No. 24-1392

IN THE

United States Court of Appeals for the Ninth Circuit

ALIVECOR, INC.,

Plaintiff-Appellant,

v.

APPLE INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California

Case No. 4:21-CV-03958-JSW
Hon. Jeffrey S. White

BRIEF FOR CHAMBER OF PROGRESS, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, AND NETCHOICE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record states that, as nonprofit entities organized under § 501(c)(6) of the Internal Revenue Code, amici curiae Chamber of Progress, the Computer & Communications Industry Association, and NetChoice have issued no stock. Consequently, no parent corporation nor any publicly held corporation could or does own 10% or more of their stock.

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)[1]

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

[1] All parties have granted amici permission to file this amicus brief. *See* Fed. R. App. P. 29(a); Circuit Advisory Committee Note to Rule 29-3.

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STATEMENT OF INTEREST

Amici are nonprofit organizations committed to promoting a society in which all people benefit from technology and interconnectivity and all people enjoy the speech opportunities available through a safe, open, and equitable Internet.

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress seeks to protect Internet freedom and free speech, promote innovation and economic growth, and empower technology customers and users. In keeping with that mission, Chamber of Progress believes that allowing a diverse range of websites and philosophies to flourish will benefit everyone—consumers, store owners, and application developers.

Chamber of Progress's work is supported by its corporate partners, but its partners do not sit on its board of directors and do not have a vote on, or veto over, its positions. Chamber of Progress does not speak for individual partner companies, and it remains true to its stated principles even when its partners disagree.[2]

Amici support free enterprise and free expression on the Internet. Chamber of

[2] Chamber of Progress's partners include a16z, Airbnb, Amazon, Apple, Aurora, Automattic, Byte, Chime, Circle, CLEAR, Coinbase, Cruise, DailyPay, DoorDash, Earnin, Filecoin, Foundation, Google, Grayscale, Grubhub, Instacart, Intuit, Klarna, Kraken, Lyft, Meta, Midjourney, Paradigm, Pindrop, Ripple, StubHub, Suno, Turo, Uber, Vivid Seats, Waymo, and Zoox.

Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all people benefit from technological leaps. Amici therefore submit this brief in support of Appellee Apple.

NetChoice is a national trade association of online businesses that works to protect free expression and promote free enterprise online.[3] Toward those ends, NetChoice engages in litigation, amicus curiae work, and political advocacy. NetChoice fights to ensure the Internet stays innovative and free.

The Computer & Communications Industry Association ("CCIA") is an international, not-for-profit trade association representing a broad cross section of communications, technology, and Internet industry firms that collectively employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA believes that open, competitive markets and original, independent, and free speech foster innovation.

[3] NetChoice's members include Airbnb, Alibaba, Amazon, AOL, Dreamwidth, eBay, Etsy, Expedia, Fluid Truck, Google, HomeAway, Hotels.com, Lime, Lyft, Meta, Netflix, Nextdoor, Oath, OfferUp, Orbitz, PayPal, Pindrop, Pinterest, PrizePicks, Snap Inc., StubHub, Swimply, Travel Tech, Travelocity, Trivago, Turo, X Corp., VRBO, VSBLTY, Waymo, Wing, and Yahoo!.

INTRODUCTION

The United States is the world's innovation hub. Individuals and companies are constantly improving and creating new technologies that provide tremendous value to consumers. Competition is fierce—forcing companies to compete on price and features that are attractive to customers. As a result, consumers are the beneficiaries. This flourishing ecosystem has given rise to some of humanity's greatest achievements, from the personal computer to mRNA vaccines. As innovation continues, the possibilities are endless for technology to help people and society, from cures for cancer to carbon capture sufficient to reverse climate change.

Part of what enables these revolutionary advances is an antitrust system that rewards product improvement. By rewarding product improvement, companies like IBM were able to shrink the size of computers from entire gymnasiums to the size of a piece of paper—and they opened the door for new competitors like Apple, Microsoft, Dell, and others to enter the market. Why? Because our system protects competition, not competitors, recognizing that the market is much better positioned than courts to determine whether an innovation is favorable.

A system that rewards competition necessarily fosters innovation. And when innovation drives technological advances, the possibilities are virtually limitless. What's more, innovation and competition are not relics of some bygone era, they are

driving technological advances today—just look at the incredible growth in the wearable technology ("wearables") industry.

Companies are rapidly introducing new, improved wearables that allow consumers to understand and improve their health in new ways. For example, wearables can detect and help with everything from asthma, cancer, diabetes, and epilepsy to physical fitness and wellness, as supported by a host of exercise apps that offer or use heart rate information.[4] This growth is especially laudable because wearables "are uniquely poised to promote health equity at scale," helping marginalized groups access care. Walter et al., *supra* n.3.

Apple is one of many competitors in the wearables space. Whether it is other tech companies like Garmin, Fitbit, and Samsung, or fashion companies like Fossil,

[4] S. Niranjana et al., *Smart Wearable System to Assist Asthma Patients*, 40 ADVANCES IN PARALLEL COMPUTING 219 (November 2021); Sarwar Beg et al., *Wearable smart devices in cancer diagnosis and remote clinical trial monitoring: Transforming the healthcare applications*, 27 DRUG DISCOVERY TODAY 3314 (2022); Carissa A. Low, *Harnessing consumer smartphone and wearable sensors for clinical cancer research*, 3 NPJ DIGIT. MED. 140 (2020); Steven S. Coughlin et al., *Use of consumer wearable devices to promote physical activity among breast, prostate, and colorectal cancer survivors: a review of health intervention studies*, 14 J. CANCER SURVIVORSHIP 386 (2020); Ciro Rodriguez-León et al., *Mobile and Wearable Technology for the Monitoring of Diabetes-Related Parameters: Systematic Review*, 9 J. MED. INTERNET RSCH. (2021); Elisa Bruno et al., *Wearable technology in epilepsy: The views of patients, caregivers, and healthcare professionals*, 85 EPILEPSY & BEHAV. 141 (2018); Jessica R. Walter et al., *From lab to life: how wearable devices can improve health equity*, 15 NATURE COMMC'NS 1 (2024).

all are vying to sell wearables. Apple also offers tools called application program interfaces ("APIs") to developers. APIs allow developers to more easily create better, more efficient, and more powerful apps. Among the APIs Apple offers is the Workout Mode API, which reports information from heart rate-interpreting algorithms. *Id.*

To improve the Workout Mode API, Apple replaced its old algorithm with a new, more efficient one that generates more accurate, reliable results—giving consumers better information about their heart rate, calories burned, and other exercise-related data.

If successful, AliveCor's claims—that Apple acted anti-competitively by replacing an old API with an improved version—both threaten to undermine the innovative ecosystem and harm consumers by preventing companies from offering improvements that could meaningfully impact their health and fitness. Indeed, AliveCor's claims contravene the very foundations of antitrust law. "The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). Put another way, the Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Id.* This is all consistent with the "long recognized right" of a company to "freely exercise [its] own independent

discretion as to parties with whom [it] will deal." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

The district court correctly rejected AliveCor's claims, recognizing that Apple's efforts to improve its wearable technology are precisely the type of innovation that antitrust law promotes. All companies are "permitted and indeed encouraged to compete aggressively on the merits." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998 (9th Cir. 2010) (quoting *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544-45 (9th Cir. 1983), *overruled on other grounds*, *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 657 (9th Cir. 1997)). As the Ninth Circuit has made plain, if a "design change is an improvement, it is 'necessarily tolerated by the antitrust laws,'" barring an abuse of "monopoly power in some other way." *Id.* at 1000 (quoting *Foremost*, 703 F.2d at 544).

Continued vibrant innovation depends on these foundational principles. To ensure that consumers continue to benefit from better and more affordable technologies, amici urge the Court to affirm.

ARGUMENT

I. The district court correctly applied longstanding, pro-competitive and pro-innovation Ninth Circuit precedent.

It is an "uncontroversial proposition" in antitrust law "that product improvement by itself does not violate Section 2 [of the Sherman Act]." *Allied*

Orthopedic Appliances Inc., 592 F.3d at 999-1000 (citing Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 776a at 285-86 (3d ed. 2006)). The Ninth Circuit has therefore made clear that a company "has no duty to help its competitors survive or expand when introducing an improved product design." *Id.* at 1002. Imposing such a standard, as advocated by AliveCor, would be unworkable and negate antitrust law's very purpose: serving consumers.

A. Antitrust law staunchly protects the right of companies to improve their products, paving the way for technological progress.

The nation's antitrust laws correctly distinguish anticompetitive conduct from competitive conduct that is an inherent and desired feature of an innovative marketplace. A successful claim under Section 2 of the Sherman Act requires a very particular showing. Specifically, a plaintiff must establish "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Consistent with this approach, courts have made clear that Section 2 of the Sherman Act is not intended to undermine innovation, which would thwart the very goals of antitrust to foster competition. All companies, regardless of market power, are "permitted and indeed encouraged to compete aggressively on the merits, and any success [a company] may achieve solely through 'the process of invention and

innovation' is necessarily tolerated by the antitrust laws." *Allied Orthopedic Appliances Inc.*, 592 F.3d at 998 (quoting *Foremost*, 703 F.2d at 543).

The rule is therefore that "a design change that improves a product by providing a new benefit to consumers does not violate Section 2 absent some associated anticompetitive conduct." *Id.* at 998-99. In other words, if a company's "design change is an improvement, it is 'necessarily tolerated by the antitrust laws' unless the monopolist abuses or leverages its monopoly power in some other way when introducing the product." *Id.* at 1000. This approach helps to protect valuable product improvements while discouraging practices that change a product without improving it, such as patent evergreening, or improvements accompanied by unrelated abusive conduct.

Examples from the Ninth Circuit illustrate this framework. For example, the Ninth Circuit rejected a claim against changes to computer chips, disk drives, and controllers because "there was uncontroverted evidence that [the] changes allowed [the company] to reduce manufacturing costs and prices to the consumer and also improved performance of the product." *Id.* at 999 (citing *Cal. Comput. Prods., Inc. v. Int'l Bus. Mach. Corp.*, 613 F.2d 727, 744 (9th Cir. 1979)). The company "had the right to redesign its products to make them more attractive to buyers" and "was under no duty to help [plaintiff] or other peripheral equipment manufacturers survive or expand." *Id.* Likewise, the Ninth Circuit rejected a claim against changes to a new

system that was "incompatible with generic sensors and harmed generic sensor manufacturers" because the "incompatibility . . . was the necessary consequence of" an improvement. *Allied Orthopedic Appliances Inc.*, 592 F.3d at 1002.

Importantly, as the Ninth Circuit has held, "[t]here is no room" for courts to be involved in "balancing the benefits or worth of a product improvement against its anticompetitive effects." *Id.* at 1000. It is "unwise" and "unadministrable" to engage in "weigh[ing] the benefits of an improved product design against the resulting injuries to competitors" because "[t]here are no criteria that courts can use to calculate the 'right' amount of innovation, which would maximize social gains and minimize competitive injury." *Id.* at 988, 1000.

After all, "[a] seemingly minor technological improvement today can lead to much greater advances in the future," and courts are not equipped to "weigh as-yet-unknown benefits against current competitive injuries." *Id.* at 1000. The Ninth Circuit's precedent "strongly counsel[s] against such a test." *Id.* Instead, "[a]bsent some form of coercive conduct by the monopolist, the ultimate worth of a genuine product improvement can be adequately judged only by the market itself." *Id.*

B. Antitrust law also does not require companies to deal with competitors on their preferred terms, which would be anathema to competition.

The Supreme Court has "repeatedly" affirmed that "there is 'no duty to deal under the terms and conditions preferred by [a competitor's] rivals[.]'" *Fed. Trade*

Comm'n v. Qualcomm Inc., 969 F.3d 974, 993 (9th Cir. 2020) (quoting *Aerotec Int'l Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016)); *see also Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 457 (2009). At the end of the day, "[c]ompetitors are not required to engage in a lovefest," which would undermine the spirit of competitive innovation woven into antitrust law and be impossible to administer. *Aerotec Int'l*, *Inc.*, 836 F.3d at 1184.

Antitrust law fundamentally acknowledges the benefit to consumers of encouraging companies to innovate by allowing them to create better technologies that strengthen their market position. Forcing companies to cooperate on technological developments undermines this desirable incentive, thereby depriving consumers of "economically beneficial" innovations. *Trinko*, 540 U.S. at 407-08. For this reason, antitrust law does not generally require companies "to share the source of their advantage" if they have strengthened their market position "by establishing an infrastructure that renders them uniquely suited to serve their customers." *Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130, 1138 (9th Cir. 2022) (quoting *Trinko*, 540 U.S. at 407). Even worse, "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion." *Trinko*, 540 U.S. at 408.

Imposing requirements for companies to deal together is also infeasible and myopic. "Enforced sharing . . . requires antitrust courts to act as central planners,

identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited." *Id.* For the same reasons of administrability discussed in the previous subsection of this brief, courts cannot be expected to make these kinds of decisions. "The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency." *Id.* at 415 (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989)). Courts are not experts in these economically complex decisions or designed to serve this kind of function.

C. AliveCor's Sherman Act claims fail because it can only point to Apple's endeavors to improve Apple's own products—efforts fundamentally encouraged by antitrust law.

As explained, Apple's thousands of APIs help developers to create better, more powerful apps, including the company's Workout Mode API, which reports information from heart rate-interpreting algorithms. To improve the Workout Mode API, Apple changed algorithms, generating more accurate, reliable results for consumers to understand information about their heart rate, calories burned, and other exercise-related data.

Confronted with these facts, the district court correctly concluded that AliveCor's Sherman Act claims fail. The court first found that Apple's algorithm

update was indisputably "a product improvement," recognizing how the company had sought and found a better way for users to track their health. 1-ER-22.

The court then explained that AliveCor failed to show that Apple "abuse[d] or leverage[d]" any alleged market power other than by pointing to activity that was necessarily part of improving Apple's product. 1-ER-21 and 24. AliveCor focused on Apple's changes to Workout Mode. But as the district court concluded, this decision was not anticompetitive. 1-ER-24.

The court noted the unacceptable "logical conclusion" of AliveCor's claims. 1-ER-25. It observed that AliveCor would require Apple "to maintain any algorithm used by a single developer on watchOS if removal of dated algorithms would disrupt third-party apps and give Apple increased market share." *Id.* Because each of Apple's many APIs on watchOS "occupies space and requires battery life to run," such an "overinclusion would slow down the Apple Watch and drain the battery faster." *Id.* That "outcome would be untenable and would stymie the innovation that the antimonopoly laws are intended to promote." 1-ER-25.

Additionally, the court noted that AliveCor is free to use the updated API that Apple uses. So, even if AliveCor prefers the discontinued algorithm, the company "could enter the . . . market today by relying on the exact same heart rate information used by Apple to monitor for irregular heart rhythm on the Apple Watch." *Id.* Further, the court explained, Apple was under "no antitrust obligation to make its

improvements to Workout Mode compatible with AliveCor's app, such as by designing a mechanism to enable AliveCor or other competitors to access . . . data" for the old algorithm because antitrust law does not require companies to help competitors. 1-ER-25 and 26.

II. Reversing the district court would hobble competition and innovation, deny consumers the benefit of transformative technologies, and undermine America's economy and status as the world's tech leader.

Antitrust law aims to promote competition and innovation on behalf of consumers. Reversing the lower court under the theories proffered by AliveCor would harm consumers and jeopardize the competitive, vibrant wearables market and innovation more generally by stopping companies from improving their products effectively.

A. Wearable technology is progressing every day at lightning speed to improve people's lives and create a better society.

The wearables industry is buzzing with activity as companies compete to develop better and more affordable devices to help people. Innovators from electronics companies like Samsung, to GPS companies like Garmin, to fitness companies like Fitbit, and to fashion companies like Fossil are all working in this space. The global market for wearable technology was valued at $61.30 billion in 2022 and is anticipated to grow at a compound annual growth rate of 14.6% from 2023 to 2030. *Market Analysis Report: Wearable Technology Market*, GRAND VIEW RSCH. (Jan. 5, 2023), https://www.grandviewresearch.com/industry-

analysis/wearable-technology-market. The fitness tracker market is a significant portion of the wearable technology market, valued at $44.8 billion in 2022. *Market Analysis Report: Fitness Tracker Market*, GRAND VIEW RSCH. (Jan. 5, 2023), https://www.grandviewresearch.com/industry-analysis/fitness-tracker-market.

This technology is powerful. Wearables foster "improved patient engagement" and "a sense of empowerment and accountability." Ehizogie Paul Adeghe et al., *A review of wearable technology in healthcare: Monitoring patient health and enhancing outcomes*, 7 OPEN ACCESS RSCH. J. MULTIDISCIPLINARY STUD. 142, 144 (2024). They can be used for "everything from tracking activity levels to measuring sleep quality and quantity, to assessing heart rate and other vital signs—all in real-life settings and circumstances," which "enables researchers to understand a patient's physical status over a longer period than usually can be accomplished during a health care visit." Lisa D. Ellis, *Trends in Medicine: Exploring the Promise of Wearable Devices to Further Medical Research*, HARV. MED. SCH. (May 19, 2023), https://tinyl.io/BciB.

Wearables are especially useful for helping achieve health equity because they "physically interact with a single patient, often in the lived environment, yet virtually connect this individual to families, caregivers, healthcare providers and their social and healthcare networks more generally." Walter et al., *supra* n.3. For example, by facilitating remote care, wearable technology is improving access to healthcare

during pregnancy and ameliorating provider shortages. *Id.* As another example, wearables are supporting people with disabilities, "such as neuromuscular [bionic neurons] for para- and tetraplegics and radio frequency identification canes, or specialized eyeglass cameras for the blind." Nathan W. Moon et al., *Designing wearable technologies for users with disabilities: Accessibility, usability, and connectivity factors*, 6 J. REHAB. & ASSISTIVE TECHS. ENG'G. 1, 5 (2019). Research also shows that wearables can help racially and economically marginalized youth learn about fitness and develop a passion for exercise. Trevor Bopp & Joshua D. Vadeboncoeur, *"It makes me want to take more steps": Racially and economically marginalized youth experiences with and perceptions of Fitbit Zips® in a sport-based youth development program*, 9 J. SPORT FOR DEV. 54 (2021).

B. The flywheel of innovation relies on companies constantly improving their offerings, replacing old products with new, superior products that benefit consumers.

Companies cannot be chained to what they have created in the past. They must be able to tinker, tweak, and transform. Constant breakthroughs require innovators to take what they have created, identify opportunities for improvement, and apply ingenuity to develop even better products.

This process often requires replacing old products with new products. This constant experimentation and determination to improve is what has led the United

States to lead the world in technological development and will allow it to continue to do so in the future.

For example, in this case, Apple found a way to improve Workout Mode for users, bringing more accurate, reliable results on the user's heart rate, calories, and more. This is helping users to better understand their health, enhance their exercise, and take more control of their lives. Making this possible required swapping out an old algorithm for a new one. Future innovations with Apple Watch and other wearables may help users in countless ways, from detecting early signs of cancer to managing chronic addictions.

Other innovations can be understood in the same way. A car company will replace old parts with new parts to offer more affordable green technology. An online platform seeking to attract a diversity of customers may refine its algorithms to help prevent marginalized voices from being shut out. A hearing aid manufacturer will introduce new components to better enable a grandparent to enjoy their grandchild's piano recital.

C. Permitting AliveCor's claims to proceed would stymie progress by stopping companies from improving their products.

The upshot of AliveCor's theory is that organizations that improve their legacy products or features are not safe from antitrust liability if the improvement could hurt the business of a company that has relied on the legacy product. If adopted by the Ninth Circuit, that theory would hinder innovation as innovators would need

to perpetually offer old products alongside their new ones or somehow ensure that the new product is better for every single use case. This Court should not burden companies by forcing them to keep old features alive merely to appease rivals, as doing so would sacrifice the ability to innovate and improve products.

Companies would risk antitrust liability any time they replace an old product with a better one, just because a rival relies on an outdated version and chooses not to adapt. On the flip side, they could be forced to continue offering old products alongside the newer ones, and to invest the time and expense necessary to keep the old products running simultaneously, to avoid an antitrust claim like the one Apple faces here.

For example, major developers of prosthetic devices may be hindered from making the best, most affordable devices available because of concerns about antitrust liability based on how other medical products rely on aspects of a device's design. If a developer changed designs to improve performance, but the change also meant that competitors would no longer be able to create complementary products reliant on the design, the developer might need to hold back on its innovations or continue producing a dated, costly design. Consumers would suffer, potentially losing access to better designs and facing artificially inflated prices if old designs need to be maintained. The Ninth Circuit rightly rejected this type of obligation in *Allied Orthopedic*. *See* 592 F.3d at 1002.

D. Affirming AliveCor's claims would impose an unworkable framework requiring courts to act as central planners.

AliveCor's claims would require courts to decide whether a product is innovative enough to evade antitrust scrutiny and tell companies exactly the services they need to offer, for how long, and to whom. This approach is unsustainable and likely to block future innovation.

As the Ninth Circuit has stated: "To weigh the benefits of an improved product design against the resulting injuries to competitors is not just unwise, it is unadministrable." *Id.* at 1000. After all, "[t]here are no criteria that courts can use to calculate the 'right' amount of innovation, which would maximize social gains and minimize competitive injury" and "[a] seemingly minor technological improvement today can lead to much greater advances in the future." *Id.*

The Ninth Circuit has wisely rejected remedies that would order companies "to provide parts, data, and prices" that were previously provided because doing so in any "meaningful" way "would require the courts to play precisely the kind of 'central plann[ing]' role that courts are 'ill suited to play." *Aerotec Int'l, Inc.*, 836 F.3d at 1184 (quoting *Trinko*, 540 U.S. at 408). Under this system, innovation would suffer further because courts might impose orders that block the development of new technologies that would benefit consumers. Additionally, this system would make it difficult for companies to know how to comply with the law, chilling companies

from pursuing any innovative activities that could invite antitrust scrutiny, to the detriment of the market and consumers.

CONCLUSION

For the reasons stated above, the Court should affirm the district court's grant of Apple's motion to dismiss.

Respectfully submitted,

s/ Mark W. Brennan

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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