

Nos. 21-16506 & 21-16695

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

EPIC GAMES, INC.,

*Plaintiff/Counter-Defendant,
Appellant/Cross-Appellee*

v.

APPLE INC.,

*Defendant/Counter-Claimant,
Appellee/Cross-Appellant.*

On Appeal from the United States District Court
for the Northern District of California
No. 4:20-cv-05640-YGR
The Honorable Yvonne Gonzalez Rogers

**BRIEF OF AMICI CURIAE 38 LAW, ECONOMICS, AND BUSINESS
PROFESSORS IN SUPPORT OF APPELLANT/CROSS-APPELLEE**

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Other Authorities

VII Phillip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law: An Analysis of Antitrust Principles and Their Application</i> (4th ed. 2017)	19, 20
Michael A. Carrier, <i>The Four-Step Rule of Reason</i> , 33 Antitrust 50 (Spring 2019)	20
Michael A. Carrier, <i>The Real Rule of Reason: Bridging the Disconnect</i> , 1999 B.Y.U. L. Rev. 1265	3
Michael A. Carrier, <i>The Rule of Reason: An Empirical Update for the 21st Century</i> , 16 Geo. Mason L. Rev. 827 (2009)	3
Erika M. Douglas, <i>Data Privacy Protection as a Procompetitive Justification</i> , 36 Antitrust 1 (Dec. 2021)	11

Richard J. Gilbert & A. Douglas Melamed, <i>Innovation Under Section 2 of the Sherman Act</i> , 84 Antitrust L.J. 1 (2021).....	12
Michael Spence, <i>Cost Reduction, Competition, and Industry Performance</i> , 52 Econometrica 101 (1984)	12
I J. von Kalinowski, <i>Antitrust Laws and Trade Regulation</i> (2d ed. 2017)	20

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