Protection or Pretext? Structuring an Appropriate Antitrust Analysis of Apple's Security Justifications for App Store Restrictions

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All three branches of the federal government are currently grappling with Apple's App Store restrictions on third-party app developers, third-party app stores, and iOS users. Congress is considering the bipartisan Open App Markets Act, which recently advanced out of the Senate Judiciary Committee in a 20-2 vote.[1] The Ninth Circuit Court of Appeals is reviewing a mixed, 185-page district court ruling on app-maker Epic Games's antitrust and unfair competition claims against Apple.[2] And the Biden administration, whose Justice Department submitted an amicus brief in support of Epic, issued a directive to the Secretary of Commerce to recommend changes to the mobile app ecosystem to improve competition, reduce entry barriers, and maximize user benefits.[3] Pursuant to the directive, the Commerce Department's National Telecommunications and Information Administration (NTIA) launched a formal inquiry in April.[4]

Consumers and developers surely would gain from a boost in app-market competition. The mobile operating system market is a duopoly of Apple and Alphabet, and, outside of China, the two firms' app stores, which are bundled with their respective operating systems, reportedly control more than 95% of app store market share.[5] According to a Congressional report, both Apple's and Alphabet's profits from app store commissions far exceed the costs of managing the services, which implies that new entry would compete down profits and deliver significant benefits to trading partners on both the supplier and user sides of the platforms.[6] But before finalizing any legislative, judicial, or

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[1] *See* Mark MacCarthy, Non-Resident Senior Fellow, Brookings Inst., *The Open App Markets bill moves out of Senate Judiciary Committee* (March 10, 2022), https://www.brookings.edu/blog/techtank/2022/03/10/the-open-app-markets-bill-moves-out-of-the-senate-judiciary-committee/.

[2] *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, 2021 U.S. Dist. LEXIS 172303 (N.D. Cal. Sep. 10, 2021) [hereinafter "*Epic* Op."].

[3] Executive Office of the White House, E.O. 14036, 86 FR 36987, Sec. (r)(iii) (July 9, 2021), https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf#page=1.

[4] Nat'l Telecom & Info. Admin, Developing a Report on Competition in the Mobile App Ecosystem, 87 Fed Reg. 24134, 24134-24139 (Apr. 22, 2022), https://www.federalregister.gov/documents/2022/04/22/2022-08573/developing-a-report-on-competition-in-the-mobile-app-ecosystem#footnote-1-p24134.

[5] Business*of*Apps, App Store Data (2022) (last updated May 4, 2022), https://www.businessofapps.com/data/app-stores/.

[6] *See* U.S. House of Representatives, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendation 344-45 (2020); *see also Epic* Op. at *76 (crediting plaintiff's expert's measurement of operating margins above 75% and deeming them "extraordinarily high").

executive branch interventions to promote competition in app markets, policymakers likely will confront a multi-billion dollar question: Could stronger competition lead to weaker security and privacy? Apple, in particular, has a business model predicated on marketing and selling premium products and services whose strong security features may be central to its users' value proposition. A key question, therefore, is whether policymakers can promote app store competition without sacrificing security and harming Apple and its customers.

This commentary explores the appropriate antitrust framework for resolving disputes over the legitimacy of Apple's security justifications for App Store and other restrictions. Part I explains how Apple's compromise in choosing to allow an open app market into its otherwise closed ecosystem has made it a quasi-regulator of market competition to sell and distribute iOS apps. Part II explores the kinds of concerns that arise when private market participants have regulatory powers in markets where they actively compete, drawing lessons from the Supreme Court's treatment of state governmental delegations of regulatory authority to privately controlled licensing boards. Part III unpacks the competing narratives around Apple's security justifications, with Apple's critics maintaining the justifications are pretextual[7] and Apple itself maintaining they are essential. Parts III.A. and III.B., respectively, examine the importance of properly assigning burdens of production and persuasion and understanding the implications of potential less restrictive alternatives in considering the legitimacy of Apple's security justifications. Part IV concludes.

I. The iOS App Store: An Open Aspect of an Otherwise Closed System

While many of the policy considerations raised by government intervention into app store markets apply equally to the Alphabet and Apple app stores, Apple's distinct business model appears facially to threaten more challenging trade-offs between competition and security. Alphabet, like many other leading firms that have come to dominate the internet economy by capitalizing on network effects and demand-side scale economies, has grown the Android ecosystem using an "open" business model. It licenses Android for free, permits interoperability across a variety of hardware manufacturers, and invites third-party hardware and software providers to standardize and innovate on and around the platform, albeit subject to controversial forced bundling restrictions.[8] Apple, by contrast, has earned customers and grown its mobile ecosystem primarily by marketing uniquely attractive (and expensive) proprietary products and services.

Apple's "closed" business model offers numerous benefits. Among other things, it gives Apple the flexibility to implement tight security and privacy controls, because its revenue does not depend as heavily on monetizing user data through targeted advertising. But Apple's model also comes with unique business risks. The company must provide especially attractive products and services to prevent customers from choosing an alternative "open" ecosystem that permits interoperability. Those benefits and risks, and the tradeoffs they sometimes entail, became prominent with the rise and growth in popularity of mobile apps.

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[7] *See* BLACK'S LAW DICTIONARY 1206 (7th ed. 1999) (defining "pretext" as "[a] false or weak reason or motive advanced to hide the actual or strong reason or motive.").

[8] *See* Kamil Franek, *How Google Makes Money from Android: Business Model Explained* (last updated Jan. 4, 2020), https://www.kamilfranek.com/how-google-makes-money-from-android/. For a discussion of network growth strategies using "open" versus "closed" systems, *see* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 227-59 (1999).

Apple recognized early on that, by offering especially attractive proprietary products, it could successfully compete against Android and other open operating systems in numerous individual product markets within the broader mobile ecosystem. The app market, however, is different from most of these markets. To win the app market, a single company, like Apple, would have had to match the collective ingenuity and creativity of legions of individual app developers working feverishly in Silicon Valley garages and elsewhere throughout the world. A nearly impossible task.

Apple deduced that a closed system would not be strategically viable in the presence of an open rival system in the app market, and it therefore compromised. It chose to continue to compete as a closed system in most respects—it continues to prevent, for example, its hardware from interoperating with other firms' operating systems and its operating system from interoperating with other firms' hardware. But Apple chose to open its App Store to independent third-party developers. Apple invites third-party developers into the otherwise closed iOS ecosystem to sell and distribute apps to Apple's customers, albeit subject to Apple's terms and conditions.

By opening its doors in this way, Apple single handedly created a new and successful market for iOS apps, which has benefitted iOS users, developers, and Apple. But with that new market has come new competition, with two important consequences for Apple. First, Apple must meet this competition in the app and app-store markets to prevent its proprietary products from being displaced. Second, because Apple imposes numerous restrictions on app sales and distribution, Apple also *oversees* this competition in the course of meeting it. By setting and policing the privacy, security, and other terms on which independent third-party developers may sell and distribute products through the App Store, Apple serves as a quasi-regulator of the app market.[9] It sets restrictions that determine whether and how developers and rival app stores may compete to sell iOS apps both with each other and with Apple itself.

Several of Apple's security-related justifications for App Store restrictions were challenged as pretextual in the *Epic* case. The plaintiff contested the legitimacy of Apple's security justifications for (1) prohibiting users from "sideloading" apps onto their devices from alternative web sources; (2) prohibiting users from loading apps via independent, third-party app stores; and (3) requiring that developers collect in-app payments from users, which are subject to Apple's 30% commission, using Apple's proprietary in-app-purchasing (IAP) software exclusively.

Although not an App Store restriction per se, Apple also offers controversial security justifications for its restrictions preventing rival "digital wallets" from accessing its devices' Nearfield Communications (NFC) technology, which leaves Apple Pay as the lone digital-wallet product through which iOS users pay for not only App Store apps but also numerous retail products at the point of sale, using tap-and-go technology.[10] In an online guide for developers, Apple reportedly encourages "presenting the Apple Pay button as the first or only payment option, displaying it larger than other options, or using a line to visually separate it from other choices."[11]

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[9] *Compare, e.g.*, U.S. Dept. of Health & Human Svcs., HIPAA Administrative Simplification Regulation Text, Security and Privacy, 45 CFR § 164.105(a)(2)(ii) (persons working for a covered entity "must not use or disclose protected health information" in a manner prohibited by the act), *with* APPLE, INC., APP STORE REVIEW GUIDELINES § 5.1.3 (2021) ("Apps may not use or disclose to third parties data gathered in the health, fitness, and medical research context…for advertising, marketing, or other use-based data mining purposes….").

[10] Patrick McGee, *Apple Pay draws antitrust attention*, FINANCIAL TIMES (Dec. 17, 2020), https://www.ft.com/content/13da1d7e-d771-40b1-a597-e37ab7112d46.

[11] *Id.*

In 2020, both the European Commission and the Netherlands Authority for Consumers and Markets launched formal investigations into Apple's policy of denying rival digital-wallet products access to NFC technology.[12] Earlier this month, the Commission issued a Statement of Objections making a preliminary finding that Apple abused its dominance in violation of Article 102.[13]

II. Private Regulation of Competition, Opportunism, and Blended Motives

Specific kinds of challenges arise when private market participants have oversight authority in the markets where they actively compete. The U.S. Supreme Court has carefully considered these challenges, albeit in the different context of state governmental delegations of regulatory authority to private occupational licensing and other oversight boards. Particularly when specialized knowledge is required for effective oversight, state governments often prefer to delegate regulatory authority to private market participants, because they are naturally more expert in the relevant subject matter and can be expected to behave ethically.[14] But almost invariably, antitrust disputes arise when the private delegees use their regulatory powers in ways that affect market competition.

To be sure, the analogy between private delegations of state regulatory authority and Apple's self-imposed regulatory authority is imperfect. There is no ethical expectation or even pretense that Apple regulates in the public interest; as a for-profit company, it is expected to regulate in its own interest. Nonetheless, the Supreme Court's jurisprudence in state-action cases remains instructive in some important respects. Among other things, it suggests policymakers are right to carefully scrutinize the choices that Apple and Alphabet make in how they regulate competition in app and app-store markets, whether in the name of security or otherwise.

The Court has, over many decades, shown marked hostility when private market participants have assumed the authority to regulate the markets in which they actively compete. Notwithstanding that states' governmental preferences carry significant weight in our dual federalist system, and no matter how clearly or affirmatively a state may express a preference to delegate regulatory authority to private experts, the Court has imposed especially demanding standards before tolerating anticompetitive regulation by active market participants under federal antitrust law.[15]

Some of the risks that have informed the Court's hostility to private market regulation by active market participants are obvious and intuitive. First and foremost, active market participants have "an incentive to pursue their own self-interest under the guise of implementing [regulatory] policies."[16] That is, "'private regulation of market entry, prices, or output may be designed to confer

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[12] *See id.*

[13] Press Release, Commission sends Statement of Objections to Apple over practices regarding Apple Pay, EUROPEAN COMM'N (May 2, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2764.

[14] *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scruti*ny?, 162 U. PA. L. REV. 1093, 1103, app. 1157-64 (2014) (noting that, in Florida and Tennessee, 90% and 93% of occupational boards were under the majority control of private professionals).

[15] *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 511-12, 135 S. Ct. 1101, 1114 (2015) ("The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement."); *id.* at 1115 (summarizing the "constant requirements of active supervision").

[16] *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216, 226 (2013).

monopoly profits on members of an industry at the expense of the consuming public.'"[17] And "prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy."[18]

But even where private regulation is not obviously anticompetitive by design, the Court still perceives significant risks. The problem is that "[d]ual allegiances are not always apparent to an actor," and "established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern."[19] The Court therefore "does not question the good faith" or "intent" of private market participants who assume regulatory authority in the markets where they compete, but rather it makes "an assessment of the structural risk of market participants' confusing their own interests with the [regulatory] policy goals."[20] When that structural risk is present, the Court affords heightened scrutiny to protect against the "'real danger'" that the private regulator is "'acting to further his own interests'" rather than the asserted goals of the regulatory regime.[21]

Whether because of naked anticompetitive intent or unconscious dual allegiances, critics of Apple's App Store restrictions maintain that they fall on the wrong side of the line between regulating in Apple's and its users' legitimate security interests and "regulating," anticompetitively and illegally, in Apple's self-interest in monopoly profits.

III. Locating Pretext in a Rule-of-Reason Analysis: Allocating Burdens and Evaluating Less Restrictive Alternatives

The debate over Apple's security justifications has been framed in "either/or" terms, with policymakers being asked to choose between two mutually exclusively narratives.[22] Opponents of Apple's restrictions argue that Apple's security justifications are entirely pretextual; they serve merely to mask self-interested restrictions on competition and can be eliminated without sacrificing any legitimate security interests. Apple itself maintains that its restrictions are sacrosanct; to compromise at all on its restrictions would necessarily and inextricably compromise on its customers' safety.

Regarding its prohibitions on sideloading via alternative web sources and third-party app stores, Apple argues that any other rule would "allow predators and scammers to side-step Apple's privacy and security protections completely," including by preventing Apple's "human review of every app and every app update."[23] Apple credits its human review and its prohibition on sideloading with helping iOS achieve "98% less malware than Android," and it warns that "forcing iPhones to allow

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[17] *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 505 (quoting *Hoover v. Ronwin*, 466 U. S. 558, 584 (1984) (Stevens, J., dissenting)).
[18] *Id.* at 505 (emphasis added).
[19] *Id.*
[20] *Id.*
[21] *Id.* at 507 (quoting *Patrick v. Burget*, 486 U. S. 94, 100 (1988)).
[22] *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUMBIA L. REV. 927, 963 (2016) (distinguishing a "shortcut approach," which "eschew[s] the investigation of overall effect in favor of uncovering or 'smoking out' a single, decisive aspect of defendant's conduct," from a "balancing approach," which requires the weighing of competing values against one another).
[23] Letter from Timothy Powderly, Senior Director, Government Affairs, Americas, Apple, Inc., to Senate Committee on the Judiciary and Senate Subcommittee on Competition Policy, Antitrust and Consumer Rights *re* S. 2992, the American Innovation and Choice Online Act, and S. 2710, the Open App Markets Act 2 (Jan. 18, 2022) [Hereinafter "Apple Letter"], *available at* https://9to5mac.com/wp-content/uploads/sites/6/2022/01/Apple-letter-full.pdf.

sideloading could lead to hundreds of thousands of additional mobile malware infections per month."[24]

However, a prominent cybersecurity expert from Harvard's Kennedy School, Bruce Schneir, has characterized "Apple's reasoning regarding side-loading" as "self-interested, oversimplified, and dishonest."[25] He notes that users presumably would have to choose to opt into sideloading and thereby accept the risk, much as users today can choose to use a "jailbroken" phone and accept similar risks.[26] Moreover, to the extent sideloading would interfere with Apple's human review via the App Store, this review is only one of several levels of protection between users and malware. And, importantly, allowing sideloading does nothing to interfere with Apple's ability to restrict what rogue apps are capable of disrupting; the common mobile practice of "sandboxing" may largely or entirely mitigate the hypothetical risk of any additional malware infections were Apple's restrictions to be removed.[27]

In the *Epic* case, the district court found "little dispute that completely unrestricted sideloading would increase malware infections," but it rejected Apple's arguments because it concluded that Apple could still maintain the same security controls, including human review, by simply reviewing an app, certifying it, and then sending it back to the developer to be distributed directly or in an alternative app store.[28]

Regarding mandatory use of Apple's IAP processing software, Apple has maintained that centralizing app transaction data in one place renders it "better able to detect new patterns in fraudulent transactions using algorithms" and to "verify certain transactions."[29] However, the district court in *Epic* observed that Apple's IAP product processes only 3% of market-wide IAP transactions, and thus to the extent scale improves fraud detection, there are other companies in the market who could do it better because they process more transactions.[30]

Regarding Apple's denial of access to NFC technology to rival digital-wallet products, Apple maintains that rival wallets may use "a technical architecture that's ultimately less private and less secure."[31] In response to the European Commission's Statement of Objections, it said its policies regarding access to NFC technology are part of "setting industry leading standards for privacy and security."[32] During a press conference announcing the Statement, however, Commissioner Vestager said, "Our investigation to date did not reveal any evidence that would point to such a higher

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[24] *Id.* at 3.
[25] Letter from Bruce Schneier to Senate Committee on the Judiciary and Senate Subcommittee on Competition Policy, Antitrust and Consumer Rights *re* S. 2992 and S. 2710 2 (Jan. 31, 2022) [Hereinafter "Schneier Letter"], *available at* https://www.schneier.com/wp-content/uploads/2022/02/Schneier-Letter-to-Senate-Judiciary-re-App-Stores.pdf.
[26] *See Epic* Op. at *55-56 (despite warnings regarding risks, developers have continued to jailbreak iPhones).
[27] Schneier Letter at 2-3. Sandboxing restricts access to system resources and user data to contain damage if an app becomes compromised. *See* Bart Jacobs, *What Is Application Sandboxing?*, COCOACASTS (last visited May 23, 2022), https://cocoacasts.com/what-is-application-sandboxing/.
[28] *Epic* Op. at *184, *194.
[29] *Id.* at *199.
[30] *Id.*
[31] McGee, *supra* note 10 (quoting Jennifer Bailey, Head of Apple Pay).
[32] Foo Yun Chee, *Apple hit with EU antitrust charge over mobile payments technology*, REUTERS (May 2, 2022, 5:08 PM EDT), https://www.reuters.com/technology/apple-hit-with-eu-antitrust-charge-over-its-payment-technology-2022-05-02/ (quoting company statement).

security risk. On the contrary, evidence on our file indicates that Apple's conduct cannot be justified by security concerns."[33]

As the *Epic* court observed, Apple's security justifications can be challenging to evaluate "[b]ecause Apple has created an ecosystem with interlocking rules and regulations," making it "difficult to evaluate any specific restriction in isolation or in a vacuum."[34] Moreover, *something* that Apple is doing, or perhaps some extrinsic factors, such as Apple's tight control over hardware or the sophistication of its wealthy user base, appears to be working in Apple's favor. According to a dataset compiled by Nokia, in 2019 the iPhone accounted for only 0.85% of total malware infections, compared to Android's 47% of the total.[35] In 2020, the iPhone accounted for 1.72% compared to Android's 26.64%.[36] In 2021, Nokia altered its reporting, but it found that Android accounted for 50.31% of total infections, Microsoft Windows accounted for 23.10%, various Internet of Things devices accounted for 13.22%, Mac OSX accounted for 9.20%, and all "other" devices, which presumably includes but may not be limited to the iPhone, accounted for 3.73%.[37] Thus, at least some aspects of Apple's overall approach to security are presumably legitimate and effective; it is a question of which ones.

A. The Defendant Has the Burden to Establish a Nonpretextual Procompetitive Justification

From an antitrust perspective, one of the important first steps in determining whether a claimed procompetitive justification is pretextual is to properly assign the parties' evidentiary burdens. The Supreme Court's most recent articulation of the rule of reason identifies a three-step burden-shifting approach. First, the plaintiff has "'the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." Second, "[s]hould the plaintiff carry that burden, the burden then 'shifts to the defendant to show a procompetitive rationale for the restraint.'" Third, "[i]f the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[38]

Pretext first enters the equation at step two. Federal courts define a "procompetitive justification" under the rule of reason as "a nonpretextual claim that [the defendant's] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."[39] Thus, the "defendant bears the burden of presenting a 'nonpretextual claim' and proving procompetitive justification on the facts."[40]

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[33] *Id.*

[34] *Epic* Op. at *203.

[35] NOKIA THREAT INTELLIGENCE LAB, NOKIA, CORP., THREAT INTELLIGENCE REPORT 2020 (2020), *available at* https://onestore.nokia.com/asset/210088.

[36] *Id.*

[37] NOKIA THREAT INTELLIGENCE LAB, NOKIA, CORP., THREAT INTELLIGENCE REPORT 2021 (2021), *available at* https://onestore.nokia.com/asset/210870.

[38] *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021) (internal citation and quotation omitted).

[39] *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (2001) (en banc).

[40] *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 488 (7th Cir. 2020); *FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020); *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 438 (3d Cir. 2016).

A key part of the defendant's burden at this stage of the rule of reason is to "adduce hard evidence of the procompetitive nature of its policy."[41] To meet its burden, the defendant therefore must produce evidence of a procompetitive justification from which a reasonable factfinder could rule out a pretextual explanation.[42] If the defendant's evidence of a procompetitive justification admits as easily of a pretextual explanation as not, then the defendant has not made the requisite evidentiary showing and has not met its burden.[43]

Placing this burden on the defendant makes sense because "the evidence of efficiencies is almost always likely to be in the control of the defendants," and "[t]hey are thus in the best position to come forward with that evidence."[44] Moreover, because the plaintiff will have "satisfied its initial burden of production with respect to [illegality], the chances of a false positive [will be] greatly diminished."[45] Indeed, if the plaintiff has established a prima facie violation and the defendant cannot produce evidence of a procompetitive explanation that would allow a reasonable factfinder to rule out pretext, then there should be no need to continue the inquiry any further.[46]

From an antitrust perspective, then, Apple should have the burden to produce evidence that tends to exclude the possibility of a pretextual explanation for its claimed security justifications if its restrictions reduce competition. In the *Epic* case, after the plaintiff met its initial burden at step one of the rule of reason, the evidence Apple produced in support of a "nonpretextual claim" of procompetitive security justifications did not clear this bar. Apple produced evidence that its restrictions on sideloading, third-party app stores, and IAP processing enhanced operating system security, but the evidence showed only an alternative explanation preferred by Apple; it did not tend to exclude the possibility of Epic's explanation, which was supported by a prima facie showing that the purpose and effect of the restrictions was to reduce competition. Apple thus failed to show its security justifications for its restrictions were nonpretextual. The district court, in its findings of fact, rejected Apple's claimed security justifications accordingly.[47]

However, in its conclusions of law, the *Epic* court nonetheless ruled for Apple. It could do so only because it mistakenly allocated the evidentiary burden for establishing pretext to Epic.[48] Instead of inquiring whether "the defendant" satisfied its "burden of 'proffer[ing] 'nonpretextual' procompetitive justifications for its conduct,'"[49] the district court inquired whether the "plaintiff's

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[41] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 776 (1999).
[42] *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[T[he trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant.").
[43] *Cf. Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) ("something more than evidence…is needed. There must be evidence that tends to exclude the possibility [of legality]" and "'reasonably tends to prove'" illegality); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 567 (2007) (a pleading "stops short of the line between possibility and plausibility" if it makes evidentiary allegations that "could very well signify illegal[ity]" but that are also susceptible to "an obvious alternative explanation").
[44] Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, *in* 1 ISSUES IN COMPETITION LAW AND POLICY 156 (ABA Section of Antitrust Law 2008).
[45] *Id.* (noting that "it may be appropriate to impose not only a burden of production, but one of proof on parties asserting efficiency defenses in response to claims of antitrust violations").
[46] *See infra* Part III.B.
[47] *Epic* Op. at *193-94 ("[T]he Court finds persuasive that app review can be relatively independent of app distribution…. Thus, even though unrestricted app distribution likely decreases security, alternative models are readily achievable to attain the same ends even if not currently employed.").
[48] *Id.* at *258 ("Epic Games does not persuasively rebut the security justification nor shows it to be pretextual.").
[49] *Mylan Pharm. Inc.*, 838 F.3d at 438.

proffer" persuasively rebutted "Apple's security rationale."[50] The proper inquiry was not whether Apple could posit a valid security rationale for its App Store restrictions, but rather whether it could offer evidentiary proof that tends to show it established the restrictions pursuant to that valid rationale—proof from which a factfinder could determine the likelihood that the explanation is pretextual.[51] The district court, in its own findings of fact, had already determined Apple had not done so. Although the error may yet be corrected on appeal, the *Epic* case thus shows how misallocating burdens can lead to false negatives at step two of the rule of reason.

B. Less Restrictive Alternatives Can Be Relevant at Step Two, Before the Burden Shifts

Pretext analysis also can enter the rule-of-reason equation during the consideration of less restrictive alternatives (LRAs) to the challenged conduct. "The idea" behind LRA analysis "is that it is unreasonable to justify a restraint of trade based on a purported benefit to competition if that same benefit could be achieved with less damage to competition."[52] However, as Justice Brennan explained in the first recorded appearance of the term "less restrictive alternatives" in the U.S. Reports, "If the restraint is shown to be excessive for the manufacturer's needs, then its presence invites suspicion…that the real purpose of its adoption was to restrict price competition."[53] Such masking of an illicit anticompetitive motive with a false and misleading legal motive, as in Justice Brennan's framing, is the legal definition of pretext.[54]

Consistent with Justice Brennan's framing, which requires that restraints must be "shown" to be excessive for their claimed purpose, LRAs are typically for the plaintiffs to establish and prove at step three of the rule of reason, after the defendant has established a nonpretextual procompetitive justification and the burden has shifted back to the plaintiff. However, not all LRA's require an additional evidentiary showing by the plaintiff to carry weight. Even without such a showing, an obvious LRA that is unaccounted for by the defendant's evidence introduced at step two can reveal that a defendant has not carried its burden of establishing a nonpretextual procompetitive justification.[55]

When an LRA is apparent without any additional evidentiary showing made by the plaintiff to rebut the defendant, it should prevent the defendant from carrying its burden of establishing a

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[50] *Epic* Op. at *259.

[51] *See Alston*, 141 S. Ct. at 2160 (defendant must "show" a procompetitive rationale); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2291 (2018) (Breyer, J., dissenting) ("[T]he burden shifts to the defendant to show that the restraint *in fact* serves a legitimate objective.") (quoting 7 Areeda & Hovenkamp ¶1504b, at 415) (emphasis added).

[52] *Impax Labs., Inc. v. FTC*, 994 F.3d 484, 497 (5th Cir. 2021); *see* ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE 285 (4th ed. 2022) (noting that LRA analysis "can be understood as derivative of ancillary restraint analysis, which asked whether a restraint was ancillary, necessary, and no greater than necessary to achieve a legitimate purpose").

[53] *White Motor Co. v. United States*, 372 U.S. 253, 270 n.9 (1963) (Brennan, J., concurring); C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUMBIA L. REV. 927, 964 (2016).

[54] *See supra* note 7; *but see* Hemphill, *supra* note 53, at 970-73 (noting that pretextual procompetitive justifications in antitrust law are more precisely revealed not from *less restrictive* alternatives but rather from *more profitable* alternatives and encouraging that *Microsoft*'s reference to pretext might be "read as an oblique call for such an analysis.").

[55] *See* Hemphill, *supra* not 53, at 973 (when the claimed pro- and anticompetitive effects are negatively correlated and the court's task is "choosing between the two parties' stories," the LRA test can indirectly "shed light on pretext … [b]y reinforcing the evidence of anticompetitive effect" and "simultaneously undermin[ing] the procompetitive effect").

nonpretextual procompetitive justification at step two of the rule of reason.[56] Indeed, if an LRA is plain before the plaintiff has introduced any additional proof in response to the defendant's showing, then the rule-of-reason inquiry should not proceed beyond step two; it should end. The burden should not shift back to the plaintiff, because the defendant necessarily has failed to proffer the caliber of evidence needed to meet its burden at step two.[57] It has merely claimed a procompetitive justification that is as consistent with a pretextual explanation as not—a showing that falls short of the mark.[58]

In *Epic*, the court again dropped the ball because it was not carefully attuned to the allocation of burdens. It assumed that LRAs were only relevant at step three of the rule of reason, where the plaintiff has the burden of producing additional evidence.[59] On Apple's sideloading and third-party app-store restrictions, for example, Epic had argued that Apple's current use of "notarization" and "enterprise" models for certain customers, both of which allow sideloading and third-party uploads, belied Apple's security justifications. But despite concluding that "Apple already implements both models on iOS and Mac" and that the enterprise model in particular "could be extended to app stores" based on its own prior findings of fact,[60] the district court ruled for Apple because the *plaintiff* "had not sufficiently developed" the LRAs.

The district court held that the LRAs, which were entered into the factual record as part of the plaintiff's prima facie case rather than as rebuttal evidence in response to the defendant's claim to a valid procompetitive justification, "leave unclear" whether Apple's security justifications are pretextual, and also that the record was too "underdeveloped."[61] In doing so, it failed to consider that the lack of clarity and the underdeveloped record should have borne directly on whether *Apple* adequately established a nonpretextual business justification at step two. Again, it misconstrued the evidence by misallocating the burden of showing a nonpretextual justification.

IV. Conclusion

Because the district court was not properly attuned to the allocation of burdens or the potential significance of LRAs at step two in rule-of-reason cases, the *Epic* decision was a missed opportunity to properly evaluate Apple's security justifications for its sideloading, third-party app store, and IAP

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[56] *See Alston*, 141 S. Ct. at 2162 ("Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits."); *cf. New York v. Actavis PLC*, 787 F.3d 638, 658 (2d Cir. 2015) ("Based largely on Defendants' own documents, New York has rebutted Defendants' procompetitive justifications," and "[b]ecause we have determined that Defendants' procompetitive justifications are pretextual, we need not weigh them against the anticompetitive harms.").

[57] GAVIL, KOVACIC, BAKER & WRIGHT, *supra* note 52, at 285 (It may be that presence of a LRA "calls into question whether the agreement has a legitimate purpose in the first place, in which case the restraint should be condemned."); Hemphill, *supra* note 53, at 983 ("[W]hen conduct makes no incremental contribution to a claimed beneficial end, cessation is an LRA. Another way to say this is that there is no benefit in the first place, a point on which the defendant properly bears the burden of persuasion."); *see also Actavis PLC*, 787 F.3d at 658.

[58] *See supra* notes 42-43 and accompanying text.

[59] *Epic* Op. at *262 ("*Turning to the last step*, the parties dispute whether these procompetitive justifications could be achieved through less restrictive means") (emphasis added); *id.* at *264-65 ("Epic has not met its burden to show" that alternatives were less restrictive).

[60] *Id.* at *263; *see id.* at *190-94.

[61] *Id.* at *264-65. The district court rejected LRAs to the IAP restrictions for similar reasons. *Id.* at 266-67.

restrictions. While we await the review of that decision on appeal, the European Commission will have the opportunity to evaluate Apple's security justifications for its prohibitions on allowing third-party digital wallets to access NFC technology. Congress may also consider the claimed justifications as it marks up the Open App Markets Act, as may the NTIA during its inquiry initiated in response President Biden's Executive Order.

It seems possible that, with further review, the "either/or" framing around Apple's security justifications may prove incorrect. One possibility, among many, is that Apple's App Store and NFC restrictions add marginally to its superior overall security track record, but that removing the restrictions would enable competitive benefits that, on net, dwarf the security gains.[62] Of course, in an antitrust case in federal court, the argument that anticompetitive restrictions should be tolerated "on the basis of the potential threat that competition poses to the public safety" would not even be cognizable; it would be greeted as a "frontal assault on the basic policy of the Sherman Act."[63] But if it does become necessary, whether in a judicial forum or otherwise, to balance cognizable pro- and anticompetitive effects rather than choose between two mutually exclusive narratives involving pretext and vulnerability, it will become especially important for judges and policymakers to follow the right analytical path.

If Apple's App Store, digital-wallet, and other similar restrictions harm competition, Apple should have the burden to establish that its security justifications are nonpretextual. The burden should be to produce evidence, likely to be within Apple's control, from which a reasonable factfinder would rule out an illicit anticompetitive strategy masquerading as a legitimate, procompetitive regulatory policy. If the evidence suggests a pretextual explanation is as likely as a nonpretextual explanation, including because it fails to account for an obvious LRA before the plaintiff has had to adduce any rebuttal evidence of an LRA at step three of the rule of reason, the restrictions should be condemned.

[62] Notably, it is possible that benefits from competition would lead to increased security, offsetting any hypothetical loss in security from removing Apple's restrictions. *See* Schneier Letter at 3-4.
[63] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).