

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**

Michael A. Carrier
Distinguished Professor
Rutgers Law School
217 North Fifth Street
Camden, NJ 08102
856-225-6380
mcarrier@law.rutgers.edu

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF IDENTITY AND INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION	1
I. Unlike the Vast Majority of Rule-of-Reason Cases, Epic Showed Substantial Anticompetitive Effects.....	2
II. The Court Below Erred in Treating Apple’s Security and Privacy Explanations as Antitrust Justifications	6
III. The Court Erred in Not Crediting the Less Restrictive Alternatives It Found in Its Findings of Fact.....	14
IV. The Court Erred in Not Balancing the Harms Against the Claimed Benefits.....	19
CONCLUSION.....	22

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Broadcast Music, Inc. v. CBS, Inc.</i> , 441 U.S. 1 (1979).....	11
<i>Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.</i> , 996 F.2d 537 (2d Cir. 1993)	20
<i>Cont'l T.V., Inc. v. GTE Sylvania, Inc.</i> , 433 U.S. 36 (1977).....	3, 11
<i>Chicago Prof'l Sports Ltd. P'ship v. NBA</i> , 961 F.2d 667 (1992)	6
<i>Epic Games, Inc. v. Apple Inc.</i> , No. 4:20-CV-05640-YGR (N.D. Cal. Sept. 10, 2021).....	<i>passim</i>
<i>FTC v. Indiana Fed'n of Dentists</i> , 476 U.S. 447 (1986).....	9, 11, 14
<i>FTC v. Superior Court Trial Lawyers Ass'n</i> , 493 U.S. 411 (1990).....	10, 14
<i>In re Glumetza Antitrust Litig.</i> , No. C 19-05822 WHA, 2021 WL 1817092 (N.D. Cal. May 6, 2021).....	4
<i>In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.</i> , 958 F.3d 1239 (9th Cir. 2020)	17
<i>Leegin Creative Leather Products, Inc. v. PSKS, Inc.</i> , 551 U.S. 877 (2007).....	12, 13
<i>NCAA v. Alston</i> , 141 S. Ct. 2141 (2021).....	<i>passim</i>
<i>Nat'l Soc'y of Prof'l Eng'rs v. United States</i> , 435 U.S. 679 (1978).....	<i>passim</i>

<i>O'Bannon v. NCAA</i> , 802 F.3d 1049 (9th Cir. 2015)	14
<i>Ohio v. Am. Express Co.</i> , 138 S. Ct. 2274 (2018).....	2, 20
<i>Standard Oil Co. v. FTC</i> , 340 U.S. 231 (1951).....	8, 9
<i>United States v. Aluminum Co. of Am.</i> , 148 F.2d 416 (1945)	6
<i>United States v. Joint Traffic Ass'n</i> , 171 U.S. 505 (1898).....	6
<i>United States v. Microsoft Corp.</i> , 253 F.3d 34 (D.C. Cir. 2001).....	19
<i>United States v. Trenton Potteries Co.</i> , 273 U.S. 392 (1927).....	6

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



Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.