No. 25-521

IN THE

Supreme Court of the United States

GOOGLE LLC, *et al.*,

Petitioners,

v.

EPIC GAMES INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have a strong interest in the Court granting certiorari for at least two reasons.

First, in the antitrust context, the Chamber's members rely on injunctions that are carefully crafted to remedy actually proven antitrust harms. Although antitrust laws exist to preserve vibrant competition—an important value at the heart of America's economic success and continued growth—those laws also need to be applied with a scalpel, not a sledgehammer, to ensure they serve their important function without unduly punishing pro-competitive behavior and economic growth. The Ninth Circuit's decision below departed

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Both parties were timely notified in advance of the filing of this brief.

from these core antitrust principles and, if left uncorrected, will allow for the proliferation of decidedly *in*cautious antitrust remedies.

Second, the district court's injunction, affirmed by the Ninth Circuit, threatens to create substantial unacknowledged effects. The challenged provisions will create significant negative downstream consequences that will affect the security of millions of app developers and users. The Chamber's members have a strong interest in the correct resolution of this dispute so that competition in the relevant markets can resume without Google and others being improperly fettered by the Ninth Circuit's precedential affirmance of the district court's overbroad injunction.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has instructed that, when fashioning an antitrust remedy, "caution is key." *NCAA* v. *Alston*, 594 U.S. 69, 106 (2021). This is because judges "make for poor 'central planners' and should never aspire to the role." *Id.* at 103 (Gorsuch, J.) (quoting *Verizon Commc'ns Inc.* v. *Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (Scalia, J.)). An antitrust remedy untethered to specific violations risks creating unintended consequences for both courts and third parties. That risk is heightened for rarely used remedies that impose a duty to deal. Such forced-dealing remedies are, in the words of the leading treatise, the "[m]ost difficult of all." Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 653b2.

These important remedial concerns are at their apex here given the complex, ongoing two-sided network setting of this case. Google's Play platform connects,

on one side, one million app developers of all sizes and sophistication, collectively producing over 3.3 million apps in Google's library for the benefit of, on the other side, hundreds of millions of individual users. These relationships are not transient. To the contrary, those who interact with Google's Play platform (Google Play itself, app developers, and app users) usually maintain an ongoing relationship via, *e.g.*, updates and technical fixes, extended use of the app over time, ongoing subscription payments, and other interactions.

Although parts of the injunction issued by the district court and affirmed by the Ninth Circuit are routine, two provisions leave caution far behind. One provision imposes a forced-sharing requirement on Google, mandating that Google provide unfettered access to its catalog of Google Play apps for any other app store. Another imposes a forced-carrying requirement on Google, requiring Google Play to carry third parties' app stores at court-imposed "reasonable fees."

These portions of the injunction steered the district court into the "sea of doubt" that over 125 years of precedent warn against. *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898) (Taft, J.), aff'd as modified, 175 U.S. 211 (1899). No analogous case has been cited—by the parties, the district court, or the Ninth Circuit—in which such provisions have been applied in a two-sided network setting. And the problems these remedies create are as obvious as they are egregious.

First, these provisions are not narrowly tailored to redress the harm about which Epic complained, which the district court adequately addressed in the injunction's first ten paragraphs. *Second*, the forced-sharing provision, in particular, will harm app developers and

app users, expropriating developers' intellectual property while exposing users' most sensitive data to all comers.

The Chamber recognizes the importance of antitrust remedies in protecting competition.[2] But when imposing the most difficult of all antitrust remedies, a court must account for the settings in which those remedies will operate. This Court should grant certiorari and vacate, at minimum, these two provisions of the district court's injunction.

ARGUMENT

I. FEDERAL COURTS IMPOSING EQUITABLE ANTITRUST RELIEF SHOULD NARROWLY TAILOR IT TO FIT PROVEN HARMS

Longstanding principles of judicial restraint require courts to exercise caution when crafting injunctions. This Court has instructed district courts to impose injunctive relief only as broad as necessary to remedy an established harm. Antitrust cases require district courts to carefully consider whether the scope and purpose of any remedy employed will further the important goals of antitrust law—fostering competition and protecting consumers—while ensuring a vibrant, pro-competitive marketplace.

A. This Court's Rulings Require Judicial Restraint When Remedying Harm

Section 16 of the Clayton Act, 15 U.S.C. § 26, authorizes injunctive relief that is appropriate under "tradi-

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[2] The Chamber takes no position on Google's arguments regarding liability.

tional principles of equity." *Zenith Radio Corp.* v. *Hazeltine Rsch., Inc.*, 395 U.S. 100, 130 (1969). Injunctive relief should be no more burdensome . . . than necessary to provide complete relief to the plaintiffs. See *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). Accordingly, in "fashioning an antitrust remedy," district courts must "resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives." *NCAA* v. *Alston*, 594 U.S. 69, 106 (2021). This tailoring ensures a remedy for antitrust wrongs and protects markets by allowing defendants to continue engaging in competitive behavior.

Thus, antitrust injunctions must narrowly target the harm proven in a given case. In particular, an antitrust remedy must be fashioned to "restrain acts which *are of the same type or class*" as the unlawful acts that have been committed or may "fairly be anticipated." *Zenith Radio Corp.*, 395 U.S. at 132 (citations modified). That is because courts are not at liberty to enjoin "all future violations of the antitrust laws" and most certainly not those "unrelated to the violation found by the court." *Id.* at 132–133.

Furthermore, a court "must base its relief on some clear indication of a significant causal connection between the conduct enjoined or mandated and the violation found directed toward the remedial goal intended." *United States* v. *Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001) (en banc) (per curiam) (citation modified); see also, *e.g.*, *Massachusetts* v. *Microsoft Corp.*, 373 F.3d 1199, 1210 (D.C. Cir. 2004) (praising the district court for fashioning a limited remedy that "went to the heart of the problem . . . without intruding itself" into the defendant's business).

B. Narrowly Tailored Remedies Are Pro-Competitive and Foster Economic Growth

Equitable antitrust remedies also promote consumer welfare by protecting the free market. That is particularly so here, where the first ten paragraphs of the injunction against Google contain more-tailored provisions that already address the relevant anticompetitive conduct *without* imposing harm on Google Play's millions of users. *E.g.*, Pet. App. 68a-69a. Given these existing provisions, the district court "should [have] be[en] particularly disinclined to require more" in "adopting . . . forward-looking provision[s] addressing conduct not previously held to be anticompetitive." *Massachusetts*, 373 F.3d at 1218. But the district court did not exercise such restraint in this case, and the Ninth Circuit's blessing of that failure invites future overreaches that will likewise harm the marketplace and consumers.

Courts face a delicate balance between remedying bad conduct and not tamping down competitive behavior. "[E]ven under the best of circumstances, applying the antitrust laws can be difficult." *Alston*, 594 U.S. at 99 (citation modified); see also *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 895 (2007) (explaining that a proposed legal rule could "increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage"). Indeed, since the time of then-Judge Taft, courts have been "wary" about interposing their judgment over complex business relationships, lest they "set sail on a sea of doubt." *Alston*, 594 U.S. at 107 (quoting *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899)).

The danger posed by overbroad antitrust rulings reaches its apex at the remedy stage. The further a remedy departs from repairing the established harm, the greater the risk that the equitable "relief" will constrict natural free-market efficiencies. See *National Soc'y of Pro. Eng'rs* v. *United States*, 435 U.S. 679, 698 (1978) (remedial relief must "represent[] a reasonable method of *eliminating the consequences of the illegal conduct*" (emphasis added)). In particular, a court fashioning an antitrust remedy must remember that "competition, not government intervention, is the touchstone of a healthy, vigorous economy." *United States* v. *Syufy Enters.*, 903 F.2d 659, 663–664 (9th Cir. 1990). To that end, a court must consider the specific and potentially novel business context that its injunction targets, as well as any downstream effects from that injunction. See Areeda & Hovenkamp, ANTITRUST LAW ¶ 653j ("[A]ny equitable decree must be attentive to the state of competition that results from the decree.").

II. THE NINTH CIRCUIT ERRONEOUSLY AFFIRMED A NOVEL INJUNCTION THAT WAS NOT NARROWLY TAILORED TO ESTABLISHED HARM

The decision below is an outlier among antitrust decisions and conflicts with bedrock antitrust principles established by this Court. The Ninth Circuit erroneously approved two overly broad and insufficiently justified components: a forced-sharing requirement for all apps in Google's Play store (Pet. App. 69a-70a, ¶ 11) and a forced-carrying requirement for other app stores within Google Play at court-imposed "reasonable" fees (Pet. App. 70a, ¶ 12). Both provisions go far beyond the conduct that Epic initially complained about—fees charged for in-app transactions.

The district court should have assessed carefully whether the forced-sharing and forced-carrying requirements were necessary to remedy the complained-of conduct. It failed to do so. The downstream consequences of this decision are particularly easy to anticipate from the forced-sharing requirement—consequences that neither the district court nor the Ninth Circuit meaningfully considered, much less justified. Absent correction, the Ninth Circuit's decision will invite future district courts in that Circuit to impose antitrust remedies that are equally untethered to an established antitrust violation.

A. Certain Requirements Are Not Narrowly Tailored to the Anticompetitive Conduct Involving Google Play

The remedies ordered by the district court and upheld by the Ninth Circuit go far beyond the conduct about which Epic complained (and which a jury later concluded Epic proved). Epic challenged Google's imposed revenue-sharing and licensing restrictions on original equipment manufacturers (OEMs), prohibitions on app developers offering apps elsewhere or creating their own app stores, and requirements for app developers to use Google's in-app payment processing. See D. Ct. Doc. 82, at 12–15, ¶¶ 18-26 (Aug. 20, 2021).[3] In other words, Epic wanted to access the Android operating system without having to pay Google.

In its injunction, the district court granted Epic the very relief it sought. Google can no longer impose certain conditions on its revenue-sharing with OEMs or app developers (Pet. App. 68a-69a, ¶¶ 7-8) and can no longer require app developers to use Google's in-app

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[3] First Amended Complaint (D. Ct. Doc. 82), *Epic Games, Inc.* v. *Google LLC*, No. 3:21-md-02981-JD (N.D. Cal.).

payment processing service in order to have an app distributed in the Google Play store (Pet. App. 69a, ¶ 9). Both the district court and the Ninth Circuit, however, failed to consider whether that relief, taken alone, was sufficient to cure the conduct complained of. See *National Soc'y of Pro. Eng'rs*, 435 U.S. at 698 ("The standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct.").

Having failed to consider whether the relief provided by the injunction's first ten paragraphs was sufficient, the district court and the Ninth Circuit compounded that error by both failing to consider whether the additionally imposed remedies were overbroad (itself a legal error worthy of this Court's review) and then approving remedies that *were in fact* overbroad (a significant harm that increases the importance of the case and the need for this Court's review). The district court acknowledged significant evidence of harms caused by various Google agreements "conditioning . . . access by OEMs to Google's Android services on preinstallation of the Google Play Store." Pet. App. 90a. But the district court never explained why the other parts of its injunction, specifically targeted at ending those agreements, would not resolve Epic's complaints. See Pet. App. 83a-95a. And although the district court was concerned about network effects (Pet. App. 88a-89a), neither court below ever explained why Epic required the additional remedies beyond the ones narrowly tailored to the harms Epic experienced. This "fail[ure] to provide an adequate explanation for the relief it ordered" is an independent basis to vacate these requirements. *Microsoft Corp.*, 253 F.3d at 103. And both the forced-sharing and force-carrying requirements fail to heed the well-established caution against courts "adopting a forward-looking provision addressing conduct not

previously held to be anticompetitive." *Massachusetts*, 373 F.3d at 1218.

Fundamentally, both lower courts' rulings fail to distinguish between lawful and anticompetitive conduct in this two-sided network setting. Google's platform, by its very nature and in the absence of anticompetitive conduct, inherently benefits from network effects. Yet the court affirmed a sweeping remedy of forced access to the *entire* Play catalog because it purportedly would help "to overcome the Play Store's illegally amplified network effects by giving rival stores a fair opportunity to establish themselves." Pet. App. 41a (citation modified); see also Pet. App. 46a-47a.

Critically, however, that holding fails to distinguish the portion of network effects inherent to the platform from the portion attributable to the allegedly anticompetitive conduct that "unfairly enhanced" those network effects. Pet. App. 46a. That distinction is crucial: to be appropriately narrowly tailored—to say nothing of a "significant causal connection"—the remedy must address Google's specific conduct, not Google's mere act of maintaining an app platform that benefits from network effects. See *Ohio* v. *American Express Co.*, 585 U.S. 529, 544–547 (2018) (Thomas, J.) (explaining the sensitive interlocking effects of a two-sided transaction network). Accordingly, a remedy granting competitors access to the full breadth of that platform well exceeds any arguable connection to anticompetitive conduct, sweeping in the value and pro-competitive offerings of Google's network and thus "chill[ing] the very conduct the antitrust laws are designed to protect." *Verizon Commc'ns Inc.* v. *Law Offs. of Curtis V. Trinko, LLP,* 540 U.S. 398, 414 (2004) (citation modified). The overbreadth of this remedy would stifle the competition and innovation for which Silicon Valley is known. But worse, as discussed below, the problem

here is likely to leach into other antitrust remedies nationwide, creating a cascading effect with the issuance of other overbroad injunctions in many other industries.

B. The Forced-Sharing Requirement Affirmed by the Ninth Circuit Ignores the Serious Downstream Harms It Imposes

The Ninth Circuit also erred by affirming the district court's imposition of a forced-sharing provision without accounting for the unique nature of the two-sided network setting in which Google operates. A court must consider the downstream consequences of its antitrust injunction. See, *e.g.*, *Trinko*, 540 U.S. at 414 (weighing the "slight benefits of antitrust intervention" against a "realistic assessment of its costs"). The district court never performed this analysis, and the Ninth Circuit never justified that failure. If left to stand, the Ninth Circuit's decision will open the doors to litigation over whether district courts may forgo this crucial analysis in crafting injunctive relief in other cases, wasting limited judicial resources in the process. District judges are likely to interpret the Ninth Circuit's decision to short-circuit the correct legal analysis, turning future courts into the "poor 'central planners'" that this Court has warned against. *Alston*, 594 U.S. at 103.

The Ninth Circuit's affirmance is particularly harmful here, where *there are* significant downstream effects. The district court issued a mandatory regulatory injunction compelling Google to undertake sweeping and materially new conduct to deal with millions of other market participants. See Areeda & Hovenkamp ¶ 653b2 ("Most difficult of all are remedies that force defendants to deal with others. Invariably the court

must then impose the terms of dealing and perhaps retain ongoing jurisdiction to regulate the price and terms of future sales.").

There is no indication that either the district court or the Ninth Circuit grappled with the many deleterious downstream consequences that the district court's injunction would cause in the novel markets the injunction regulates. Because the Google Play platform is a two-sided network that matches app developers and app users who both continue to rely on the network, see Pet. App. 85a-86a, there are multiple ongoing relationships between diverse groups of parties affected by this remedy: the platform operator (Google), app developers, and app users. It was incumbent upon the Ninth Circuit, as it was upon the district court, to consider how the injunction would affect the various stakeholders' commercial relationships.

But the Ninth Circuit failed to appreciate that apps are not widgets, such as spark-plugs or telescopes—the products at issue in the cases on which it relied. See Pet. App. 43a (citing *Ford Motor Co.* v. *United States*, 405 U.S. 562, 572 (1972) (spark plugs) and *Optronic Techs., Inc.* v. *Ningbo Sunny Elec. Co.*, 20 F.4th 466, 486–487 (9th Cir. 2021) (telescopes)). Google Play does not sell discrete products or engage in one-off transactions. Rather, Google facilitates ongoing relationships between app developers and users. And the district court's forced-sharing requirement has no criteria for what counts as a "third-party Android app store[]." See Pet. App. 69a, ¶ 11. By requiring Google to share all apps in the Google Play store with any entity that purports to have its own app store, the district court's order demands forced sharing not just with one company, but with *millions* of developers, apps, and users. This will harm parties on both sides of the network.

On the app developer side, some might not want users to have uncontrolled, unsupervised access to their products, whether because of scale issues (*e.g.*, not enough server space on the developer's end), channel management, reputation management, or separate exclusivity agreements, among other concerns. The forced-sharing remedy also likely harms app developers by forcing them to publish their intellectual property in multiple channels without the developers' consent, in violation of Google's licensing agreements with those developers. C.A. E.R. 624–625; cf. *New York Times Co.* v. *Tasini*, 533 U.S. 483, 488 (2001) (authors maintained copyrights in digital works that were not covered by earlier licensing agreement). And although a single sentence of the injunction requires Google to develop some kind of opt-out mechanism for developers who do not want their app hosted on another app store, see Pet. App. 69a, ¶ 11, this mechanism is more likely to cause confusion than clarity. The district court gave no specific instructions for how this opt-out mechanism should actually work.

On the app user side, the ramifications are even more troubling. Google has no discretion to determine whether an app store is a bona fide third-party, a fraudulent designer trolling for user data, or a nefarious agent of a foreign government. C.A. E.R. 626–627. If the forced-sharing requirement goes live, it will provide innumerable and unregulated "app stores" unfettered access to highly sensitive information about app users, such as health information, private communications, and political affiliation. *Id.*; cf. *Carpenter* v. *United States*, 585 U.S. 296, 311 (2018) (data generated by a smart phone "provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political,

professional, religious, and sexual associations" (citation modified)). Neither the district court nor the Ninth Circuit acknowledged—much less addressed—these downstream consequences. Pet. App. 83a-95a; Pet. App. 63a-64a & n.19.

Given the vast scale of the Google Play store (with its millions of users), security risks almost inevitably will turn into real-world harm. Despite recognizing the "robust record" and extensive amicus briefing on security risks of forced sharing, the Ninth Circuit sanguinely affirmed the district court's order on the basis that "allowing Google 'to ensure that the platforms or stores . . . are safe'" would be sufficient. Pet. App. 63a & n.19. The Ninth Circuit, however, did not explain how any company, even a sophisticated one, could investigate and monitor the safety and security of every possible online comer purporting to be an app store. As the Chamber and other amici have contended, the risks to users on this issue are considerable and merit far more than the cursory consideration given below.[4]

Nor did the Ninth Circuit address Google's concern that the court's forced-sharing requirement risks harming competition itself. As Google explained,

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[4] See, *e.g.*, Chamber of Commerce of the United States of America C.A. Amicus Br. 3, 5, 16–19 (C.A. Dkt. No. 243.1); Former Nat'l Sec. Offs. & Scholars Amicus Br. 4 (No. 25A354) ("Because the injunction limits Google's ability to protect Android users, as soon as the injunction goes into effect, they will be more vulnerable to cyberattacks, threatening both their and the Nation's security."); ACT | The App Ass'n Amicus Br. 3 (No. 25A354) ("[T]he trial court's novel remedy affirmed by the panel creates real security risks in the app ecosystem on which the app developers depend."); Former Nat'l Sec. Offs. & Scholars C.A. Amicus Br. 21 (C.A. Dkt. No. 48.2) (similar); ACT | The App Ass'n C.A. Amicus Br. 5 (C.A. Dkt. No. 214.1).

"eliminating rivals' need to compete with Play for distribution," "unnecessarily entrenches Play as the primary source of distribution even for third-party app stores." C.A. E.R. 634 (citation modified). The forced-sharing remedy will encourage other app stores to free-ride on Google's app catalog rather than compete by developing their own offerings. C.A. E.R. 630–631; cf. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977) (discussing how the "'free rider' effect" reduces overall output in areas such as service and repair). Indeed, the interdependent nature of two-sided networks, see *American Express Co.*, 585 U.S. at 544–547, elevates this risk to its zenith, as app developers and users inevitably will gravitate toward the cheapest source of pre-written apps, see *Microsoft Corp.*, 253 F.3d at 55.

The district court needed to pay close attention to the relationships it sought to regulate—relationships that have not before been regulated by court decree. By failing to attend to these market realities, the district court prescribed a cure that is untethered to the supposed disease. And by affirming the district court's forced-sharing arrangement in a binding precedential opinion, the Ninth Circuit invited future district courts to do the same.

III. THE NINTH CIRCUIT'S DECISION WARRANTS THIS COURT'S REVIEW

The remedies imposed here are massive and unprecedented, not only requiring Google to engage in a new undertaking to bring competitors' services to market, but also forcing Google to provide them access to the entire Play app catalog, all without a finding that the harms complained of extend nearly as far as the remedy imposed. Nor have these remedies ever been imposed in the unique context of a two-sided market. Cf.

Trinko, 540 U.S. at 408 (highlighting concerns about "[e]nforced sharing" in a one-sided setting). The Ninth Circuit's failure to reckon with the downstream consequences of this remedy, spanning from privacy risks and security to the dangers of courts as central planners, demands correction.

In addition, the Ninth Circuit's decision breaks with the prior decisions of this Court, as well as the decisions of the D.C. and Fourth Circuits, which require antitrust remedies to be carefully aimed at eliminating the consequences of illegal conduct without placing courts in impossible administrative quagmires. See *Trinko*, 540 U.S. at 408; *Massachusetts*, 373 F.3d at 1218; *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 533–534 (4th Cir. 2003) (vacating injunction that was "targeted . . . only toward an emerging and as yet undefined collateral market without identifying any purpose that this injunction would have to protect competition in the relevant market"), abrogated on other grounds by *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Microsoft Corp.*, 253 F.3d at 105. In this novel setting, the risks to the public are multiplied and the arguments for caution stronger. The Ninth Circuit's failure to consider those risks portends enormous consequences for participants in digital-product and digital-service markets.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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