse effect on competition between those air carries whose flight schedules were published and those whose were not, the court nonetheless reversed the Commission's holding that such arbitrary conduct by a monopolist causing injury in a market in which it does not operate was unlawful under Section 5. *Id*. at 924, 927. The court recognized that "*enforcement of the FTC's order . . . would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry." Id*. (emphasis added).

In *Boise Cascade v. FTC,* this court overturned an FTC decision that a plywood manufacturer violated Section 5 by adopting a non-collusive delivered price system which charged customers a "west coast" freight factor regardless of the shipping destination. 637 F.2d 573 (9th Cir. 1980). The Commission had found an anticompetitive effect could be presumed from the industry-wide use of an artificial pricing system. This court disagreed: absent evidence of overt collusion, the FTC could not remedy "a complete absence of meaningful evidence in the record that price levels . . . reflect an anticompetitive effect" by relying on a presumption of effect or a by holding the conduct to be unlawful *per se*. *Id*. at 579. Notwithstanding that *Brown Shoe* had recognized the FTC's unique power to outlaw incipient trade restraints, allowing a finding of Section 5 liability would, this court warned, *"blur*

*the distinction between guilty and innocent commercial behavior." Id*. at 582 (emphasis added).

Lastly, *E.I Dupont de Nemours & Co v. FTC* vacated a Commission order that had found a violation where certain common practices were adopted, unilaterally, by four leading domestic producers and sellers of lead antiknock gasoline. 729 F.2d 128 (2nd Cir. 1984). The common practices included so-called price-signaling behavior, including selling at uniform delivered prices, giving advance notice of price increases beyond what was required in contracts with customers, and using most-favored nation clauses. *Id*. at 130. The Commission concluded that these practices violated Section 5 because they contributed substantially to uniform, supercompetitive prices by facilitating systematic price-matching. *Id*. The Second Circuit vacated, noting the insufficient showing of a lessening of competition, and expressed concern that the FTC's principal of liability failed to "discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable," and that this failure which could "open . . . the door . . . to the arbitrary and capricious administration of §5." *Id*. at 138. *See also FTC v. Abbott Laboratories*, 853 F. Supp. 526, 535-36 (D.D.C. 1994) ("The Second Circuit stated emphatically that some workable standard must exist for what is or is not to be considered an unfair method of competition under §5. Otherwise, companies subject

to FTC prosecution would be the victims of 'uncertain guesswork rather than workable rules of law.'")

In an earlier case, the FTC did not rely on the incipiency doctrine that the district court relied on here. In *General Foods Corp.*, 103 F.T.C. 204 (1980), the FTC rejected complaint counsel's argument that Section 5 could reach anticompetitive conduct by a firm with substantial market power even if there was no dangerous probability that the firm could achieve monopoly power. The Commission explained:

> While Section 5 may empower the Commission to pursue those activities which offend the 'basic principles' of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed. . . . To distinguish between an attempt to monopolize and an incipient attempt on the basis of potential market power is to engage in such fine distinctions as to challenge . . . the competitor trying to conform its conduct to the law. *If the conduct at issue here cannot reach the early threshold of doubt under the Sherman Act, we will not condemn it under the* [*FTC*] *Act.*

*Id*. at 365-66 (emphasis added, footnote omitted).

These cases address conduct other than anti-steering provisions. However, each identifies a significant concern with a broad application of the FTC Act, untethered from the Sherman Act, that is relevant to application of California's UCL. Neither the panel nor the district court considered such concerns. The full Ninth Circuit should consider these criticisms in reviewing the panel's affirmation of the district court.

## III. Former FTC Chairs and Commissioners Have Been Critical of an Overly Broad Application of the FTC's Prohibition on Unfair Methods of Competition; These Criticisms Apply to California's UCL

FTC Commissioners of both parties have rejected overly broad interpretations of the FTC's authority to identify conduct as an unfair method of competition (UMC). "[O]ne must be very, very cautious about using Section 5. It is not a roving mandate to the Commission to go around doing good from an antitrust point of view." Comments of then-FTC Chairman Robert Pitofsky, Transcript, Federal Trade Commission Workshop, Section 5 of the FTC Act as a Competition Statute at 64 (Oct. 17, 2008). "[C]onduct challenged under Section 5 "'must have an "anticompetitive effect." That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice.'" Statement of FTC Commissioner Joshua D. Wright on the Proposed Policy Statement Regarding Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act (Jun. 19, 2013) at 7 (quoting *United States v. Microsoft Corp*., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam)).

Former Commissioner (and Acting Chair) Maureen Ohlhausen also cautioned against an overly broad view of unfair competition:

> [T]he FTC [should] consider several important factors to discern when consumers and competition would be better off with a definition of UMC that goes beyond the antitrust laws. . . . [T]he FTC should use its UMC authority only in cases of substantial harm to competition . . . only where there is no procompetitive justification for the challenged conduct or where such conduct results in harm to competition that is

> disproportionate to its benefits. . . . UMC enforcement must be grounded in robust economic evidence [and tied to] promoting and protecting consumer welfare. . . . *The FTC should not use UMC to rehabilitate a deficient Sherman or Clayton Act claim.*

Former FTC Commissioner Maureen Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 JOURNAL OF ANTITRUST ENFORCEMENT 1, 9-10, 13 (2014) (emphasis added).

Here, Epic has asked the court to do just that: rehabilitate its deficient Sherman Act claim using the broad expanse of California's UCL. The full Ninth Circuit should turn a more critical and discerning eye to Epic's claim.

## IV. The Tethering Rule of *Cel-Tech* Requires a Two-Sided Evaluation of the Effect of the Anti-Steering Rules

Two-Sided platforms differ from traditional markets; in particular, they exhibit indirect network effects, where the value of the two-sided platform to one group of participants depends on how many members of a different group participate on the other side of the platform. *Ohio v American Express,* 138 S. Ct. 2274, 2280-81 (2018). In some situations, an antitrust evaluation of a restraint in a two-sided market must consider the economic effects of the restraint on both sides of a platform. *Id*. at 2286.

In *American Express*, the value of the platform was associated with the use and acceptance of an American Express card; American Express included anti-steering provisions in its contract with merchants to minimize nudges from

merchants to consumers to use a card with cheaper exchange fees. Here, Apple's anti-steering restrictions balance the potentially competing interests of developers and consumers on opposite sides of Apple's App Store platform with respect to security and privacy.

Consistent with the tethering rule of *Cel-Tech*, the courts should have evaluated the competitive and consumer effects of the restrictions on *both* sides of the platform. Neither did so: The district court found liability by considering effects on only one side of the platform, and the panel affirmed without considering this deficiency. This is reason enough for rehearing en banc. The district court's holding and the panel's affirmance put at risk any platform operator with anti-steering provisions. As we understand it, the empirical evidence introduced at trial shows that many (if not nearly all) platforms have similar rules. See 4-SER-997-1012. Common rules across platform operators, those with market power and those without, suggest such rules are procompetitive and not solely for the purpose of excluding a competitor. Neither the district court nor the panel of this court appears to have taken notice of this fact and its implications. This court should grant rehearing.

## CONCLUSION

For the foregoing reasons, and for the reasons identified in Apple's petition for rehearing, Amicus TechFreedom respectfully urges the Court to grant rehearing.

Dated: June 20, 2023

Respectfully submitted,

**TechFreedom**

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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## CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated: June 20, 2023 /s/ *Bilal K. Sayyed*