

No. 25-7917

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In the United States Court of Appeals  
for the Ninth Circuit

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IN RE: APPLE INC. APP STORE SIMULATED CASINO-STYLE GAMES LITIGATION,

FRANK CUSTODERO, et al.,  
*Plaintiffs-Appellees,*

v.

APPLE INC.,  
*Defendant-Appellant.*

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On Appeal from the United States District Court for the  
Northern District of California, No. 5:21-md-2985

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BRIEF OF AMICUS CURIAE TECHFREEDOM IN SUPPORT  
OF DEFENDANT-APPELLANT AND REVERSAL

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## **CORPORATE DISCLOSURE STATEMENT**

TechFreedom has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

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## INTEREST OF AMICUS CURIAE\*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C., dedicated to promoting technological progress that improves the human condition. It advocates for public policy that fosters experimentation, entrepreneurship, and investment.

Technological progress depends on legal stability. TechFreedom therefore files amicus briefs supporting the rule of law and a predictable legal system—and opposes efforts, like this one, to subject online services to forms of liability that their offline counterparts have never faced. The Supreme Court has now held in three unanimous decisions, issued in the last three years, that providers of neutral, generally available services do not become aiders and abettors simply because some customers misuse what they offer. That principle resolves this case. We write to explain why.

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\* 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's being filed.

## SUMMARY OF ARGUMENT

The defendants don't operate social casinos. They run app stores, where they process payments for apps that do. That is a theory of secondary—or aiding and abetting—liability, and it must be evaluated as one. See Apple Prin. Br. 44-47.

Viewed in that light, the plaintiffs' lawsuit fails twice over.

First, it fails as a matter of statutory authority. The plaintiffs rely heavily on states' "little FTC Acts." These should be construed in harmony with the federal FTC Act, which almost certainly does not permit aiding-and-abetting liability. Secondary liability exists only where Congress has said so in the statute, and Congress did not say so in Section 5. The FTC has flirted with an astatutory workaround—the "means and instrumentalities" doctrine—but it recently (quite properly) narrowed this to a handful of circumstances, none of which is present here. The plaintiffs' fallback laws—state civil gambling-loss statutes and the federal RICO statute—likewise do not permit backdoor claims of secondary liability.

Second, the suit fails on the merits. Even assuming aiding-and-abetting liability were available, the Supreme Court has now made clear, three times over, that it does not reach the conduct alleged here. *Twitter v. Taamneh*, 598 U.S. 471 (2023); *Smith & Wesson v. Estados Unidos*

*Mexicanos*, 605 U.S. 280 (2025); and *Cox Communications v. Sony Music Entertainment*, 607 U.S. \_\_\_\_ (Mar. 25, 2026), all confirm—each by a vote of 9-0, no less—that a defendant who provides a neutral, generally available service to the public is not an aider and abettor merely because that service is misused by some customers. Social-media platforms are not liable for hosting terrorists. Gun manufacturers are not liable for selling guns through ordinary channels. Internet service providers are not liable for supplying access to copyright infringers. And so: app stores are not liable for processing payments.

The app stores' relationship to the alleged wrongdoing is even more attenuated than the relationships that missed the mark in *Taamneh*, *Smith & Wesson*, and *Cox*. The defendants do not design the casino apps, operate the games, or set the odds. They do not decide how the digital chips will flow. They simply offer the same standardized payment service to every developer on the platform. To call that aiding and abetting would be to impose secondary liability on the everyday provision of general commercial services—exactly the result the Court has shot down again and again.

## ARGUMENT

### **The Plaintiffs Plead a Secondary-Liability Theory That Is Neither Statutorily Authorized Nor Factually Supported.**

The plaintiffs’ theory is aiding and abetting. Their own allegations show as much. They say the app stores “profit” from “illegal gambling” by “processing . . . unlawful transactions.” Pls’ Am. Master Compl. ¶¶ 199-200. But that is not an allegation that the app stores themselves “operat[e] . . . social casinos.” It is an allegation that the app stores provide payment-processing services to apps that allegedly violate gambling laws. The app stores, in other words, are not the asserted primary wrongdoers. At most, they “help[ed]” others commit the alleged wrong. *Rosemond v. United States*, 572 U.S. 65, 70 (2014).

That distinction controls the analysis. Because the plaintiffs allege not primary liability, but secondary liability, they must establish two things: first, that the statutes they invoke permit aiding-and-abetting liability at all; and second, that the defendants’ conduct satisfies the demanding standard for such liability.

The plaintiffs rely primarily on various states’ little FTC Acts—statutes modeled, as the name suggests, on the Federal Trade Commission Act. Many such laws are expressly to be construed in harmony with their federal counterpart. See, e.g., *Yumilicious Franchise*,

*LLC v. Barrie*, 819 F.3d 170, 176 (5th Cir. 2016) (courts construing the Texas little FTC Act must “follow the interpretations given by . . . the federal courts to Section 5(a)(1), Federal Trade Commission Act”); *Plan v. GlaxoSmithKline*, 737 F. Supp. 2d 380, 410 (E.D. Pa. 2010) (similar—Idaho); *In re Packaged Seafood Prods. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1087 (S.D. Cal. 2017) (West Virginia); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F. Supp. 2d 160, 186 (D. Me. 2004) (Maine); David J. Federbush, *Obtaining Relief for Deceptive Practices Under FDUTPA*, Fla. B. J., vol. 75, no. 10, p. 22 (Nov. 2001) (Florida). At least four of the little FTC Acts the plaintiffs invoke are subject to this harmony requirement. See, e.g., *FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 942 (N.D. Ill. 2008) (Illinois); *Devane v. L'Oréal U.S. Inc.*, 19-cv-4362, Dkt. 32 at 11 (S.D.N.Y. Sep. 14, 2020) (Alabama); *1st Nationwide Collection Agency v. Werner*, 654 S.E.2d 428, 431 (Ga. Ct. App. 2007) (Georgia); *Larsen Chelsey Realty Co. v. Larsen*, 656 A.2d 1009, 1020 (Conn. 1995) (Connecticut).

Under the federal FTC Act, aiding-and-abetting liability likely does not exist at all. Beginning in the late 1970s, the Supreme Court came to recognize that courts have no roving authority to read causes of action into statutes, because doing so “cannot be squared with the separation of powers.” *Cannon v. Univ. of Chicago*, 441 U.S. 677, 730 (1979) (Powell,

J., dissenting). It is now settled that “private rights of action to enforce federal law must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); see also *Ziglar v. Abbasi*, 582 U.S. 120, 132-33 (2017).

Among the cases that effected this shift, *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), matters most here. The Court held that “there is no general presumption” in federal civil law that a “plaintiff may . . . sue aiders and abettors.” *Id.* at 181-82. Put differently, a federal court may not sneak aiding-and-abetting liability into a statute when Congress did not put it there. That principle defeated the plaintiff in *Central Bank* because the Securities Exchange Act contained no express aiding-and-abetting provision. The same problem exists here—the FTC Act contains no such provision either. Multiple FTC commissioners have accordingly recognized that, under *Central Bank*, “the FTC may well be precluded from bringing Section 5 cases under an aiding and abetting theory.” *In re True Ultimate Standards Everywhere, Inc.*, No. 1323219 (FTC Nov. 17, 2014) (Ohlhausen, Comm’r, dissenting in part).

In an explicit attempt to work around *Central Bank*, the FTC used to invoke the concept of “means and instrumentalities” as an “alternative theor[y]” for reaching “secondary actors.” *FTC Reauthorization: Hearing*

*Before the S. Comm. on Com., Sci., and Transp.*, S. Hrg. 110-1148, p. 22 n.56 (2008) (Prepared Statement of the FTC). More recently, though, the Commission has dropped that effort and conceded that “means and instrumentalities,” properly construed, is a narrow doctrine. It applies only to cases involving deceptive materials supplied by the defendant, products or services that are inherently deceptive, or knowledge that the recipient will use the product to violate Section 5. *In re Rytr LLC*, No. 2323052 at 4-5 (FTC Dec. 22, 2025). None of that is present in this case: the defendants do not provide a service whose ordinary, lawful use deceives anyone or violates anything. Private litigants, moreover, have no business importing a contested agency gloss—one the FTC itself now treats as a narrow patch for gaps in its enforcement of primary liability—into state-law causes of action that say nothing about secondary liability.

Even setting aside the harmony requirement, the result is the same. As the Supreme Court has explained, “our *legal system generally* does not impose liability for mere omissions, inactions, or nonfeasance.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 489 (2023) (emphasis added). This is the verdict of the common law and its “centuries-old view of culpability.” *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 288 (2025). The plaintiffs invoke a patchwork of state consumer-protection statutes, civil gambling-loss recovery statutes, and

the federal RICO statute. Not one authorizes the theory they press. The consumer-protection statutes say nothing about secondary liability. The gambling-loss statutes reach the “winner” of a wager—not a platform charging a standard fee on every transaction. See *Sonnenberg v. Amaya Grp. Holdings (IOM) Ltd.*, 810 F.3d 509, 510-11 (7th Cir. 2016) (Posner, J.) (holding that collecting a rake does not make one a “winner” under Illinois’s loss-recovery statute). To call such a platform a “winner” imposes aiding-and-abetting liability by another name. And RICO reaches those who “participate in the operation or management of the enterprise itself.” *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). Providing payment-processing services on standardized commercial terms is not that. In each instance, the plaintiffs are trying to smuggle aiding-and-abetting liability into statutory text that will not bear it.

So much for statutory authority. Things get no better for the plaintiffs on the merits. Even if aiding-and-abetting liability were available under the FTC Act (or one of the other laws), the Supreme Court has made clear that it would not reach the conduct alleged here. In a trio of recent rulings—two unanimous and one unanimous in the judgment—the Court has rejected efforts to impose secondary liability on defendants that provide neutral, generally available services to the

public, even when those defendants know those services will be misused by some customers.

*Twitter, Inc. v. Taamneh*, 598 U.S. 471, found that social-media platforms were not liable for aiding and abetting an ISIS attack, even though the platforms allegedly failed to eject some ISIS supporters from their services. As *Taamneh* explains, aiding and abetting requires “conscious” and “culpable” participation in wrongdoing “so as to help make it succeed.” 598 U.S. at 493. It does not arise from the provision of a service that is “arm’s length,” nor from “mere passive nonfeasance.” *Id.* at 500.

*Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, and *Cox Communications, Inc. v. Sony Music Entertainment*, 607 U.S. \_\_\_ (Mar. 25, 2026), drive the point home. *Smith & Wesson* rejected Mexico’s effort to hold gun manufacturers liable for selling lawful products through ordinary distribution channels that allegedly included some rogue dealers. 605 U.S. at 289, 297. Routine commercial conduct, the Court explained, is not aiding and abetting merely because a defendant knows some downstream misbehavior will occur. *Cox* reversed a billion-dollar verdict against an Internet service provider accused of continuing to serve subscribers engaged in copyright infringement. *Cox* “simply provided Internet access, which is used for

many purposes other than copyright infringement.” *Cox*, 607 U.S. \_\_\_, slip op. at 9. As two justices noted in concurrence, “nothing about that conduct [wa]s inherently culpable,” and “mere indifference . . . is not enough for aiding and abetting liability to attach.” *Id.* slip op. at 10, 12 (Sotomayor, J., concurring in the judgment).

This case is easier than any of those. The app stores’ alleged role—processing payments for social-casino apps—is further removed from the asserted wrongdoing than the conduct the Court found insufficient in *Taamneh*, *Smith & Wesson*, and *Cox*. The defendants provide a neutral, generally available payment service to all app developers on standardized terms. They do not design the casino apps, operate the games, set the odds, or determine which virtual chips are won and lost. At most, the plaintiffs allege generalized awareness that some apps on the platforms may violate some states’ gambling laws. But the Supreme Court has now rejected that sort of theory three times. If social-media platforms are not liable for hosting terrorists, gun manufacturers are not liable for selling guns through ordinary channels, and Internet service providers are not liable for supplying access that some subscribers misuse, then app stores are not liable for offering ordinary payment-processing services on the same terms they offer everyone else. A contrary rule would create secondary liability for the everyday provision

of general commercial services—exactly the result the Court has thrice forbidden.

## CONCLUSION

The Court should reverse.

April 17, 2026

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify:

This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 2,124 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Corbin K. Barthold

## CERTIFICATE OF SERVICE

On April 17, 2026, a copy of this brief was filed and served on all registered counsel through the Court's CM/ECF system.

/s/ Corbin K. Barthold