

No. 25-521

IN THE
Supreme Court of the United States

GOOGLE LLC, *et al.*,

Petitioners,

v.

EPIC GAMES, INC., A MARYLAND CORPORATION,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**BRIEF OF AMICUS CURIAE THE COMMITTEE
FOR JUSTICE IN SUPPORT OF PETITIONERS**

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INTRODUCTION AND INTEREST OF AMICUS CURIAE¹

CFJ has a critical interest in the outcome of this litigation. The Committee for Justice (CFJ) is a non-profit legal and policy organization founded in 2002, dedicated to promoting the rule of law and preserving the Constitution's protection of individual liberty. Consistent with this mission, CFJ files amicus briefs in key cases and educates the American public and policymakers about the benefits of individual liberty and the need to ensure that antitrust law is properly interpreted such that it protects genuine competition, to the benefit of consumers.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion affirms a radical form of liability and a radical injunction penalizing Google for rising to the top of the market in the area of selling smartphone apps using innovation and business acumen and forces it to open its Play Store to its competitors, something this Court has repeatedly admonished against.

1. CFJ notified counsel for all parties of its intent to file this brief more than 10 days before the due date. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person—besides *amicus curiae* and its counsel—contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. The injunction’s mandated duty-to-deal remedies conflict with this Court’s precedent because they lack legal predicate and required causation.

For more than a century, this Court has recognized that firms ordinarily have no duty to assist their rivals by sharing assets, technology, or distribution channels. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). The outer boundary of any contrary principle is *Aspen Skiing*, which involved termination of a voluntary, profitable course of dealing that made no business sense but for its exclusionary effect. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608–11 (1985)). In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, the Court clarified that *Aspen* “is at or near the outer boundary of § 2 liability,” rejected any freestanding “essential facilities” doctrine, and warned that compelled sharing risks turning courts into “central planners” unable to set “price, quantity, and other terms” in a sustainable way (540 U.S. 398, 407–11, 415 (2004)). The Court then underscored in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.* that where there is no duty to deal, courts cannot do indirectly—through price or access mandates—what they cannot do directly (555 U.S. 438, 448–56 (2009)). These cases establish the liability baseline: forced dealing is extraordinary and appropriate, if ever, only when tightly matched to *Aspen*-like facts and to remedying a specific anticompetitive harm. *See Trinko*, 540 U.S. at 407–11; *linkLine*, 555 U.S. at 448–56; *Aspen Skiing*, 472 U.S. at 608–11).

The Ninth Circuit attempted to sidestep this Court’s precedent by asserting that *Trinko* concerned only the

liability implications of refusals to deal, not the “legality of compelling a defendant [already] found liable to deal with competitors.” App. 42a–43a. But this is a false distinction. Those liability limits matter at the remedies stage because the same concerns—judicial administrability, chilling investment, and distorting competitive incentives—persist regardless of when a court imposes sharing. This Court has expressly recognized that “similar considerations apply” when fashioning antitrust remedies; intrusive decrees can “wind up impairing rather than enhancing competition.” *NCAA v. Alston*, 594 U.S. 69, 102–03 (2021) (quotation omitted). A court-imposed duty-to-deal still raises the specter of ongoing regulatory supervision and reduced incentives for both the company and its rivals, no matter if it is imposed as a remedy after liability or as a direct Section 2 violation.

Therefore, here, the injunction’s affirmative requirements (catalog access and app-store distribution) are legally impermissible remedies because they constitute forced dealing beyond the limits of antitrust law and are not causally linked to the violation found. The Ninth Circuit affirmed an injunction forcing Google to share its Play Store platform and app catalog with rivals—compelled dealing—without any finding that this mandate would cure the harm from Google’s adjudicated misconduct. This “remedy” exceeds the proper scope of equitable relief in antitrust, which must target the consequences of the illegal conduct. In conflict with decisions of this Court and the D.C. Circuit, the Ninth Circuit held that a court may strip a firm of lawfully earned advantages merely because the firm was found liable on some other basis.

Such an approach effectively imposes a general duty-to-deal with competitors, a proposition this Court has rejected except in extraordinary circumstances. If allowed to stand, the ruling would embolden courts to act as central planners in the economy—compelling business relationships and restructuring markets in ways unrelated to addressing the actual antitrust violation – thereby chilling innovation and punishing competitive success. Certiorari is warranted to realign the law with established precedent that antitrust remedies must remedy the violation, and to prevent the undermining of incentives to compete that results from judicially forced dealing.

A. Antitrust remedies must address the proven violation, not penalize lawful competitive advantages.

For over seventy years, it has been a bedrock principle that antitrust remedies should target the fruits of the offense, not confer unwarranted benefits on others. This Court has consistently directed that equitable relief in antitrust is remedial, not regulatory. It must eliminate the consequences of the illegal conduct—no more, no less. *See Int’l Salt Co. v. United States*, 332 U.S. 392, 400 (1947) (antitrust remedies are intended to deny the violator the “fruits of its violation”); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 698 (1978) (an antitrust injunction should aim at “eliminating the consequences of the illegal conduct”).

This remedial principle guards the line between enforcing the law and inhibiting legitimate competition. The D.C. Circuit has repeatedly reaffirmed this approach. In *United States v. Microsoft Corp.* the *en banc* court

vacated an initial decree and held that the trial court must determine whether a “sufficient causal connection” links the anticompetitive conduct and the proposed remedial goal before imposing relief. *United States v. Microsoft Corp.*, 253 F.3d 34, 105–06 (D.C. Cir. 2001). On remand, the D.C. Circuit again insisted that remedies not overshoot the violation: it approved measures addressing Microsoft’s exclusionary acts but warned against those that “went beyond the liability” findings. *Id.* at 1215. Notably, the D.C. Circuit refused to require Microsoft to share or divulge assets (like proprietary code) in ways that would effectively allow rivals to “clone” Windows because such relief would “deny Microsoft the returns from its investment in innovation,” and because “the fruits of a violation must be identified before they may be denied.” *See Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1218–20, 1232 (D.C. Cir. 2004).

This Court has likewise emphasized that antitrust law should not punish a firm’s lawfully obtained advantages. Even a proven monopolist is not to be deprived of competitive benefits it earned through lawful means. This is because antitrust law protects competition, not competitors. *See Brunswick Corp. v. Pueblo BowlOMat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))). Mere size or success, and the concomitant ability to charge high prices, is not unlawful—it is often the reward of innovation. *Verizon Commc’ns Inc. v. Trinko*, 540 U.S. 398, 407–08 (2004) (“The opportunity to charge monopoly prices—at least for a short period—is what attracts business acumen; it induces risk taking that produces innovation and economic growth.”) (internal quotation omitted). Antitrust enforcement, therefore, must preserve incentives to

compete vigorously. A remedy that strips a successful firm of competitive gains without showing those gains stem from wrongdoing runs contrary to these principles.

B. The Ninth Circuit’s duty-to-deal injunction defies precedent and creates a circuit split.

The injunction affirmed by the Ninth Circuit imposes exactly the kind of broad duty-to-deal remedy that precedent forbids. The district court ordered Google to open its Android platform and Play Store to direct dealings with rival app distributors – in particular, to “share its catalog of apps with competitors” and even “distribute directly competing app stores through [Google] Play.” See *Epic Games, Inc. v. Google LLC, In re Google Play Store Antitrust Litig.*, 147 F.4th 917, 951 (9th Cir. 2025) (Appendix at 69a–70a) (describing injunctive provisions ¶¶11–12 requiring Google to carry competitors’ apps and app stores on its platform).

This mandate was justified by the lower courts as a way to diminish Google’s “network effects” (the self-reinforcing popularity of its Play Store) rather than to redress any specific exclusionary act proven at trial. In fact, the district court expressly declined to ask whether Google’s conduct had caused those effects, deeming causation “not salient” and assumed that because Google’s conduct helped maintain its market position, an injunction undermining that position was appropriate *per se*. Pet. App. 87a, 85a–90a. The Ninth Circuit embraced that approach, holding that an antitrust remedy need not “only touch the consequences of a defendant’s conduct” and allowing this form of extraordinary relief merely because it was connected to “the creation or maintenance” of monopoly power. Pet. App. 46a, 42a–45a.

This approach squarely conflicts with the D.C. Circuit’s rule in *Microsoft* and with this Court’s teachings. Compare App. 45a–47a (no requirement that remedy address consequences of the violation) with *United States v. Microsoft*, 253 F.3d 34, 105–06 (D.C. Cir. 2001) (*en banc*) (requiring causal link between conduct and remedy)³ and *Mass. v. Microsoft*, 373 F.3d at 1219–20 (rejecting relief enabling rivals to “clone” the defendant’s product absent proof that such advantage was unlawfully gained. Under the D.C. Circuit’s standard – followed by other courts – a duty-to-deal injunction like this could never be approved without a finding that the compelled sharing would cure the precise anticompetitive harm proved. The Ninth Circuit’s ruling, by contrast, permits courts to use a liability finding as a springboard for imposing sweeping affirmative obligations unrelated to the proven violation. This deviation in remedial standards is outcome-determinative and has already been noted as a split in authority. It invites forum-shopping by plaintiffs seeking expansive injunctions and threatens inconsistency in antitrust enforcement nationwide.

By treating *Trinko*’s principles as irrelevant post-liability, the Ninth Circuit ignored that the very reason this Court is reluctant to recognize a duty-to-deal claim is the difficulty of imposing and policing a duty-to-deal remedy. The decision thus creates an end-run around this Court’s refusal-to-deal doctrine: a court in the Ninth Circuit can simply find a defendant liable on some other theory, then attach an onerous dealing mandate as relief – accomplishing via “remedy” what no court could compel as an element of liability. Such a rule effectively nullifies the strict limits this Court set.

II. Under the Rule of Reason, a “balancing stage” is not appropriate if the plaintiff fails to rebut the defendant’s demonstration of procompetitive benefits.

A. Improper balancing leads to the harming of consumers and courts micromanaging businesses.

Applying the Rule of Reason consists of three steps. First, the plaintiff must demonstrate that the defendant has engaged in anticompetitive practices (Step 1). If the plaintiff satisfies Step 1, it has established a prima facie case. Second, the defendant can rebut this prima facie case by showing its anticompetitive conduct produced procompetitive benefits (Step 2). If the defendant satisfies Step 2, the burden then shifts back to the plaintiff to demonstrate that the defendant could have achieved the procompetitive benefits through less restrictive means (Step 3). If the plaintiff satisfies Step 3, it prevails. *See Ohio v. American Express Co. (Amex)*, 585 U.S. 529, 541-42 (2018); *Alston*, 594 U.S. at 96-97.

What happens if a plaintiff fails to satisfy Step 3? According to some circuits—which follow both *Amex* and *Alston*—that ends the game and the defendant wins; the defendant’s establishment of procompetitive benefits at Step 2 defeats the plaintiff’s challenge. But according to other circuits—which discard *Amex* and *Alston*—we play on. In that situation, the courts must conduct a balancing, equitable test, weighing the benefits resulting from the procompetitive achievements in Step 2 with the supposed harm resulting from the anticompetitive conduct in Step 1. These latter circuits mandate such a balancing test

despite neither *Amex* nor *Alston* even suggesting—much less mandating—that such a balancing test is appropriate. The Ninth Circuit adopted the latter, erroneous approach, when it ruled that “the district court did not err in its balancing instruction.” (Apx.33a n.10). *See also County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (“Because plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage.”)

Such a nebulous balancing test does not provide the courts with a firm, consistent way of ensuring antitrust law achieves its intended purpose. Antitrust law protects competition, not competitors. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 1 (1984) (“The goal of antitrust is to perfect the operation of competitive markets.”). “Always, [t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to consumers and restraints stimulating competition that are in the consumer’s best interest.” *Alston*, 594 U.S. at 81 (quoting *Amex*, 585 U.S. at 541).

Thus, antitrust enforcement is not primarily concerned about protecting small businesses from dominance by big businesses. As Chief Justice Taft noted, “[m]ere size is no sin against the law.” Jeffrey Rosen, *William Howard Taft* 114 (2018) (quoted in Douglas H. Ginsburg, *Balancing Unquantified Harms and Benefits in Antitrust Cases Under the Consumer Welfare Standard*, 2019 Colum. Bus. L. Rev. 824, 825 (alteration in original)). If a large company comes to dominate the market through its own business ingenuity—thus providing consumers with the best, most efficient ability to purchase its goods—antitrust law cannot—and should not—punish such a company for

its own success. “Allowing non-competition social benefits to justify losses of consumer welfare obviously harms consumers; so, too, does using non-competition social harms to deny benefits to consumers.” Ginsburg, *supra* at 836.

Not surprisingly, antitrust enforcement carries with it the risk that courts will micromanage an entire industry and substitute their own personal judgments for those who actually run the companies. Given that judges lack any particular competence in the such areas, it is critical to ensure such micromanaging does not come about. But allowing a court to conduct a balancing test even where the plaintiff fails to show that the defendant’s pro-competitive achievements could have been attained through less restrictive means enables exactly the type of micromanaging that antitrust law is meant to avoid. “Once a court purports to engage in balancing it is almost always acting outside of its competence except in the most obvious cases.” Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 132 (2018).

As Google rightly notes (Pet.17), the Ninth Circuit first joined this “balancing” side of the circuit split in *Epic Games, Inc. v. Apple Inc.*, 67 F.4th 946, 994 (9th Cir. 2023). The seed for the *Apple* decision was planted over two decades earlier, in *County of Tuolumne*, 236 F.3d at 1160. There, the Ninth Circuit concluded that “[b]ecause plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage.” *Id.* Thus, even though the plaintiffs had failed to satisfy Step 3 (showing the existence of less restrictive alternatives), that did not mean that the defendants prevailed. Instead, the court proceeded to a balancing step.

The Ninth Circuit cited no precedent in coming to this conclusion. Rather, it relied, *id.*, on an antitrust treatise that declared, “[i]f the plaintiff satisfies the burden of persuasion on [Steps 1 and 3], he prevails. If not, the tribunal must somehow weigh and balance the harm against the benefit.” Phillip E. Areeda, *Antitrust Law* ¶1507b, at 397 (1986).

Areeda’s conclusion has been criticized as inconsistent with the consumer welfare standard and opening the door to the type of business micromanagement that antitrust law seeks to avoid. “[P]roof that the venture in fact produces [procompetitive] benefits undermines any assertion by the plaintiff that higher prices indicate that the restraint creates or exercises market power. . . . [S]uch price increases may simply reflect the enhanced quality produced by the restraint.” Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 Ill. L. Rev. 77, 164. Consequently, “there is simply no reason to balance benefits against harms, since proof of benefits negates the existence of any harms by establishing that any price increase shown by the plaintiff does not necessarily reflect an exercise of market power.” *Id.* at 164-65. Thus, “there is no reason to weigh benefits against anticompetitive harm, since the very existence of such benefits undermines any presumption of harm.” *Id.* at 165.

Areeda’s proposed balancing test “assumes that the benefits the defendant has established coexist with harms presumed once the plaintiff establishes a prima facie case.” Alan J. Meese, *Against the Sliding Scale*, 2025 Penn. L. Rev. Online 1, 30. Unless the defendant is arguing that the only procompetitive benefit is an increased economy of scale—something Google is not asserting here, as it

is not claiming cost savings from increased production volume—“proof that the restraint overcomes a market failure may, in fact, undermine any inference that higher prices reflect an exercise of market power.” *Id.* Thus, “[a]bsent additional evidence of harm, there is simply no reason to presume that the benefits the defendant has proven [nevertheless] coexist with harms.” *Id.*

Given this, there is no reason to conduct a balancing test if the plaintiff is unable to satisfy Step 3 and refute the defendant’s demonstration of procompetitive benefits at Step 2. The establishment of benefits at Step 2 ends the game, unless the plaintiff proves a less restrictive means. This approach accords with the idea that courts “should adopt some simple presumptions that structure antitrust inquiry,” Easterbrook, *supra* at 14, and that such presumptions should be in favor of behavior which results in procompetitive benefits. *Id.* at 14-17. This would enable courts to conduct a clear, straightforward application of the Rule of Reason, without running the risk that they will end up micromanaging a particular company or industry while furthering the economic goal of antitrust law—the protection of consumer welfare.

B. Clarifying that no balancing test exists in this context would logically develop this Court’s antitrust jurisprudence protecting competition as a source of consumer welfare.

Ever since the Sherman Act came into being, courts have faced the temptation to view it as defining the ground rules for how much competition is appropriate, rather than protecting competition itself. Chief Justice Taft warned about this as early as 1898. He observed that some “courts,

mistaking . . . the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set said on a sea of doubt, and have assumed the power to say . . . how much restraint of competition is in the public interest, and how much is not.” *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898). Taft’s concern proved well-founded twenty years later when Justice Brandeis, writing for the Court, characterized the Rule of Reason as requiring courts to consider so many hypertechnical economic matters as to make even the most ardent advocate of the balancing test blush. According to Brandeis, courts should “consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.” *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). Nor was that all—courts also needed to examine “[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained . . .” *Id.*

Brandeis’s formulation of the Rule of Reason was—and is—a recipe for chaos. “A test that makes everything relevant provides nothing useful, because it gives no calculus for weighting or even identifying the important factors.” Hovenkamp, *supra* at 133. “In a complex world it is essential that antitrust tribunals keep their eyes on the ball, which under the consumer welfare test refers to restraints that realistically restrict output and increase price, and that are not essential to carrying on a joint venture’s legitimate functions.” *Id.*

Unfortunately, this Court did not always heed the above principle and ended up applying a *per se*

condemnation of various forms of restraints that have, in fact, produced procompetitive benefits. *See, e.g., United State v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380-82 (1967) (holding vertical exclusive territorial restrictions on wholesalers). Fortunately, since 1977 this Court has increasingly recognized that anticompetitive conduct may not, of itself, harm competition—rightly understood—but rather may actually result in procompetitive benefits. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47-59 (1977) (overruling *Schwinn* and recognizing that vertical territorial restrictions may have value). In the past decade, this Court has clarified the nature of the Rule of Reason as upholding restraints promoting competitive benefits. *See Alston*, 594 U.S. at 81; *Amex*, 585 U.S. at 541. This case provides the Court with the opportunity to further clarify the Rule of Reason and make explicit what *Alston* and *Amex* already hold implicitly—that if a plaintiff fails to satisfy Step 3 through showing the availability of less-restrictive means to achieve the procompetitive benefits, the defendant prevails as a matter of law.

C. This case’s procedural posture as a jury trial makes it the ideal vehicle to resolve this issue.

It has become practically a truism that “neither judges nor juries are particularly good at handling complex economic arguments.” Easterbrook, *supra* at 39. As noted above in Part I.A., this is especially true when it comes to any attempt to impose a “balancing test” where the plaintiff has failed to satisfy Step 3. Both judges and juries should be able to rely on a clear, straightforward version of the Rule of Reason in deciding antitrust cases. Mandating that the defendant prevail if the plaintiff cannot satisfy Step 3 does this. And given that this case is on appeal from

a jury verdict, instead of from the trial court granting a dispositive motion, this is the perfect vehicle for this Court to enunciate such a version of the Rule of Reason. The district court refused to submit Google's proposed instruction on Epic's failure to satisfy Step 3 to the jury. By holding that this was erroneous, and that Google was entitled to submit such an instruction, this Court can clarify the contours of the Rule of Reason in a manner that enables both judges and juries as non-specialists in economic matters to resolve antitrust cases in a manner that furthers the economic goals of antitrust law.

III. The Injunction violates foundational antitrust policy goals, endangers national security, and ignores standing requirements.

A. Antitrust must protect entrepreneurial discovery and innovation as property.

The injunction penalizes success earned through innovation and efficiency—conduct that antitrust law recognizes as lawful. By compelling Google to share the fruits of its ingenuity with competitors, the decision converts antitrust law from a charter of competitive liberty into a judicial redistribution regime.

By forcing Google to grant rivals privileged access to its proprietary app distribution network and users, the decision sends a troubling signal: a firm that invests in building a successful ecosystem may be compelled to share the benefits of its success with competitors that did not invest, even where the competitive advantage was lawfully earned. This diminishes the reward for innovation. Per the warning in *Trinko*, compelling a

company to aid competitors on such terms “may lessen the incentive for the monopolist, the rival, or both to invest in ... innovation.” Future entrepreneurs in the tech sector will think twice if any market leadership they achieve can be so readily upended by judicial decree.

Justice (then-Judge) Gorsuch subsequently warned in *Novell v. Microsoft Corp.*, 731 F.3d 1064, 1074 (10th Cir. 2013), that courts risk becoming “central planners” when they force firms to share property or redesign products for rivals. That warning echoes Friedrich Hayek’s insight that no central authority can possess the dispersed knowledge of entrepreneurs and consumers. See F.A. Hayek, *Competition as a Discovery Procedure*, in *New Studies in Philosophy, Politics, Economics and the History of Ideas* 179 (1978). Forcing Google to “open” its platform requires courts and regulators to perform precisely the allocative function Hayek deemed impossible: deciding which technologies to pursue and which investments to reward.

As Hayek and Israel Kirzner explained, markets are discovery processes, not mechanical equilibria. Entrepreneurs respond to profit signals and the right to exclude others from their discoveries. Compelled “sharing” eliminates those incentives. When innovators must anticipate judicial reallocation of their returns, they invest and experiment less—the very behaviors antitrust law is meant to encourage.

The Austrian school treats competition as a dynamic process unfit for a static analysis. See Israel Kirzner, *The Essence of Entrepreneurship and the Nature and Significance of Market Process* 141 (Liberty Fund 2018).

Entrepreneurs—not judges—generate knowledge about consumer wants and technical feasibility. Judicial mandates replace market discovery with bureaucratic, point-in-time conjecture and converts the judiciary into what Ludwig von Mises called an “interventionist” manager of production. *See* Ludwig von Mises, *Interventionism: An Economic Analysis* 83–88 (Liberty Fund 1998).

That transformation erodes the natural-rights foundation of American innovation law. From Locke’s *Second Treatise* through the Constitution’s IP Clause, the Nation has recognized a property right as a result of one’s own physical or intellectual labor. *See* John Locke, *Second Treatise of Government* § 27 (1690). As natural rights scholars observe, IP rights “secure to authors and inventors the financial rewards of their creative works and innovations for limited times, thereby promoting the public good,” anchoring property and innovation. *See* Randolph J. May & Seth L. Cooper, *The Constitutional Foundations of Intellectual Property* 53 (Carolina Academic Press 2015). Other scholars have shown that early U.S. patent law treated patents as property, not regulatory privileges, ensuring stable investment expectations. *See* Adam Mossoff, *Private Property and Regulatory Entitlements*, 92 S. Cal. L. Rev. 921 (2019). The injunction rejects that tradition, treating Google’s innovations as utilities to be operated for others’ benefit.

Innovation is the principal engine of economic growth. As Aghion, Howitt, and Mokyr demonstrated, sustained prosperity arises from “creative destruction,” in which entrepreneurs displace old technologies. *See Scientific Background to the 2025 Nobel Prize in Economic Sciences* 1–4 (Aghion et al.). Antitrust law should preserve—not

politicize—that process. By forcing Google to distribute its proprietary catalog and host rival stores, the lower court replaces market evolution with judicial stasis—a result directly contrary to both economic theory and the constitutional protection of property.

In short, the injunction transforms antitrust law from a shield for competition into a tool of industrial policy. It imposes a “duty to share” where none exists, erodes incentives to innovate, and invites courts to perform the central-planning functions Hayek and Gorsuch warned against. The Court should grant certiorari to reaffirm that competition on the merits—not coerced collaboration—remains the foundation of both antitrust law and American innovation.

B. The injunction creates severe and irreversible national-security risks.

Aside from threatening cybersecurity, the injunction also weaponizes American courts in a way that aligns with the Chinese Communist Party’s “lawfare” strategy—using Western legal systems to weaken U.S. technological and economic power. By forcing Google to open its proprietary ecosystem, the injunction functions as a judicially imposed technology transfer consistent with Beijing’s industrial objectives.

1. Cybersecurity threats.

The injunction compels an immediate and highly damaging restructuring of Google’s platform, creating immediate and irreversible national security risks by severely degrading the security and integrity of

the Android ecosystem. This judicial interference compromises the defense of millions of users against malicious actors, including foreign adversaries and state-sponsored hacking groups. By mandating open access and restricting Google’s prophylactic security measures, the ruling undercuts America’s technological edge in a critical era of global strategic competition.

The injunction’s “link-out” and competing-store provisions will, experts warn, “drastically lower[] the barriers” for hostile actors to infiltrate U.S. Android users’ devices. *Brief of Former National Security Officials and Scholars in Support of Stay 2*, 7–12 (*Epic v. Google*, 9th Cir. Aug. 15, 2025). Third-party app stores are known vectors for pirated apps, malware, and phishing. Deceptive links can smuggle malware, steal data, or enable surveillance—risks with real-world consequences for users’ privacy and safety.

At the same time, the injunction hamstring Google’s defenses by requiring that its protections be “strictly necessary and narrowly tailored,” a vague and reactive standard. It deprives Google of critical visibility into app-level activity, hindering integrated cybersecurity. As experts note, addressing breaches post-hoc is “like putting toothpaste back in the tube.” Yet the order places a non-Article III Technical Committee in charge of real-time platform security—a task for which courts are ill-suited and which carries extraordinary risk.

2. The injunction advances China’s “lawfare” seeking to undermine U.S. technological leadership.

The injunction also advances China’s broader “lawfare” campaign. Tencent Holdings Ltd.—a Chinese conglomerate with close CCP ties—owns about 40 percent of Epic Games. Epic’s parallel antitrust suits against Google and Apple manifest Beijing’s strategy to undermine U.S. digital platforms that anchor AI and cyber infrastructure.

Chinese firms have exploited U.S. intellectual property (IP) law weaknesses to erode innovation. Since creation of the Patent Trial and Appeal Board (PTAB) and *inter partes* review (IPR), large Chinese tech companies have been among the most prolific petitioners seeking to invalidate U.S. patents.² The PTAB has turned patents from secure property rights into “regulatory entitlements,” making them easier to invalidate and disproportionately harming small inventors. See Adam Mossoff, *Private Property and Regulatory Entitlements*, 92 S. Cal. L. Rev. 921 (2019). These increased invalidations have hindered the commercialization of U.S.-developed advanced technologies, creating an opportunity for China’s ascendance.

2. See *China Hijacks US Patent System to Steal American Innovation*, Journal (via U.S. Congress subcommittee), U.S. House of Representatives, Comm. on the Judiciary, Subcomm. on Courts, Intellectual Property, and the Internet, China’s Efforts to Steal U.S. Intellectual Property: The PTAB and Beyond, 117th Cong. 2d Sess. 4–5 (June 22, 2022), *available at* bit.ly/4hICzHY (“The top Chinese companies utilizing the PTAB to invalidate U.S. patents include ZTE (127 petitions), HTC (115 petitions), and Huawei (114 petitions).”).

These legal tactics, in both the antitrust and intellectual property spaces, coincide with China’s drive for technological dominance. The National Security Commission on AI warned that “China possesses the might, talent, and ambition to surpass the United States as the world’s leader in AI in the next decade.” *See* NSCAI Final Report, Executive Summary (2021). Judicial actions like this injunction work against the Trump Administration’s America’s AI Action Plan (July 2025), which declares global AI leadership a “national security imperative.” Empirical data confirm China’s growing technological prowess. ASPI’s 2024 Critical Technology Tracker shows China now leads in 57 of 64 critical technologies—including quantum computing, drones, AI hardware, and advanced aircraft engines—with the Chinese Academy of Sciences being the world’s best performing institution in 31 of the 64 technologies. Such gains stem partly from the erosion of U.S. IP protection and the export of American know-how through both legitimate (e.g., “forced” technology transfers via judicial channels or market access requirements) and illegitimate (e.g., theft) means.

Permitting this injunction furthers China’s rise: it compels an American innovator to open secure infrastructure to a foreign-influenced rival and rewards a firm partly owned by a Chinese state-linked entity. Antitrust law should not become the next arrow in China’s “lawfare” quiver. The Court should grant certiorari to prevent that outcome.

C. The Ninth Circuit ignored Article III’s standing requirements.

Article III confines the federal judiciary to genuine “Cases” and “Controversies.” A plaintiff must show an “injury in fact” that is “concrete and particularized,” causally traceable to the challenged conduct, and likely to be “redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Those elements must be met for each form of relief. See *Davis v. FEC*, 554 U.S. 724 (2008). The Ninth Circuit ignored these principles by upholding a nationwide injunction that rested on speculation about third-party behavior rather than any redressable injury to Epic.

The panel treated the scope of relief as a discretionary question rather than a jurisdictional one, contradicting this Court’s teaching that standing is “an essential and unchanging part of the case-or-controversy requirement.” *Lujan*, 504 U.S. at 560. Federal courts have “an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). By declining to evaluate Epic’s standing for each injunction provision, the Ninth Circuit expanded judicial power beyond constitutional limits.

Epic has no ongoing injury traceable to Google’s conduct. It has no apps on the Play Store and no plans to return. Its claimed harm rests on hypothetical future interactions between developers and consumers. A “threatened injury must be certainly impending,” not merely possible. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (internal citations omitted). Without a

present stake, Epic’s grievances are indistinguishable from the “general interest common to all members of the public” in the proper application of the antitrust laws, which cannot confer standing. *Lujan*, 504 U.S. at 575 (internal citations omitted).

The nationwide injunction rests on speculative chain-reactions among non-parties. The duty-to-deal and catalog-access remedies assume that if Google is compelled to host rival app stores, developers will respond by changing distribution patterns, consumers will alter purchasing habits, and Epic will thereby gain business. That speculative multi-link chain cannot satisfy the redressability requirement. See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (plaintiffs lacked standing where alleged injury depended on independent decisions of some third party not before the court). Epic offered no “specific facts” showing that hundreds of thousands of independent actors would behave predictably so as to redress its claimed injury. *Summers*, 555 U.S. at 498 (internal citations omitted). The injunction therefore rests on precisely the kind of conjecture Article III forbids.

Epic lacked standing to seek injunctive relief for policies that no longer affect it. Even if Epic once experienced competitive constraints, the absence of an ongoing injury precludes equitable relief. Injunctions require an “irreparable injury” and such an injury cannot exist “where there is no showing that the plaintiff will be wronged again.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Because Epic voluntarily withdrew from the Play Store, it cannot plausibly claim a continuing injury or a likelihood of future harm. The Ninth Circuit’s failure to require that showing transforms Article III’s limits into a nullity.

By allowing a plaintiff without a concrete stake to obtain nationwide structural remedies, the decision below effectively converts the judiciary into an economic regulator. That result offends both Article III and the limits emphasized in *Lewis v. Casey*, 518 U.S. 343, 357 (1996), where this Court held that “the remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.” Here, the Ninth Circuit’s injunction—overhauling an entire ecosystem used by billions worldwide—extends far beyond any cognizable injury to Epic and disregards the constitutional principle that “federal courts may exercise power only in the last resort, and as a necessity.” *Allen v. Wright*, 468 U.S. 737, 752 (1984) (internal citations omitted).

This Court’s intervention is necessary to protect the integrity of Article III. It should grant certiorari to reaffirm that standing must be proven for each form of relief, that conjecture about third-party market behavior cannot substitute for evidence of redressability, and that nationwide structural decrees affecting non-parties exceed the judicial power. As this Court emphasized in *TransUnion LLC v. Ramirez*, 594 U.S. 413, 442 (2021), “No concrete harm, no standing.” Epic’s speculative injuries and generalized grievances fall far short of that standard.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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