Restructuring the Standard of Anti-Competitive Behavior with Tax-Free Spinoffs

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ABSTRACT

Monopolistic behavior and violations of antitrust statutes are prominent issues in the United States. Large corporate entities strive to maximize the wealth of their shareholders. However, those efforts often interfere with and exclude other companies from the market. In addition, corporations' unrestrained drive to maximize shareholder wealth can hurt the welfare of consumers.

In 2023, the Ninth Circuit Court of Appeals's decision in *Epic Games, Incorporated v. Apple, Incorporated* legitimized Apple's monopolistic presence in the mobile gaming market. The court's decision in *Epic Games* effectively eliminated small company competitiveness from the mobile gaming market and left consumers with few mobile gaming alternatives. Traditionally, courts have considered a defendant's subjective intent when determining whether a defendant has attempted to monopolize the market. While a defendant's subjective intent is appropriate for determining other specific intent crimes, it is not appropriate when analyzing an attempted monopoly.

This Comment analyzes the court's decision in *Epic Games v. Apple* and discusses the complications with its holding. In addition, this Comment discusses the standard used to analyze a tax-free spinoff and how the tax-free spinoff standard would be more appropriate when scrutinizing attempted monopolies. Further, this Comment discusses why a tax-free spinoff standard is most appropriate when analyzing attempted monopoly cases. This Comment also provides its own analysis of Apple's attempted monopoly using the tax-free spinoff standard. Finally, this Comment recommends that courts should use the tax-free spinoff standard when analyzing a business's conduct rather than using the traditional specific intent standard.

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I. INTRODUCTION

Apple Inc. ("Apple") is one of the largest and most influential technology-based companies in the world.[1] In 2022, nearly two billion consumers owned an Apple product.[2] That number represents approximately 500 million more consumers than in 2020, reflecting a 33% increase in two years.[3] Because of Apple's success in the smart phone and

1. *See* Umar Shakir, *Apple Surpasses 2 Billion Active Devices*, VERGE (Feb. 2, 2023), https://perma.cc/M98J-3A5N.
2. *See id*.
3. *See id.*

computer markets, Apple strives to expand into other markets in the tech industry.[4]

One of the most notable tech markets is the mobile gaming industry.[5] Between 2020 and 2027, the mobile gaming industry projects to develop at a 14.3% compound annual rate, making it one of the fastest growing industries in the gaming universe.[6] With the increased popularity of the mobile gaming market, competition for mobile gaming market control has increased.[7] This increased competition, heightens concerns of a single company gaining monopolistic control over the mobile gaming market.[8] A monopoly would reduce competition by increasing barriers to entry for potential competitors.[9] Monopolistic concerns stood at the forefront of the lawsuit brought by Epic Games against Apple.[10]

In *Epic Games, Incorporated v. Apple, Incorporated*,[11] Epic Games ("Epic") agreed to pay Apple a 30% fee for all consumer in-app purchases for Epic's popular video game Fortnite.[12] In addition, Epic agreed not to place in-app stores in Fortnite that redirected players to Epic's website to make in-app purchases.[13] Critically, the agreement required Epic to sell in-app items only through Apple's iOS platform.[14]

In 2020, Epic submitted a software code to Apple for approval.[15] The code redirected all Fortnite players to Epic's website.[16] Apple approved the software, but unknowingly approved the redirect code.[17] Upon discovering the redirect code, Apple declared that Epic breached their agreement and removed Epic from the iOS platform.[18] Epic sued Apple, arguing that Apple's conduct constituted monopolistic behavior, which

4. *See* Mark Gurman, *Inside Apple's Big Plan to Bring Generative AI to All Its Devices*, BLOOMBERG (Oct. 22, 2023), https://perma.cc/L824-EK6F (discussing Apple's plan to spend one billion dollars on AI).

5. *See* Axel Vega, *The Rise of Mobile Gaming: A Look at the Growing Industry*, LINKEDIN (Mar. 10, 2023), https://perma.cc/9A7V-BHUV.

6. *See id*.

7. *See* David Curry, *Mobile Games Revenue Data (2023),* BUSINESS APPS (May 2, 2023), https://perma.cc/P494-RNX9. The two major mobile gaming companies are currently Apple and Google, with iOS generating $52.3 billion in revenue and Google Play generating $37.3 billion in revenue. *See id.*

8. *See infra* Section II.A.1.

9. *See infra* Section II.A.3.

10. *See infra* Section II.A.4.

11. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 966 (9th Cir. 2023); *see also infra* Section II.A.4.

12. *See Epic Games, Inc.*, 67 F.4th at 967.

13. *See id.* at 967.

14. *See id*.

15. *See id.* at 969.

16. *See id.*

17. *See id.*

18. *See id*.

violated both sections 1 and 2 of the Sherman Antitrust Act ("Sherman Act").[19]

Ultimately, the Northern District of California and the Ninth Circuit Court of Appeals held that Apple did not hold a monopoly in the mobile gaming market.[20] The district court explained that rivaling companies could enter the market and produce competing products despite Apple's near-monopolistic conduct.[21] In addition, Apple only controlled around 52% to 55% of the market.[22] The court stated that this market share does not usually constitute a monopoly.[23]

Scholars consider monopolies an economic threat to the United States.[24] A single corporation owning 100% of the marketplace can fix prices and exclude competition, thus negatively impacting consumers.[25] In a monopolistic market, consumers pay inflated prices because their goods come from a single source.[26] Moreover, consumers receive worse products because less competition leads monopolizing companies to invest less on research and development.[27]

The decision in *Epic Games v. Apple* legitimized Apple's existing monopoly power in the mobile gaming market.[28] The court's opinion primarily considered that Apple did not hold a literal monopoly in the mobile gaming market.[29] But the court's focus was misplaced.[30] Rather than simply considering whether Apple held a literal monopoly, the court should have focused on whether Apple's conduct constituted an attempt to monopolize the mobile gaming market.[31] Specifically, the missed issue was whether the congressional purpose of the Sherman Act provided an objectively reasonable business purpose for Apple's exclusion of Epic from Apple's server.[32]

This Comment discusses that the court likely would have used a subjective analysis, rather than an objective analysis, if the court had

19. *See id*.
20. *See id.* at 999.
21. *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1031-32 (N.D. Cal. 2021), *aff'd in part, rev'd in part, and remanded*, 67 F.4th 946 (9th Cir. 2023).
22. *See Epic Games, Inc.*, 67 F.4th at 985.
23. *See id*.
24. *See generally* Aine Doris, *Do Monopolies Actually Benefit Consumers?*, CHICAGO BOOTH REV. (Oct. 13, 2021), https://perma.cc/8HPN-JCQX (explaining the economic concerns and other potential threats monopolies create in the United States).
25. *See infra* Section II.A.1.
26. *See infra* Section II.A.1.
27. *See infra* Section II.A.1.
28. *See infra* Section III.A.
29. *See infra* Section III.A.
30. *See infra* Section III.A.
31. *See infra* Section III.A.
32. *See infra* Section III.A.

considered Apple's attempt to monopolize the mobile gaming market.[33] Further, this Comment argues that courts should instead use an objective standard when analyzing a firm's attempt to monopolize a market.[34] Courts already use an objective standard to analyze a firm's actions in a tax-free spinoff.[35] A similar objective analysis is more appropriate when scrutinizing monopolistic behavior rather than analyzing specific intent and dangerous probability standards.[36] Essentially, when determining whether a company's anticompetitive behavior is in violation of the Sherman Act, courts should analyze: (1) whether there was an objectively reasonable business purpose for the business's conduct, and (2) whether the business's conduct aligns with the congressional purpose of the Sherman Act.[37]

Section II.A.1 discusses how the anticompetitive and monopolistic behavior of American railroad companies, during the nineteenth century's Westward Expansion, raised Congressional and consumer concerns.[38] Section II.A.2 discusses the Congressional debates spearheaded by Senator John Sherman and how his concerns led Congress to pass the Sherman Act.[39] In addition, Section II.A.2 discusses the congressional purposes of the Sherman Act: (1) to protect competition, and (2) to protect the consumer welfare.[40] Section II.A.3 discusses the modern standards courts use to identify attempted monopolies and the main forms of evidence courts consider when conducting their analyses: direct evidence and indirect evidence.[41] Section II.A.4 outlines the facts of *Epic Games v. Apple* and discusses the court's reasoning for its holding.[42]

Section II.B discusses tax-free spinoffs and their main purpose.[43] In addition, Section II.B discusses the statutory elements and court-based requirements for conducting a valid tax-free spinoff.[44] Part III discusses flaws with the court's analysis in *Epic Games v. Apple* and illustrates why the tax-free spinoff objective analysis is the most appropriate analytical framework for an attempted monopoly case.[45] Part III additionally analyzes *Epic Games v. Apple*, demonstrating how an objective standard

33. *See infra* Section III.A.
34. *See infra* Section III.B.
35. *See infra* Section II.B.2.
36. *See infra* Section III.B.
37. *See infra* Section III.B.
38. *See infra* Section II.A.1.
39. *See infra* Section II.A.2.
40. *See infra* Section II.A.2.
41. *See infra* Section II.A.3.
42. *See infra* Section II.A.4.
43. *See infra* Section II.B.
44. *See infra* Section II.B.
45. *See infra* Part III.

would have changed the holding in *Epic Games v. Apple*.[46] This Comment ultimately urges courts to adopt an objective standard when faced with an attempted monopoly case.[47]

II. BACKGROUND

To evaluate whether a company's conduct sufficiently constitutes an attempted monopoly, this Comment discusses: (1) the early concerns regarding anticompetitive behavior after the Civil War's conclusion; (2) Congress's purpose for enacting the Sherman Antitrust Act; and (3) the court-defined standards necessary to conduct a tax-free spinoff.[48]

A. Introduction to Antitrust and Anticompetitive Behavior

The following Sections discuss early concerns relating to anti-competitive behavior and the origins of U.S. antitrust law. The following Sections additionally highlight the types of evidence courts use when analyzing attempted monopoly cases and the issues courts encounter when using direct and indirect evidence to conduct their analysis.

1. Growing Concerns Post-Civil War

After the Civil War ended, the United States experienced an economic boom with the rapid development of railroads and banks.[49] The United States reached the peak of Westward Expansion as new towns developed across the country.[50] By establishing railroads and railroad companies, goods and services were delivered to settlors in newly developed cities and towns via the railroad.[51] In addition, farmers transported goods nationwide, providing farmed goods to American consumers at a higher volume and faster rate than before the railroad expansion.[52]

Due to high demand and large profit margins, large corporate entities established railroad companies.[53] These entities were called trusts.[54] However, even the large-scale railroad expansion struggled to satisfy the high consumer demand to transport goods and services.[55] Because of the

46. *See infra* Part III.
47. *See id*.
48. *See infra* Part II.A.1.
49. *See* E. THOMAS SULLIVAN ET AL., ANTITRUST LAW, POLICY, AND PROCEDURE 26 (Carolina Acad. Press ed., 8th ed. 2019).
50. *See Rise of Monopolies: Development of the Railroad Monopoly*, STAN. UNIV., perma.cc/H3YH-U8P5 (last visited Jan. 5, 2025).
51. *See id.*
52. *See id.*
53. *See* SULLIVAN ET AL., *supra* note 49.
54. *See id.*
55. *See id*.

high demand for railroads, railroad companies "pool[ed] markets and centraliz[ed] management" to gain more control.[56] This market centralization excluded competition, artificially raised consumer prices, and provided consumers no alternative railroad routes at more competitive prices.[57]

In response to the price fixing and subsequent lack of competition, U.S. consumers voiced their displeasure and started combatting the railroad companies' monopolistic behavior.[58] For example, farmers transported large supplies of crops annually to meet the nation's high demand.[59] However, fixed railroad rates and low competition forced farmers to capitulate to the railroad's high prices.[60] Farmers had no other economically viable options for crop shipments.[61] In response, Oliver Hudson Kelley and The Grangers farming organization initiated one of the earliest protests of anticompetitive behavior.[62]

The Grangers lobbied to enact new state regulations, known as "the Granger Laws," to combat the monopolistic railroad market.[63] As a result, states passed legislation to regulate intrastate railroad behavior.[64] These regulations ultimately led to a string of lawsuits including *Wabash, St. Louis & Pacific Railway Company v. Illinois.*[65]

In *Wabash*, the Wabash Railway Company sued the state of Illinois on the grounds that an Illinois state statute violated Article 1 § 8 of the U.S. Constitution.[66] The disputed Illinois statute stated that if a railroad company charged a specific rate for a specific distance to a specific location for one consumer, then the railroad company could not charge a different consumer a higher freight rate to ship their goods to the same location.[67] The statute outlawed rail rate price discrimination.[68] The Supreme Court held that the Illinois statute was unconstitutional because only Congress had the power to regulate interstate transportation of goods "under the terms of the third clause of Section eight of Article one of the

56. *Rise of Monopolies: Development of the Railroad Monopoly*, *supra* note 50.

57. *See id.*

58. *See Fears of Monopolistic Power: The Granger Revolution*, STAN. UNIV., https://perma.cc/9DDN-UJ4U (last visited Jan. 5, 2025).

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *Id.*

64. *See* Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 596 (1886); *see also* U.S. Const. art. 1, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

65. *See Wabash*, 118 U.S. at 562.

66. *See id.* at 562.

67. *See id.* at 561.

68. *See id.*

Constitution of the United States."[69] In response to the Court's decision in *Wabash*, Congress developed federal legislation regulating railroad companies' price fixing, which encouraged competition within the railroad industry.[70]

2. Creation of the Sherman Antitrust Act and Congress's Purpose for the Statute

In 1890, Congress passed the Sherman Act to regulate railroad companies' price fixing and monopolistic behavior.[71] Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."[72] Further, section 2 of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."[73] This Comment will primarily focus on section 2 of the Sherman Act.

In the congressional debates concerning the Sherman Act's creation, Congress offered two key purposes for the statute's creation.[74] First, Senator Sherman indicated that the "trusts and combinations are great wrongs to the people."[75] Senator Sherman voiced concerns that the trusts fixed prices, artificially inflated prices, and drastically decreased the cost of production.[76] Further, Sherman indicated the railroads' conduct caused abnormally high profit margins for the railroad trusts.[77] Therefore, this conduct gave trusts the power to "aggregate to themselves great, enormous wealth by extortion which makes the people poor."[78] Senator Sherman then asserted that "the people" needed protection from trusts.[79] In other

69. *Id.* at 563.

70. *See* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 241 (2003) (explaining that Congress passed legislation and other regulations in response to monopolistic behavior in the railroad market); *see also* Bruce Johnsen & Moin A. Yahya, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403, 450 (2004) (indicating *Wabash* was one of the "backdrops" that led to the creation of the Sherman Act).

71. Sherman Antitrust Act, ch. 647, 36 Stat. 209 (1890).

72. 15 U.S.C § 1.

73. *Id.* § 2.

74. *See* 21 Cong. Rec. 2461 (Mar. 21, 1890) (Statement of Sen. Sherman).

75. *Id.*

76. *See id.*

77. *See id.*

78. *Id.*

79. 21 Cong Rec. 2461*; see also* William Kolasky, *Senator John Sherman and the Origin of Antitrust*, ANTITRUST, 85, 87 (2009) (explaining Senator Sherman's background

words, everyday consumers need protection from price fixing, price gouging, and other monopolistic behaviors.[80] Therefore, a primary purpose of the Sherman Act is protecting the consumer.[81]

Second, Senator Sherman denied the notion that the Sherman Act would interfere with "lawful trade."[82] He stated that the statute would not "affect combinations in aid of production where there is free and fair competition."[83] Senator Sherman stressed that every working individual had the right to work freely and fairly without unfair competition interfering with a company's capacity to compete within a given industry.[84] Senator Sherman then indicated that the purpose of the statute not only was to protect the average consumer, but to protect the market and fair competition.[85] Protecting competition lowers the barrier of entry for potential competitors within a given industry.[86] Therefore, the second purpose of the statute is to protect fair competition.[87]

3. Problems Arising from Today's Standards for Section 1 and Section 2 Violations of the Sherman Antitrust Act

The Supreme Court has indicated that for a company to illegally attempt to monopolize a market in violation of section 2 of the Sherman Act, the company must: (1) act with the intent to monopolize a market, and (2) represent a "dangerous probability" that their conduct will establish a monopoly within a market.[88]

With respect to the first element, intent to monopolize the market, courts apply a subjective standard of intent consistent with the general standard of specific intent in criminal law.[89] A specific intent standard considers the motivations underlying a company's behavior rather than

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and concern that Senator George's proposed legislation would interfere with trade and create an increased consumer cost).

80. *See* 21 Cong. Rec. *supra* note 74 at 2461.

81. *See id.*

82. 21 Cong. Rec. 2457 (Statement of Sen. Sherman).

83. *Id.*

84. *See id.*

85. *See id.*

86. *See* ANTITRUST DIV. U.S. DEP'T JUST., *Mission*, JUST., https://perma.cc/HP58-8F95 (last updated Aug. 31, 2023) (providing information on the primary congressional purposes of the Sherman Antitrust Act).

87. *See* 21 Cong. Rec., *supra* note 82.

88. Lorain J. Co. v. United States, 342 U.S. 143, 153 (1951); *see also* DEP'T OF JUST., *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 1*, JUST., https://perma.cc/ZNF5-AESB (last updated Mar. 18, 2022).

89. *See, e.g.*, Kiersten Jensen, *General Intent Crimes vs. Specific Intent Crimes,* NOLO, https://perma.cc/UVB8-U5RQ (last visited Jan. 6, 2025) (explaining the difference between general and specific intent).

accounting for the objective purposes of a company's conduct.[90] Regarding the second element, some courts consider the dangerous probability standard to be vague because the standard does not set a bright-line rule for what conduct is dangerously close to creating a monopoly.[91] To scholars, these court-based standards are "unattainable" and prevent effective enforcement of anticompetitive behavior.[92]

Courts use direct and indirect evidence to determine whether a company holds a monopoly.[93] Direct evidence "is evidence 'of the injurious exercise of market power[,]' such as 'evidence of restricted output and supracompetitive prices.'"[94] Direct evidence generally indicates that an actor's anticompetitive behavior directly injured their competitor in the market.[95] For example, evidence that a company's anticompetitive behavior drastically reduced a market's output may be direct evidence sufficient to constitute a violation of section 1 and section 2 of the Sherman Act.[96]

Courts also use indirect evidence to determine whether a company engaged in anticompetitive behavior.[97] To use indirect evidence in a section 2 case, a plaintiff must: (1) define the market that is effected by the anticompetitive conduct, (2) prove that the defendant has a controlling interest in the market, and (3) prove that substantial barriers to entry exist that preclude competitors from entering the market.[98] Having considered the statutory standards and evidentiary tools courts use to determine whether a company's conduct constitutes a violation of the Sherman Act,

90. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993) ("Petitioners may not be liable for attempted monopolization under § 2 absent proof of a dangerous probability that they would monopolize the market and specific intent to monopolize); *see also* United States v. Murphy, 556 F. Supp. 2d 1232, 1237 (D. Colo. 2008) (differentiating between a general intent crime and a specific intent crime).

91. *See* Kansas City Star Co. v. United States, 240 F.2d 643, 663 (8th Cir. 1957) (requiring the plaintiff to prove that the defendant, "if successful, would be likely to accomplish such monopolization"). *But see* Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir. 1964) (rejecting the notion that a probability of actually monopolizing the market is a requirement to prove an attempt to monopolize).

92. Bill Baer, *Improving Antitrust Law in America*, BROOKINGS (Oct. 1, 2020), https://perma.cc/T8LX-ZXJY.

93. *See* Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 434 (3d Cir. 2016) (indicating direct and indirect evidence can be used to determine whether a monopoly exists in the market); *see also* Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995).

94. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1029 (N.D. Cal. 2021), *aff'd in part, rev'd in part, and remanded*, 67 F.4th 946 (9th Cir. 2023) (quoting *Rebel Oil Co.*, 51 F.3d at 1434).

95. *See id.* at 1031.

96. *See id.* at 1030.

97. *See id.*

98. *See id.*

this Comment shifts to the California District Court's decision in *Epic Games v. Apple Inc.*

4. Introduction to Epic Games v. Apple Inc.

Apple is one of the largest technology companies in the world and a major player in the smartphone and app markets.[99] After debuting the iPhone in 2007, Apple permitted third parties to offer apps through Apple's app store rather than exclusively offering Apple's internally designed apps.[100] Currently, Apple holds 15% of the global smartphone market and has amassed over 30 million iOS app developers.[101] Apple generates approximately $100 billion in annual revenue from its iOS app store since entering the mobile gaming market.[102]

Although Apple has opened its app store to third-party developers, Apple aggressively gatekeeps which apps may exist in Apple's app store.[103] Essentially, Apple allows a third-party app in the iOS app store only "after Apple has reviewed [the] app to ensure that it meets certain security, privacy, content, and reliability requirements."[104] App developers must pay a $99 fee and agree to the Developer Program Licensing Agreement ("DPLA").[105] Third-party app developers must also pay Apple an ongoing 30% fee for all in-app consumer purchases through Apple's in-app payment processor.[106]

Epic Games is a video game development and publishing company known for developing the popular video game Fortnite.[107] Fortnite is a free-to-download video game that offers players the option to make game-enhancing, in-app purchases while playing the game.[108] Fortnite additionally offers users a unique feature that permits "cross-play,"[109]

99. *See App*, MERRIAM-WEBSTER, https://perma.cc/3TN3-YFP5 (last visited Jan. 6, 2025) (defining "app" as "an application designed for a mobile device"); *see also* Wayne Duggan, *The 10 Biggest Tech Companies in the World*, U.S. NEWS (Dec. 31, 2024), https://perma.cc/72T3-7SDV (listing Apple as the second most profitable technology company in the world, with $2.8 trillion dollars in market capitalization).

100. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 966 (9th Cir. 2023).

101. *See id*. at 966-67.

102. *See id.* at 967.

103. *See id.*

104. *Id.*

105. *See id.* at 968.

106. *See id*. at 967-68.

107. *See id.* at 967.

108. *See id.*

109. *Id.* For example, a player that plays Fortnite on a PlayStation 5, made by Sony, can play with a player that plays Fortnite on an iPhone. *See* Jesse Lennox, *All Cross-Platform Games (PS5, Xbox Series X, PS4, Xbox One, Switch, PC)*, DIGITAL TRENDS (Aug. 30, 2023), https://perma.cc/HDH2-N8SX.

allowing players to play with each other in real time across multiple gaming platforms.[110]

In 2010, Epic agreed to the DPLA and the 30% ongoing fee for in-app purchases.[111] The DPLA indicated that Epic could not publish the Epic Games Store app as a downloadable iOS app because the Epic Games Store app would redirect users to Epic's own store.[112] The redirect would enable the user to download the Fortnite app through Epic, avoiding Apple's 30% fee for all in-app purchases.[113] Epic would retain more profits if it avoided Apple's 30% fee.[114] Further, the DPLA required Epic to use Apple's in-app payment processor for all in-app purchases,[115] and forbade Epic from providing in-app links that would redirect users to Epic's website to avoid paying the 30% fee.[116] The DPLA further restricted Epic to sell only through Apple's iOS platform at a higher cost.[117]

In 2018, Epic released Fortnite on the iOS app store, culminating in 115 million iOS Fortnite users.[118] In 2020, Epic renewed its agreement under the DPLA but requested that Apple modify the agreement and permit Epic to provide its Fortnite consumers alternative methods for in-app purchases.[119] Apple rejected this offer.[120] In response, Epic submitted an undisclosed software code to Apple, which, "once activated, would enable Fortnite users to make in-game purchases without using Apple's [in-app payment processor]."[121] Apple approved the code without knowledge of the code's redirect, and Epic immediately opened its alternative in-app purchasing software to iOS Fortnite users.[122] Apple notified Epic that Epic breached the DPLA and ultimately removed Fortnite from the iOS app store.[123] In response, Epic sued Apple, claiming Apple's conduct constituted monopolistic behavior and illegal, anticompetitive behavior in violation of both section 1 and section 2 of the

110. *See Epic Games, Inc.*, 67 F.4th at 967.
111. *See id*. at 968.
112. *See id*. at 969.
113. *See id*. at 968.
114. *See id.*
115. *See* Adelina Kiskyte, *In-App Payments: What Are They and How They Work,* KEVIN. (Dec. 19, 2023), https://perma.cc/8X5R-AY24 (stating that "[i]n-app payments enable consumers to pay for goods or services directly in the merchant's mobile application").
116. *See Epic Games, Inc.*, 67 F.4th at 968.
117. *See id*.
118. *See id.*
119. *See id*. at 968-69.
120. *See id.* at 969.
121. *Id.*
122. *See id.*
123. *See id.*

Sherman Act.[124] Epic argued that the iOS app store ought to be an open platform permitting "[d]evelopers . . . [to] be free to distribute apps through any means they wish and use any in-app payment processor they choose."[125]

In *Epic Games v. Apple Inc.*, the district court held that Apple did not hold a monopoly in the mobile gaming industry.[126] The Ninth Circuit Court of Appeals later affirmed this decision.[127] The district court found that Apple did not hold a monopoly in the current mobile gaming market because Apple's share in the mobile gaming market remained between 52% and 57% over the course of a three-year period.[128] Therefore, Apple's market control more so indicated a duopoly with Google.[129] While the court mentioned that the 30% fee charged on all in-app purchases could indicate a form of price fixing, the fee did not substantially impact product output in the mobile gaming industry.[130]

Though failing to constitute a monopoly, Apple's market share was high enough for the court to "evaluate the state and durability of the market."[131] The court identified two main mobile gaming competitors: iOS, owned by Apple, and Android, owned by Google.[132] Apple's iOS and Google's Android held major competitive advantages and could have created significant barriers to entry for potential competitors.[133] In addition, consumers may have been unaware of any new, cheaper mobile gaming platforms because of Apple and Google's size and brand recognition.[134]

However, the court found that the mobile gaming market is "dynamic and evolving," and that other platforms, like the Nintendo Switch, have shown that the market's barriers are surmountable.[135] The court conceded that the main reason for Nintendo's ability to enter the market so easily was because of its existing intellectual property and previously-established gaming networks.[136] The court cautioned that Apple was, and still is, substantially close to holding monopoly power within the mobile gaming

124. *See id.*
125. *Id.* at 969-70.
126. *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1032 (N.D. Cal. 2021).
127. *See Epic Games, Inc.*, 67 F.4th at 999.
128. *See Epic Games, Inc.*, 559 F. Supp. 3d at 1030.
129. *See id.* Unlike a monopoly, when one company controls the entire industry, a duopoly occurs when two companies control an industry. *See duopoly,* MERRIAM-WEBSTER, https://perma.cc/3EU6-ZABS (last visited Jan. 6, 2025).
130. *See Epic Games, Inc.*, 559 F. Supp. 3d at 1030.
131. *Id*. at 1031.
132. *See id.*
133. *See id.*
134. *See id.*
135. *Id.* at 1032.
136. *See id.*

market.[137] However, the court ultimately held that Apple did not have a market power level that "reache[d] the status" of monopolistic power within the mobile gaming market.[138]

Importantly, for the purposes of this Comment, the district court did not analyze whether Apple's conduct was an illegal attempt to monopolize the market. The following discussion on tax-free spinoffs and the standards courts use when evaluating a valid tax-free spinoff provides a new perspective on how courts should evaluate monopolistic conduct.

B. Introduction to Tax-Free Spinoffs and Their Standards

This Comment argues that courts should use the standards required for tax-free spinoffs when evaluating monopolistic behavior. This Section discusses tax-free spinoffs and the statutory and judicial requirements to create a valid tax-free spinoff. In addition, this Section discusses the holding and reasoning in *Gregory v. Helvering, Commissioner of Internal Revenue*, which highlights the Supreme Court's historic requirement that entities must conduct tax-free spinoffs for an objectively reasonable business purpose.

1. What Is a Tax-Free Spinoff?

In 1954, Congress enacted section 355 of the Internal Revenue Code, allowing companies to conduct tax-free spinoffs.[139] A tax-free spinoff enables a parent corporation to establish a new subsidiary, or "spin-off," with an untaxed share distribution.[140] Generally, when a C-corporation pays dividends to shareholders, both the C-corporation and the shareholders are taxed.[141] However, tax-free spinoffs eliminate taxation to the parent company when shares are distributed to the parent's subsidiary.[142] This tax avoidance advantages entities because neither the

137. *See id.*

138. *Id.*

139. *See* 26 U.S.C. § 355 (1954); *see also* Matthew M. McKenna & Kirsten Schlenger, *How to Meet the Five Tests Spin-Offs, Split-Offs, and Split-Ups Must Pass to Provide Tax Benefits,* 14 TAX'N FOR LAW. 354, 354-55 (June 1986) (describing the purpose for a tax-free spinoff). For the purposes of this Comment, the acquiring corporation shall have the same definition as the parent company and the acquired corporation shall have the same definition as the subsidiary company.

140. *See* McKenna & Schlenger, *supra* note 139 AT 354-55*; see also* Comm'r v. Wilson*,* 353 F.2d 184, 186 (9th Cir. 1965) (explaining a spinoff's "purpose and the purpose of its predecessors is to give to stockholders in a corporation controlled by them the privilege of separating or spinning off from their corporation a part of its assets and activities and lodging the separated part in another corporation which is controlled by the same stockholders") (internal quotation marks omitted); Gada v. United States, 460 F. Supp. 859, 865 (D. Conn. 1978).

141. *See* McKenna & Schlenger, *supra* note 139, at 354.

142. *See id.*

parent nor the parent's subsidiaries will recognize a gain or loss, eliminating the double taxation requirement for C-corporations.[143] While corporations can leverage tax-free spinoffs to minimize additional tax on newly created subsidiaries, corporations still must follow several statutory and court imposed requirements to conduct an effective tax-free spinoff.[144]

2. What Are the Statutory Elements and Judicial Standards for a Tax-Free Spinoff?

To qualify for a tax-free spinoff under section 355 of the Internal Revenue Code, a party must satisfy all three elements of the statute.[145] The party must: (1) control the subsidiary before and after the distribution, (2) ensure the transaction was not used principally as a device to distribute corporate earnings and profits, and (3) verify that "the distributing corporation[] and the controlled corporation . . . [are] engaged immediately after the distribution in the active conduct of a trade or business."[146] In addition to the statutory requirements indicated in section 355, courts impose three requirements on parties seeking to implement a legal tax-free spinoff. The requirements include: (1) a business purpose, (2) continuity of business enterprise, and (3) continuity of interest.[147] Parties must satisfy all elements, and failure to comply with any one of the three court-imposed elements will "preclude treatment as a tax-free reorganization."[148] This Comment will primarily focus on the first and second court-imposed elements for tax-free spinoffs.[149]

Regarding the first court-imposed element for a tax-free spinoff, a business' purpose, "if a reorganization in reality was effected . . . the ulterior purpose mentioned will be disregarded."[150] However, if a business or a corporation is conducting a transaction to merely "put on the form of a corporate reorganization as a disguise for concealing its real character" and is a "devious form of conveyance masquerading as a corporate reorganization," the motive behind tax avoidance is not valid because the

143. *See* Edward S. Adams & Arijit Mukherji, *Spin-Offs, Fiduciary Duty, and the Law*, 68 FORDHAM L. REV. 15, 15 (1999) (explaining the benefits and requirements for an effective tax-free spinoff).

144. *See, e.g.*, Honbarrier v. Comm'r, 115 T.C. 300, 310 (2000).

145. *See* 26 U.S.C. § 355.

146. *Id*.

147. *See Honbarrier*, 115 T.C. at 310.

148. *Id.* at 311.

149. *See* Mark J. Silverman*, Corporate Divisions Under Section 355*, SJ021 ALI-ABA 1535, 1656 (2003) (discussing the third court-imposed element). With respect to the third court-imposed element, courts typically consider the degree of continuity, post-distribution continuity, pre-distribution continuity, and continuity in both the distributing and the controlled corporations. *See id.*

150. Gregory v. Helvering, 293 U.S. 465, 469 (1935).

transaction lies outside the congressional intent of the statute.[151] Courts analyze the "objective economic substance of the transactions" and the subjective business intent to determine a corporation's underlying business purpose.[152] When assessing the objective economic substance of a transaction, courts examine "whether the transaction has any practical economic effects other than the creation of income tax losses."[153]

In relation to the second court-imposed element, continuity of the business enterprise, a transaction only constitutes a tax-free spinoff if there is "continuity of the business enterprise under the modified corporate form."[154] Further, the continuity of business enterprise element requires that the parent corporation continues the legacy of the subsidiary's business or uses a "significant portion" of the subsidiary's assets.[155]

Essentially, the acquiring corporation must "retain a link" between itself and the subsidiary by continuing the subsidiary's business or by using the subsidiary's assets.[156] Courts do not consider the parent corporation's subjective intent when determining whether the subsidiary was used in continuity of business.[157] Rather, the test is whether, objectively, the parent corporation has a continuity of business with the subsidiary.[158]

In *Gregory v. Helvering*, the Supreme Court held that a taxpayer who conducts a tax-free spinoff that lacks an objectively reasonable purpose or that violates Congress's statutory purpose has not conducted a valid tax-free spinoff.[159] In *Gregory*, the taxpayer ("Taxpayer") owned all of the stock of United Mortgage Corporation ("United").[160] United held 1,000 shares of Monitor Securities Corporation ("Monitor").[161] Taxpayer created Averill Corporation ("Averill") and transferred all of the Monitor stock to Averill.[162] With this reorganization, Taxpayer sought to reduce overall taxes owed by reducing the amount of income tax incurred through dividend payments.[163] Taxpayer subsequently dissolved Averill and never conducted business with Averill.[164] Afterward, Taxpayer sold all of the

151. *Id.* at 469-70.

152. ACM P'ship v. Comm'r of Internal Revenue, 157 F.3d 231, 248 (3d Cir. 1998) (quoting Casebeer v. Comm'r, 909 F.2d 1360, 1363 (9th Cir. 1990)).

153. *Id.* (quoting Jacobsen v. Comm'r, 915 F.2d 832, 837 (2d Cir. 1990)).

154. Honbarrier v. Comm'r, 115 T.C. 300, 311 (2000) (quoting Sec. 1.368-1(b), Income Tax Regs.).

155. *Id.*

156. *Id.*

157. *See* Atlas Tool Co. v. Comm'r, 614 F.2d 860, 866 (3d Cir. 1980).

158. *See id*. at 866-67.

159. *See* Gregory v. Helvering, 293 U.S. 465, 470 (1935).

160. *See id*. at 467.

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

Monitor shares after Averill's liquidation for $133,333.33 and received a gain of $76,007.88.[165]

The Internal Revenue Service (IRS) sued, claiming Taxpayer's reorganization was not for a legitimate business purpose.[166] Therefore, the IRS claimed that Taxpayer needed to pay tax as though United paid Taxpayer dividends upon the sale of Monitor's stock.[167] The Board of Tax Appeals rejected the IRS's conclusion that Taxpayer owed tax.[168] However, the Second Circuit Court of Appeals reversed the decision and held that Taxpayer's purpose for the reorganization was illegitimate and that Taxpayer owed tax.[169] The Supreme Court granted certiorari over the case.[170]

The Supreme Court held that Taxpayer needed to pay tax on the gain realized from the tax-free spinoff of Averill.[171] The Court reasoned that Taxpayer formed Averill solely as a shell company to avoid paying tax.[172] The Court noted the subjective underlying intent of the reorganization does not typically matter, but Taxpayer's motivation behind the reorganization was not to maintain a legitimate business.[173] Rather, Taxpayer created Averill solely to avoid paying taxes, and once that purpose was satisfied, Taxpayer immediately dissolved the company to receive a tax-free gain.[174] Taxpayer's purpose for creating Averill contradicted the primary purpose of the statute, and Taxpayer was thus required to pay tax on the received dividends.[175] This Comment will now discuss a company's overall purpose and the financial statements of competitors in the mobile gaming market.

C. The Purpose of a Company and Apple's Financials in Comparison to Potential Competitors in the Mobile Gaming Market

Since 1919, courts have recognized that one of the primary purposes of a corporation is to maximize the wealth of its shareholders.[176] Further, the Supreme Court recognized that corporations are autonomous entities

165. *See id.*
166. *See id.*
167. *See id.*
168. *See id*. at 468.
169. *See Gregory*, 293 U.S. at 468.
170. *See id.*
171. *See id.* at 469-70.
172. *See id.* at 469.
173. *See id.*
174. *See id.*
175. *See id.* at 470.
176. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 685 (1919) (holding that companies should take actions that maximize the value of the company and increase the wealth of their shareholders).

with the right to protect themselves.[177] Apple continuously strives to increase its revenue to maximize the wealth of its shareholders.[178]

In 2022, Apple earned $394.3 billion in revenue and spent $27 billion on research and development.[179] In comparison, Activision, a company in the same industry as Epic, reported significantly lower values of $7.528 billion in revenue and $1.421 billion on research and development.[180]

This Comment analyzes the issues with the district court's and Ninth Circuit Court of Appeal's decisions in *Epic Games v. Apple* using the data provided in Section II.C. Further, this Comment applies a novel objective attempted monopoly standard to *Epic Games v. Apple*, modeled from the tax-free spinoff standard.

III. ANALYSIS

The *Epic Games v. Apple* decision contradicts Congress's purposes for establishing the Sherman Act.[181] The following Section argues that the court's decision violated the congressional purposes of the Sherman Act and analyzes *Epic Games v. Apple* using a tax-free spinoff standard.

A. Issues With the District Court and Ninth Circuit Court of Appeals Decisions in Epic Games v. Apple

One of the Sherman Act's purposes is to ensure fair competition for competitors.[182] Further, the Sherman Act intends for competitors to work freely in a fair and equitable economic environment.[183] Regarding this congressional purpose, the district court in *Epic Games v. Apple* found no direct or indirect evidence indicating that the market was injured despite Apple nearly holding a monopoly.[184] Further, the district court found no direct or indirect evidence indicating that Apple's conduct created substantial barriers of entry for new competitors.[185] The court reasoned

177. *See* First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 778 (1978) (holding that the government cannot restrict a corporation's First Amendment right to free speech); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010) (holding that "the Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether").

178. *See* APPLE INC., CONDENSED CONSOLIDATED STATEMENTS OF OPERATIONS 1 (Sept. 24, 2022).

179. *See id.*

180. ACTIVISION BLIZZARD, INC., 2022 ANNUAL REPORT 46 (Dec. 31, 2022). Epic is not a publicly traded company. *See* Bullish Bears, *Epic Games Stock Price and Symbol*, BULLISH BEARS, https://perma.cc/W46R-8KXN (last updated Jan. 24, 2024). As a result, Activision's financial statements will be used in this Comment instead of Epic's.

181. *See supra* Section II.A.2. (discussing that the Congressional purposes of the Sherman Act are to protect consumers and fair competition).

182. *See* 21 Cong. Rec., *supra* note 82.

183. *See id.*

184. *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1032 (N.D. Cal. 2021).

185. *See id.*

that other large companies, like Nintendo, successfully entered the mobile gaming market.[186] The court found that Nintendo's entry sufficiently proved that other smaller companies, like Epic, could also enter the mobile gaming market.[187] The court further found that Apple's 30% fee for in-game purchases did not completely exclude companies from entering the mobile gaming market.[188] However, the court did not consider the cost barriers associated with entering the market without using Apple's platforms, systems, and hardware.[189]

According to Apple's 2022 fourth quarter financial statements, Apple spent nearly $27 billion on research and development.[190] Apple's research and development expenses represent merely 7% of Apple's $394.3 billion annual revenue.[191] In comparison, a gaming company like Activision spent 19%($1.421 billion) of its $7.529 billion of revenue on research and development.[192] Activision has less revenue but spends a higher percentage of money on research and development than Apple, which indicates that Apple has a monopoly in the mobile gaming market.[193] Activision's total revenue represents merely 28% of Apple's research and development expense.[194] In addition, Activision's research and development expense represents only 5% of Apple's total research and development expense.[195] Therefore, Activision would need to spend an additional $20 billion on research and development to compete with Apple in the mobile gaming market and avoid Apple's onerous 30% fee.[196] Activision would need to increase their revenue from $7.5 billion to $143 billion to equal Apple's research and development expense of $27 billion.[197] For Activision, this would require a 1,900% increase in revenue.[198] A 1,900% increase in revenue is nearly impossible for any company to do over a short period.[199]

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186. *See id*.
187. *See id.*
188. *See id*.
189. *See id.*
190. *See* APPLE INC., *supra* note 178.
191. *See id.*
192. *See* ACTIVISION BLIZZARD, INC., *supra* note 180.
193. *Compare id.*, with APPLE INC., *supra* note 178.
194. *Compare* ACTIVISION BLIZZARD, INC., *supra* note 180, with APPLE INC., *supra* note 178.
195. *Compare* ACTIVISION BLIZZARD, INC., *supra* note 180, with APPLE INC., *supra* note 178.
196. *Compare* ACTIVISION BLIZZARD, INC., *supra* note 180, with APPLE INC., *supra* note 178.
197. *Compare* ACTIVISION BLIZZARD, INC., *supra* note 180, with APPLE INC., *supra* note 178.
198. *See* ACTIVISION BLIZZARD, INC., *supra* note 180.
199. *See id.; see also What is a Good Rate of Growth for a Small Business*, GOCARDLESS (Aug. 2021) https://perma.cc/NQW8-U736 (indicating that a healthy growth rate is between 15% and 25% annually).

These numbers suggest that heavily capitalized companies like Nintendo are technically capable of entering the mobile gaming market because of their already-established platforms.[200] However, smaller companies, like Activision and Epic, face disadvantages due to the cost barrier of entering the market.[201] Smaller companies must therefore resort to one of two options to enter the mobile gaming market: (1) capitulate to Apple's fee requirements, or (2) wait until the company develops enough financially to compete with Apple.[202] In contrast to the court's opinion in *Epic Games v. Apple*, both options reflect a significant cost barrier to enter the mobile gaming market due to the high cost of research and development, and thus the court in Epic Games erred in holding that the market did not face such cost barriers.[203]

The Sherman Act protects consumer welfare.[204] Apple's anticompetitive terms restrict Apple device owners who prefer to play Fortnite on a mobile device.[205] Nearly two billion people worldwide use Apple's platforms, and Apple's exclusion of Fortnite from iOS platforms drastically impedes a consumer's ability to play the game in a mobile format.[206] Apple strategically locks consumers into using its products and platforms while providing its consumers no alternative way to play Fortnite on Apple devices.[207] Apple consumers buy Apple phones, tablets, and computers to improve their lifestyles and maintain their livelihoods.[208] Therefore, Apple's contract terms in *Epic Games v. Apple* force consumers to change their lifestyle by switching to a different device and platform, like Google.[209] Otherwise, Apple's conduct forces its consumers to purchase expensive, non-mobile consoles to play Fortnite.[210] Similar to the farmers during the creation of the Granger laws, Apple consumers have no

200. *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1032 (N.D. Cal. 2021) (emphasizing that larger companies like Nintendo have already entered the mobile gaming market).

201. *See supra* Section II.A.1.

202. *See supra* Section II.A.1. (discussing the farmers' issues with the railroad companies' monopolistic behavior).

203. *See supra* Section II.A.1.

204. *See supra* Section II.A.2.

205. *See supra* Section II.A.2.

206. *See supra* Part I. (discussing Apple's increase in consumers since 2020).

207. *See* Todd Haselton, *Here's Why People Keep Buying Apple Products*, CNBC, https://perma.cc/39RH-QQWC (last updated May 2, 2017).

208. *See id.*

209. *See id.*; *see also* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 967-68 (9th Cir. 2023).

210. *See* Haselton, *supra* note 208; *see also* Rory Mellon, *PS5 vs. Xbox Series X: Which Console Wins?,* TOM'S GUIDE, https://perma.cc/8Y4C-DCM2 (Nov. 6, 2024) (indicating the prices for an Xbox Series X and a PS5 range between $399 and $499).

alternative to play Fortnite in a mobile format without altering their preferred lifestyle or incurring significant expenses.[211]

B. How a Tax-Free Spinoff Standard Would Provide a Viable Solution to Antitrust Cases

The district court used direct and indirect evidence to determine whether Apple held a monopoly in the mobile gaming market.[212] The court focused on whether Apple already held a monopoly in the market.[213] However, if the court had analyzed Apple's attempt to monopolize the market, the court would have used a subjective standard.[214] The subjective attempted monopoly standard considers the underlying motives of the defendant's conduct rather than the objectively reasonable business purpose for the conduct.[215] In particular, courts consider a defendant's specific intent.[216] Specific intent standards may be useful when analyzing other specific intent crimes, but an objective analysis is more appropriate for an attempted monopoly allegation.[217]

Courts should use an objective standard, similar to the standard used for tax-free spinoffs, when analyzing an attempt to monopolize for two reasons.[218] First, companies will rarely, if ever, state that their motives are to monopolize the market.[219] Companies are autonomous entities in the eyes of their shareholders and a company's purpose is to maximize the wealth of its shareholders.[220] Therefore, companies must act in the best interest of themselves and their shareholders.[221] These actions include ensuring the company's survival and financial security.[222] In the pursuit to increase revenue, distribute dividends, and ensure customer and shareholder security, companies must comply with all laws, including the

211. *See supra* Section II.A.1. (discussing the farmers' issues with respect to paying large prices to ship farmed goods with no alternative for shipping).

212. *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1032 (N.D. Cal. 2021).

213. *See id*.

214. *See* McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1500 (11th Cir. 1988) (highlighting the use of circumstantial evidence and the subjective intent of the defendant are necessary in determining violations of the Sherman Act).

215. *See* United States v. Murphy, 556 F. Supp. 2d 1232, 1237 (D. Colo. 2008) (discussing the difference between a specific intent crime and a general intent crime).

216. *See id.*

217. *See* ACM P'ship v. Comm'r of Internal Revenue, 157 F.3d 231, 248 (3d Cir. 1998); *see also* Atlas Tool Co. v. Comm'r, 614 F.2d 860, 866 (3d Cir. 1980).

218. *See ACM P'ship*, 157 F.3d at 248; *see also Atlas Tool Co.*, 614 F.2d at 866.

219. *See generally* Devenpeck v. Alford, 543 U.S. 146, 154 (2004) (indicating that "intent is *always* determined by objective means").

220. *See* First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 778 (1978); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 320 (2010); Dodge v. Ford Motor Co., 170 N.W. 668, 685 (1919).

221. *See Bellotti*, 435 U.S. at 778; *see also Dodge*, 170 N.W. at 685.

222. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 967 (9th Cir. 2023) (indicating that Apple had security concerns with respect to the apps published on its platform).

Sherman Act.[223] A company like Apple will therefore not state that its subjective intent was to monopolize the market.[224] Rather, a company like Apple will state that its conduct is in the best interest of the company and its shareholders.[225] The deeds and actions of a company speak more to the company's true intent rather than the written words and formal statements the company distributes.[226] The objective tax-free spinoff standard would emphasize the company's conduct and deemphasize the company's alleged internal intentions.[227] Therefore, courts should analyze whether the company's conduct was objectively reasonable rather than analyzing the company's underlying motives when determining a company's true intent.[228]

Second, the tax-free spinoff standard is most appropriate for attempted monopoly allegations because objectively reasonable actions must comply with the congressional purpose of the tax statute.[229] As indicated in *Gregory v. Helvering*, if a tax-free spinoff violates the tax statute's congressional purpose, then the court nullifies the taxpayer's purpose for conducting the tax-free spinoff.[230] For attempted monopolies, courts should analyze a company's conduct in relation to the Sherman Act's legislative purposes because this analysis would prevent companies from undermining these legislative purposes.[231] Further, a test that determines whether a company is compliant with the Sherman Act's congressional purposes will act as a catch-all, analyzing the impacts on fair competition and consumer welfare.[232] Therefore, courts should: (1) analyze whether the company's conduct is objectively reasonable, and (2) analyze whether the company's conduct threatens the purposes of the Sherman Act—fair competition and consumer welfare.[233] An analysis of *Epic Games v. Apple* under this improved framework follows.

223. *See* 15 U.S.C § 2; *see also Bellotti*, 435 U.S. at 778 (recognizing corporations are autonomous entities and have access to basic constitutional rights).

224. *See* Devenpeck, 543 U.S. at 155.

225. *See Dodge*, 170 N.W. at 685.

226. *See generally* Gregory v. Helvering, 293 U.S. 465, 469 (1935) (indicating that a taxpayer's actions are more indicative of a taxpayer's purpose rather than the subjective intentions).

227. *See* ACM P'ship v. Comm'r of Internal Revenue*,* 157 F.3d 231, 248 (3d Cir. 1998); *see also* Atlas Tool Co. v. Comm'r, 614 F.2d 860, 866 (3d Cir. 1980).

228. *See ACM P'ship* 157 F.3d at 248; *see also Atlas Tool Co.* 614 F.2d at 866.

229. *See Gregory*, 293 U.S. at 469.

230. *See id.*

231. *See id*.

232. *See id.*

233. *See id.*; *see also* 21 Cong. Rec., *supra* note 80.

C. An Analysis of Epic Games v. Apple Using the Tax-Free Spinoff Standard

A valid tax-free spinoff must have an objectively reasonable purpose.[234] In addition, the transaction's purpose must fall within the congressional purpose of the statute.[235] Using the tax-free spinoff standard, this Comment first analyzes whether Apple's conduct constituted an objectively reasonable business purpose. In *Epic Games v. Apple*, the court indicated that Apple implemented the DPLA to ensure the company's security.[236] In Apple's defense, the DPLA and the 30% in-app purchasing fee is an objectively reasonable business decision for two reasons.[237] First, Apple is an autonomous entity with the right to act in the best interest of the company.[238] The DPLA allows Apple to legitimize and authenticate all apps on their iOS platform to ensure the security of its software, consumers, and shareholders.[239] Second, Apple is not unreasonable to demand payment for the use of its platform because the fee increases Apple's revenue and the wealth of its shareholders.[240] In light of the Supreme Court of Michigan's holding in *Dodge v. Ford Motor Company*, Apple's DPLA and in-game purchasing fees are reasonable business practices.[241]

However, even if Apple's behavior was objectively reasonable, an analysis of whether Apple undermined the purpose of the Sherman Act must be considered.[242] With respect to the first congressional purpose of the Sherman Act, ensuring fair and equitable competition in the market, Apple's conduct makes it virtually impossible for any company to enter the mobile gaming market without using Apple's software, platforms, and hardware.[243] Gaming companies entering the mobile gaming market must pay billions of dollars in research and development or agree to Apple or Google's DPLA and fee arrangements.[244] In addition, gaming companies rely exclusively on third-party hardware and platforms to distribute their

234. *See supra* Section II.B.2.

235. *See supra* Section II.B.2.

236. *See* Epic Games, Inc. v. Apple, Inc. 67 F.4th 946, 967 (9th Cir. 2023).

237. *See id.* at 968.

238. *See* First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 778 (1978).

239. *See id.*; *see also Epic Games, Inc.*, 67 4th at 967-68.

240. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 685 (1919) (holding that the primary purpose of a company is to generate revenue and maximize the wealth of the company's shareholders).

241. *See id.*

242. *See supra* Section II.A.2.

243. *See* 21 Cong. Rec., *supra* note 80 (discussing that the purposes of the Sherman Act are to protect consumer welfare and maintain fair competition).

244. *See supra* Section III.A.

games.[245] The cost to create their own hardware and platforms is insurmountable.[246] Therefore, while the DPLA and in-game fees may be objectively reasonable business practices, these agreements still violate the Sherman Act because they make it nearly impossible for smaller companies to enter the market without dependence on Apple.[247]

Considering the protection of consumer welfare, when Apple excludes companies like Epic from the iOS platform, Apple substantially burdens consumers.[248] Consumers choose mobile devices based, in part, on what the consumer believes is the best fit for their lifestyle.[249] Mobile phone consumers determine this best fit by considering many factors, including mobile gaming.[250] Apple consumers wanting to play Fortnite in a mobile format cannot because Apple has excluded Epic from the iOS platform.[251] Thus, Apple's conduct violates the congressional purpose of the Sherman Act because it hinders consumer welfare.[252] Therefore, under the tax-free spinoff standard, Apple's conduct contradicts the congressional purpose of the Sherman Act, indicating that Apple attempted to monopolize the mobile gaming market.[253]

D. Recommended Test Courts Should Use For Attempted Monopoly Cases

Moving forward, courts should use a two-part test for attempted monopolies.[254] First, courts should analyze whether the company's conduct is objectively reasonable.[255] Specifically, courts should analyze whether the company's action increases the wealth of its shareholders.[256] In addition, courts should consider other factors, including the company's right to security and autonomy.[257]

Second, courts should analyze whether a company's conduct eliminates free and fair market competition and consider the conduct's

245. *See* Brian Mackenzie, *Hardware vs Software Explained*, TRUST RADIUS (Mar. 19, 2021), https://perma.cc/93LZ-R2PW (explaining that software relies on hardware to operate).

246. *See supra Section* III.A. (comparing Apple's financial statements to Activision's financial statements).

247. *See* 21 Cong. Rec. 2457.

248. *See* 21 Cong. Rec. 2461.

249. *See* Doug Woods, *When a Consumer Buys Apple . . . . They Buy a Lifestyle*, LINKEDIN (June 2, 2015), https://perma.cc/H7MR-B98G.

250. *See id.*

251. *See supra* Section III.A.

252. *See supra* Section II.A.2.

253. *See* ACM P'ship v. Comm'r of Internal Revenue, 157 F.3d 231, 248 (3d Cir. 1998); *see also* Atlas Tool Co. v. Comm'r, 614 F.2d 860, 866 (3d Cir. 1980).

254. *See supra* Section III.C.; *see also ACM P'ship,* 157 F.3d 231 at 248.

255. *See supra* Section III.C.; *see also ACM P'ship,* 157 F.3d 231 at 248.

256. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 685 (1919).

257. *See supra* Section II.A.3.

impact on consumer welfare.[258] Specifically, courts should consider whether smaller companies may feasibly enter a market.[259] Moreover, courts should consider whether consumers have reasonable alternatives to purchase the product from different companies within the same market.[260] Essentially, courts should analyze both the reasonableness of the business's actions and the business actions' conformity to the Sherman Act's purposes when considering whether a defendant attempted to monopolize the market.[261]

IV. CONCLUSION

The Ninth Circuit's holding in *Epic Games v. Apple* solidified Apple's monopolistic control over the mobile gaming market.[262] Further, the court's decision established a dangerous precedent.[263] Namely, the decision permits the largest corporations to draft one-sided contract provisions that may hurt competition and consumers.[264]

The Sherman Act's purpose is to protect competition and consumer welfare.[265] The specific intent standard used in attempted monopoly cases improperly emphasizes the defendant's internal motive rather than considering the defendant's actions.[266] A specific intent standard may be appropriate for other specific intent crimes, but an objective analysis is more appropriate when analyzing a business's conduct.[267] To analyze a business's conduct, courts should use a standard similar to the standard used for analyzing tax-free spinoffs.[268] Specifically, courts should first consider whether the company's conduct had a legitimate business purpose.[269] Then, after courts analyze the business's purpose, courts should consider whether the business's practices injured competitors in the market and whether consumers were injured.[270]

By implementing this standard, courts will ensure the safety of a free and open market and simultaneously protect the every-day buyer.[271] This standard would also require large corporate entities to act with greater

258. *See supra* Section II.A.3.
259. *See supra* Section II.A.3.
260. *See supra* Section II.A.3.
261. *See supra* Section II.A.3.
262. *See supra* Section III.A.
263. *See supra* Section III.A.
264. *See id.*
265. *See supra* Section II.B.2.
266. *See supra* Section III.B.
267. *See supra* Section III.B.
268. *See supra* Section III.B.
269. *See supra* Section III.B.
270. *See supra* Section III.B.
271. *See supra* Section III.B.

diligence.[272] Courts need to recognize that large conglomerate corporations have greater social responsibility.[273] As technology and lifestyles continue to change, the law must adjust to those changes.[274] Therefore, courts must ensure that they address these changes by conducting analyses that benefit consumers, promote fair competition, and hold corporations accountable for monopolistic behavior.[275]

272. *See supra* Section II.C.
273. *See supra* Section II.C.
274. *See supra* Part I.
275. *See supra* Section III.B.