

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 INTERNA-
TIONAL CENTER FOR LAW & ECONOMICS
IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

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INTEREST OF AMICUS CURIAE¹

The International Center for Law & Economics (“ICLE”) is a nonprofit, non-partisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes using law and economics methodologies and economic learning to inform policy debates and has expertise evaluating antitrust law and policy.

ICLE has an interest in ensuring that antitrust law promotes the public interest by remaining grounded in rules informed by sound economic analysis. That includes advising against undue antitrust remedies that impose excessive duties to deal with rivals, and that invite courts to act as central planners to the detriment of competition and consumers.

SUMMARY OF ARGUMENT

Courts are not central planners. This Court has repeatedly warned lower courts against the risks associated with second-guessing business decisions and imposing broad injunctive remedies. Broad, market-altering injunctions should rarely be granted in antitrust cases, and they should be especially rare in single-plaintiff, private antitrust suits. The risk of error in reasoning from a narrow finding of harm to impose a market-wide remedy is substantial, and this

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief. Pursuant to Rule 37.2, counsel of record for the parties received timely notice of intent to file this brief.

Court has imposed doctrinal constraints on lower courts aimed to minimize this risk. These constraints were ignored here, however.

First, the district court found liability through an unstructured balancing of pro- and anticompetitive effects, rather than the structured, burden-shifting Rule of Reason framework required by Supreme Court precedent. The Rule of Reason should not devolve into open-ended balancing, especially in complex two-sided markets like app stores, where courts lack the expertise to accurately assess costs and benefits.

Second, imposing a broad, market-wide remedy based on a finding of harm to a single, private plaintiff in a two-sided market invites error. Such a remedy lacks a clear causal nexus to the proven harm, is disproportionate, and is likely to cause anticompetitive effects. In this case, it risks undermining platform security, incentivizing free-riding, and harming both consumers and developers. Remedies must be tailored to the plaintiff's injury, not aimed at redesigning entire markets or benefiting non-parties.

ARGUMENT

I. SECTION TWO DECISIONS SHOULD AVOID THE ERROR COSTS OF EXCESSIVE JUDICIAL INTERVENTION

This Court has made clear that erroneous findings of liability and ill-tailored or overreaching remedies risk greater harm to competition than the conduct at issue in Section 2 cases, and courts must be

mindful of both risks. Acknowledgment and avoidance of such error costs was recently emphasized by this Court in *NCAA v. Alston*, 594 U.S. 69 (2021):

- Judges (and juries) are not experts in the management of competitive firms, much less in the design and regulation of the markets.
- Antitrust courts must give wide berth to business judgments before finding liability.
- Judges must be sensitive to the possibility that ongoing supervision of a highly detailed decree could impair rather than protect competition.
- The compliance costs associated with complex judicial decrees may exceed efficiencies gained; the decrees may unintentionally suppress procompetitive innovation and even facilitate collusion.
- Judges must be wary of the temptation to specify the proper price, quantity, and other terms of dealing—cognizant that they are neither economic nor industry experts.
- Judges must be open to reconsideration and modification of decrees in light of changing market realities.

Alston, 594 U.S. at 102 (cleaned up). “Throughout courts must have a healthy respect for the practical limits of judicial administration” because “[i]n short,

judges make for poor central planners and should never aspire to the role.” *Id.* (cleaned up).

II. THE DECISION AND ORDER EXEMPLIFY THE COURT’S CONCERNS THAT LAX LIABILITY STANDARDS AND OVERREACHING REMEDIES RISK UNDUE ERROR COSTS

A. The Rule of Reason Should Cabin the Error Cost Risks of Unbounded Balancing

The record evidence suggests that Google’s liability resulted from the jury’s attempt to balance the pro-competitive and anti-competitive effects of Google’s alleged conduct under an unstructured sort of cost-benefit analysis. That the fact finder was instructed—or even permitted—to engage in such balancing under the Rule of Reason was error of a kind that has improperly propagated across several Circuits. It should be corrected.

1. This Court Has Eschewed Rule of Reason “Balancing,” but the District Court Employed It

The district court correctly identified the Rule of Reason as the proper framework for the Section 2 allegations at issue. That entails “a multi-step, burden-shifting framework that “requires courts to conduct a fact-specific assessment” to determine a restraint’s “actual effect” on competition.” *Ohio v. Am. Express Co.* (“*Amex*”), 585 U.S. 529, 541 (2018) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467

U.S. 752, 768 (1984)); *see also*, Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. Law Rev. 81-167 (2018).

The burden-shifting framework generally requires a plaintiff to demonstrate that defendants with market power have engaged in anticompetitive conduct that has (or is likely to have) “a substantial anti-competitive effect that harms consumers in the relevant market.” *Amex*, 585 U.S. at 530. If that *prima facie* case is made, the defendant must show a procompetitive rationale for its conduct. *Id.* at 542. “If the defendant can make that showing, ‘the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.’” *Alston*, 594 U.S. at 96–97 (quoting *Amex*). The jury did not, however, follow the requisite burden-shifting steps: it was instructed not to do so.

The app store restrictions at issue protected the means by which Google monetized its platform—the main competitor to Apple’s App Store. They also served a core, pro-competitive feature of modern app stores: their role as a trusted gatekeeper between app consumers and millions of available apps. *See Epic Games, Inc. v. Apple, Inc.* (“*Epic Games*”), 67 F.4th 946, 990 (9th Cir. 2023) (upholding the district court’s finding that “Apple’s security-and privacy-related restrictions ‘provide[] a safe and trusted user experience on iOS, which encourages both users and developers to transact freely.’”).

At trial, the parties disputed whether Google might have employed less restrictive means, but “an-

titrust law does not require businesses to use anything like the *least* restrictive means” *Alston*, 594 U.S. at 98. “To the contrary, courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency.” *Id.* (simplified).

Thus, at step three, the plaintiff’s alternative must be “a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits.” *Id.* at 103. It must be “virtually as effective in serving procompetitive purposes” as current rules “without significantly increased cost.” *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1260 (9th Cir. 2020) (simplified), *aff’d* 594 U.S. 69. Where a restraint is “patently and inexplicably stricter than is necessary to accomplish” the procompetitive objective, “an antitrust court can and should invalidate it and order it replaced with a viable [less restrictive alternative].” *Id.* (quoting *O’Bannon v. NCAA*, 802 F.3d 1049, 1075 (9th Cir. 2015) (emphasis in original)).

No such “significantly less restrictive means” was found at trial: plaintiff did not establish one and the trial court did not require it. And the Ninth Circuit did not insist on such a finding. Instead, it applied *Epic Games*, allowing a plaintiff who fails at the third step to establish liability based on the fact-finder weighing the net total of pro- and anticompetitive effects. *See Epic Games*, 67 F.4th at 993.

This Court, rightly, did not recognize such an alternative in either *Amex* or *Alston*. The three-step framework is already designed to identify sufficient

imbalance to impose liability: pretextual benefits should fail to substantiate a procompetitive rationale at step two, and evidence of slight benefits but substantial harms will commonly support liability at step three. Only a close case finds steps one and two satisfied, but not step three. Unstructured ‘balancing’ by non-expert fact-finders in these closest of cases invites the very liability error the Rule of Reason is designed to avoid.

2. The Need to Avoid Rule of Reason Balancing is Particularly Acute in Two-Sided Markets

Trial courts are ill-equipped to engage in an accurate, comprehensive cost-benefit analysis of terms of dealing. “Judges must be wary . . . of the temptation to specify ‘the proper price, quantity, and other terms of dealing’—cognizant that they are neither economic nor industry experts.” *Alston*, 594 U.S. at 102 (quoting *Verizon Commc’ns Inc. v. Trinko, LLP* (“*Trinko*”), 540 U.S. 398, 408 (2004)).

Rule of Reason burden-shifting is a workable approach in contrast to an unconstrained, impressionistic, and inexpert attempt at a more global balancing. Plaintiffs can establish a *prima facie* case by meeting a substantial but tractable burden: pleading, and showing by adequate evidence, substantial cognizable harms. Defendants, in turn, can respond with a procompetitive rationale for the challenged conduct. If required, the comparison implicated by the third step is bounded by the showings in steps one and two.

Assessing competitive effects in two-sided platform markets is especially challenging for courts, particularly when balancing interests across distinct user groups. As highlighted in *Amex*, it is essential to evaluate how competition is affected throughout the entire platform, not solely on one side. This complexity is heightened when both the conduct under scrutiny and proposed remedies have varying impacts on different stakeholders, such as individual app consumers and commercial app developers. That complexity is magnified when the less restrictive alternative test requires courts to evaluate not only the demonstrated effects of the challenged conduct, but also the cross-platform effects of potential alternatives.

With two-sided platforms, this Court's concerns about mandatory dealing and forays into central planning by lower courts become doubly salient when it comes to determinations of liability—especially where the planning at issue involves mandatory access to complex, automated online markets under as-yet-untested operational standards and business terms. Moreover, in evaluating potential remedies, no court should “impose a duty that it cannot explain or adequately and reasonably supervise.” *Alston*, 594 U.S. at 102–03 (quoting *Trinko*, 540 U.S. at 415). That caution demands strict adherence to the three-step Rule of Reason.

B. The District Court's Injunction Magnifies the Error

Below, the district court reasoned that, “[i]f the jury finds that monopolization or attempted monopolization has occurred, the available injunctive relief is broad, including to terminate the illegal monopoly,

deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization.” Order re UCL Claim and Injunctive Relief, *In re Google Play Store Antitrust Litig.* (“*In re Google*”), No. 3:20-cv-05671-JD, Dkt. No. 701, at 6 (N.D. Cal. Oct. 7, 2024) (“Order re UCL Claim”).

But broad latitude to fashion adequate remedies does not mean that all available remedies are proper. Rather, antitrust enforcement should be informed by the principle that, “as a general matter, the Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’” *Trinko*, 540 U.S. at 408 (quoting *United States v. Colgate & Co.*, 250 U. S. 300, 307 (1919)). When special circumstances “at or near the outer boundary of § 2 liability,” *Trinko*, 540 U.S. at 409, justify intervention, courts should be mindful of their limitations and question whether, and to what extent, an available remedy might—or might fail to—repair the harm to competition that was caused by the conduct at issue. More complex and invasive interventions pose greater risk of remedy errors and call for great caution in application.

The decision below reverses these principles. First, it imposes an exceedingly complex duty to deal remedy despite this Court’s warnings. Second, it provides essentially no explanation as to how its *remedies* the alleged competitive injury. This Court should correct such misapprehension of the permissible scope of antitrust remedies.

1. The District Court’s Duty-to-Deal Injunction Is Improper

The district court’s injunction mandates that Google deal with rivals. *Trinko* strongly cautions against such mandates. The Ninth Circuit suggested that *Trinko* does not apply to remedies. App. 45a-46a. Not so; as explained in *Alston*, *Trinko*’s concerns “apply” when courts craft antitrust remedies. 594 U.S. at 103-02 (quoting *Trinko*, 540 U.S. at 415). *Trinko*’s reluctance to impose a duty to deal reflects not only the challenges of liability determinations, but those of designing viable, well-tailored remedies to implement such duties when necessary: “The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.” 540 U.S. at 415 (cleaned up). Indeed, the risk of a remedial morass fundamentally animates *Trinko* because the *remedy* (forced sharing) threatens to blunt investment incentives for the defendant and for rivals alike, to suppress procompetitive innovation, and to require ongoing judicial oversight. *See id.* at 407-08; 414-15; *see also Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (Gorsuch, J.).

Indeed, “the difficulty of providing an appropriate antitrust remedy was central to the *Trinko* Court’s” holding. Thomas O. Barnett, Section 2 Remedies: What to Do After Catching the Tiger by the Tail, 76 ANTITRUST L.J. 31, 33 (2009). The Court’s concerns in *Trinko* regarding the risk of chilling innovation incentives and the institutional limitations of courts acting as “central planners” are practical challenges implicated by the imposition of certain reme-

dies. The disincentive for a firm to invest in potentially valuable assets or facilities arises most acutely from the subsequent remedial obligation to share those assets with competitors on court-dictated terms. The “central planner” problem identified in *Trinko* is undeniably a remedial concern, due to the profound difficulties with designing, implementing, and overseeing complex arrangements of forced dealing.

A remedy that mandates the distribution of app stores is tantamount to a determination that the *failure* to distribute constitutes a violation of the law; and imposing a duty to deal without a showing of anticompetitive effect imposes liability by inference. See Herbert Hovenkamp, *Unilateral Refusals to Deal, Vertical Integration, and the Essential Facility Doctrine*, U. Iowa Leg. Stud. Rsrch. Paper No. 08-31, at 28 (Jul. 14, 2008), <http://bit.ly/33Q5fIM> (“[Unilateral refusal to deal under §2] comes dangerously close to being a form of ‘no-fault’ monopolization.”). Such a remedy also risks mistaken condemnation of legitimate business arrangements, which is “especially costly, because [it] chill[s] the very’ procompetitive conduct ‘the antitrust laws are designed to protect.’” *Alston*, 594 U.S. at 99 (quoting *Tinko*, 540 U.S. at 414).

This proper caution regarding remedies informs the third step under Rule of Reason. Even if it is not yet willing to foreclose generalized balancing, this Court should insist that when—as here—a plaintiff cannot establish a significantly less restrictive means, the trial court must avoid of injunctions imposing duties to deal that implicate central planning of complex markets. Such a rule avoids errors associated with extraordinary injunctions and honors the

baseline principle that, “as a general matter, the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” *Trinko*, 540 U.S. 398, 408 (2004) (quoting *United States v. Colgate & Co.* (“*Colgate*”), 250 U.S. 300, 307 (1919)).

2. The district court’s injunction is not tailored to the harm found at trial

Antitrust remedies in Section 2 cases are not penalties. Antitrust injuries must be properly tailored to the harm. Courts have thus required clear evidence of a strong causal connection between the competitive injury and the corresponding cure. Here, however, the Ninth Circuit affirmed the district court’s injunction without any such showing. Rather, the Ninth Circuit observed that “the available injunctive relief” in antitrust cases “is broad.” App. 42a-43a (quoting *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., Ltd.* (“*Optronic*”), 20 F.4th 466, 486 (9th Cir. 2021)). True, but the actual injunctive relief imposed must nonetheless rest on a “clear indication of a significant causal connection between the conduct enjoined or mandated and the violation found,” and must be a reasonable method of remedying the proven harm. *United States v. Microsoft Corp.* (“*Microsoft*”), 253 F.3d 34, 105 (D.C. Cir. 2001). The district court’s injunction fails both the causal nexus and proportionality requirements.

**a. Injunctive Relief Must
be Carefully Tailored to
the Competitive Harm**

Imposition of antitrust injunctive remedies poses enormous risk of error. *E.g.*, Herbert J. Hovenkamp, *Structural Antitrust Relief Against Digital Platforms*, 7 J. L. & Innovation 57, 64 (2024) (“the need to get it right—to avoid both under- and over-deterrence—is one of antitrust’s most vexing problems. It is nowhere more pronounced than in the antitrust law of remedies”). The history of antitrust remedies shows that they fail precisely when they over-index on harms and ignore the benefits that may also arise from ambiguous conduct and complex market structures. *See generally* Robert W. Crandall & Kenneth G. Elzinga, *Injunctive Relief in Sherman Act Monopolization Cases*, 21 Res. L. & Econ. 277, 335-37 (2004) (studying effects of behavioral remedies imposed in ten major monopolization cases). “Without a firm grasp of the economic forces that are driving changes in market structure, the [court] cannot be expected to design ‘relief’ that will result in increased competition, lower prices, and consumer benefits.” *Id.* at 335.

Remedies calibrated to the harm done are economically efficient because they force firms to internalize the costs of the harms they have caused, creating incentives for firms to avoid such harmful conduct going forward. Where the conduct at issue implicates both benefits and harms, the chilling of pro-competitive conduct and consumer benefits make both over- and under-inclusive remedies a concern: limitations (or additions) to the scope or magnitude of the remedy are liable to be inefficient. *See generally*, Steven

Shavell, *Strict Liability Versus Negligence*, 9 J. Legal Stud. 1 (1980).

To impose a remedy based on inferred competitive harm—and, further, one rooted in inferred and non-quantified conclusions about consumer behavior—magnifies the problem. Without more, it is difficult for a court to know whether the remedy will yield net benefits. Similarly, where liability relies on complex economic theories, involves conduct with potential efficiencies, or leaves the scope and magnitude of competitive harm uncertain, broad or radical remedies are inappropriate. *See Microsoft*, 253 F.3d at 78–80. The problem is magnified in two-sided markets.

For these reasons, “[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.’” *Id.* at 105 (quoting Areeda & Hovenkamp at ¶ 653b, 91-92). The *Microsoft* court’s emphasis on the need to consider “whether plaintiffs have established a sufficient causal connection,” *id.* at 106, between the anticompetitive conduct and the defendant’s dominance is especially telling given the lower bar set for liability in that case—the “edentulous standard” applied for harm to a “nascent competitor.” Hence, on remand in *Microsoft* the Court of Appeals directed the district court to “consider whether plaintiffs have established a sufficient causal connection between Microsoft’s anticompetitive conduct and its dominant position in the [operating system] market.” *Id.* (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 650a, at 67).

Similarly, courts should beware nirvana fallacies, as visions of ideal competition may be fanciful—or, in fact, relatively impoverished. *See, e.g.,* Douglas Melamed, Afterword: *The Purposes of Antitrust Remedies*, 76 Antitrust L.J. 359, 368 (2009) (“[R]emedies are hard to get right and, when suboptimal, can undermine antitrust objectives by interfering with markets and prohibiting or deterring procompetitive conduct.”). The conditions that lead to relatively concentrated markets may persist no matter what the intervention. Neither economics nor precedent suggest that an imagined state of atomistic competition should be preferred to an actual competitive market. Antitrust law recognizes that even monopoly can arise “as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). For that reason, antitrust law and, specifically, Section 2, do not condemn monopoly itself. *Id.* at 570-71. Network effects, like scale advantages, are not inherently anticompetitive. Network effects confer consumer benefits, and well-tailored remedies must account for those benefits.

As explained below, the justification and explanation for the remedy imposed below fall well short of what should be required of such sweeping injunctive relief.

b. The injunction lacks a causal nexus to the harm identified

In *Microsoft*, the D.C. Circuit vacated the district court’s remedy because the district court failed to explain how the ordered relief would “unfetter [the] market from anticompetitive conduct,” and because

structural relief “designed to eliminate the monopoly altogether” required a clearer indication of causation. 253 F.3d at 107, 106–07 (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972)). Here, the district court’s remedy should have met the same fate.

The district court’s justification for the app-store-distribution mandate is a single paragraph, anchored in one witness’ testimony about sideloading friction and the number of steps some users encountered. (Order re UCL Claim). App. 83a. That explanation does not demonstrate that forcing Google to carry rival stores is causally tied to any proven violation.

More fundamentally, neither the district court nor the Ninth Circuit explained how the remedy is causally related to the alleged harm. Users can and do obtain apps through multiple channels, and rivals can compete for distribution of specific apps without mirroring the entire catalog. In fact, the connection between the conduct to be remedied and the alleged harm was specifically disclaimed by Jury Instruction No. 24 at trial: “It is not unlawful for Google to prohibit the distribution of other app stores through the Google Play Store, and you should not infer or conclude that doing so is unlawful in any way.” Final Jury Instrs., 24, *In re Google*, 3:20-cv-05671-JD, Dkt. No. 592.

The district court’s injunction therefore lacks a causal nexus to the competitive harm allegedly done to Epic—and that applies *a fortiori* to third parties.

c. The injunction is disproportionate to the harm

An antitrust injunction must reflect a “proportionality between the severity of the remedy and the strength of the evidence of the causal connection.” *United States v. Microsoft*, 231 F. Supp. 2d 144, 164 (D.D.C. 2002), *aff’d sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004) (quoting 3 Areeda & Hovenkamp, *Antitrust Law* ¶650a, at 67). The “[m]ere existence of an exclusionary act does not itself justify full feasible relief.” *Id.*

The district court’s injunction here goes far beyond “stopping” the allegedly exclusionary act; it mandates that Google create and maintain new modes of business—hosting rival stores and exposing Play’s catalog—under continuing judicial supervision. But ordering a firm to expand or reconfigure facilities puts courts “nearly in the shoes of the regulator.” Hovenkamp, *supra*, at 25. Such a remedy could be proportionate only to the most severe, widespread, and pervasive anticompetitive conduct—nowhere near what was presented on the facts here.

A critical distinction also separates this case from *Microsoft* (and from precedents like *Associated Press v. United States*, 326 U.S. 1 (1945)): those cases addressed discriminatory restrictions that prevented others—intermediaries or members—from dealing with rivals. The appropriate remedy in there was to prohibit the discrimination and require equal terms for similarly situated actors. *See also Optronic*, 20 F.4th at 486 (injunction curing discriminatory terms).

Here, by contrast, the district court’s injunction mandates that Google provide a brand-new form of access it has never offered: distribution of rival app stores in Play and wholesale access to its curated catalog. *Trinko* precludes a court from ordering a defendant to provide access to a competitor if the defendant is not already providing access elsewhere. See *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004). And this Court in *Associated Press* refused to embrace a “public utility concept” obliging a firm to deal with all newcomers; its remedy simply forbade discriminatory denial of admission. See Hovenkamp, *supra*, at 10–11.

d. The injunction is anti-competitive and likely to cause net consumer and developer harm

The remedy is not just far broader than the identified harm: it is likely to cause substantial harm to competition, consumers, and other market participants.

The injunction mandates that Google fundamentally re-engineer its platform to actively assist its direct competitors, requiring it to share its proprietary app catalog and host rival app stores directly on the Google Play. By imposing such obligations on Google Play Store, but none on Apple’s App Store, the injunction effectively removes product differentiation as a source of competition, redesigning one competitor via a haphazard judicial mandate. The paradoxical import of the injunction is a remedy that purports to increase *intra*-platform competition (i.e., among app stores within the Android ecosystem) but is almost

certain to decrease the more vital *inter*-platform (inter-brand) competition between app stores and their payment processing systems. And “it is ‘the promotion of interbrand competition,’ after all, that ‘is the primary purpose of the antitrust laws.’” *Ohio v. American Express*, 585 U.S. at 552 (cleaned up).²

Courts have long recognized that an injunction is improper when it imposes a remedy that is itself anticompetitive. For example, the Ninth Circuit struck the part of an injunction that promoted “free-riding,” noting that remedies must not inadvertently stifle competition. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1225 (9th Cir. 1997). In this case, the injunction enables free-riding by allowing Epic Games (and other developers) to use Google’s platform and catalog for less than their market value. Such free-riding introduces market distortions that go well beyond Google.

The injunction’s most pernicious aspect is its assault on the incentives to create and sustain the very platforms that drive the digital economy. By severing—for one key competitor—the link between the use of a platform and the means by which it is monetized, the remedy sets a dangerous precedent: it signals that returns on massive, long-term platform investments are subject to judicial confiscation and rent-shifting.

² That the injunction ignores this impact on *inter*-platform competition is unsurprising. After all, the district court rejected Google’s argument that Epic ought to be precluded from arguing a different market definition between its parallel and simultaneous challenge to Apple’s App Store and Google Play.

The injunction fundamentally misunderstands the nature of platform competition. Building a successful digital ecosystem is not a single act of creation but a continuous process of innovation and refinement—one that requires ongoing investment. Platform operators must remain perpetually attentive to users and developers on both sides of the market by investing in system maintenance and security, as well as new and improved features. A legal regime that allows the fruits of this ongoing investment to be siphoned off by free-riding competitors undercuts the incentive to make such investments.

Problems with the injunction here run deeper still. For consumers, the injunction introduces a host of security, privacy, and usability problems. A core, pro-competitive feature of a modern app store is its function as a trusted gatekeeper. Platforms like Google Play invest enormous resources in vetting applications to protect users from malware, data theft, and other malicious content. This curation provides a safety baseline safety that encourages consumers to engage with the digital marketplace.

The injunction systematically dismantles this protective function. The mandate that Google host all third-party app stores creates what is, in effect, a forced endorsement. Consumers have been conditioned to see the Play Store as a safe and curated space. When they download an app store from the Play Store, they will reasonably assume it has met Google's standards of safety, privacy, and reliability. Yet the injunction requires Google to carry these rival stores even if they employ vastly different and poten-

tially inferior security protocols and privacy protections. This creates a significant risk of consumer confusion and harm.

For developers, the injunction introduces a new era of fragmentation, uncertainty, and cost. The current “centralized” model provides immense benefits to the developer community, particularly to small and independent creators. It offers a single, predictable set of rules, a secure and reliable global distribution channel, and a trusted monetization system. This lowers barriers to entry and allows developers to focus on their core competency: building innovative software. The injunction threatens to fragment this landscape.

* * *

The district court imposed a broad, sweeping injunctive remedy on Google. That remedy forces Google to deal, is disproportionate to the alleged harms, is justified by the thinnest of explanations, and is likely to cause anticompetitive and other harm. If this Court’s proper reluctance to make district courts into central planners ever had purchase, it does here. The Court should grant review and take the opportunity to emphasize just how rigorous and cautious courts should be in imposing sweeping antitrust remedies.

III. THE INJUNCTION IS INCONSISTENT WITH THIS COURT’S REMEDIAL JURISPRUDENCE

This Court’s precedents require that a remedy be tailored to the plaintiff’s injuries—not those of non-

parties. This is true for antitrust plaintiffs. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111–13 (1986) (requiring antitrust injury “that flows from that which makes defendants’ acts unlawful” for injunctive relief under Section 16) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). And it is true more broadly. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Here, the district court ordered Google to (i) host rival app stores inside Play and (ii) open Play’s catalog to rival stores. But that remedy necessarily regulates the *entire* Android mobile distribution ecosystem. In so doing, it gives potential benefits to some non-parties and imposes costs and risks on other non-parties, many of whom may be harmed by reduced security or by fragmentation they do not want.

This Court’s decision in *CASA* confirms that injunctive relief must be tailored to the parties before the court—not used to deliver *de facto*, class-wide remedies to non-parties. In *CASA*, the Court drew a sharp line between (i) injunctions that afford “complete relief *between* the parties,” even if they “incidentally” advantage others, and (ii) injunctions designed to confer direct relief “to nonparties.” *Trump v. CASA*, 606 U.S. 831, 851 (2025) (citation omitted); see also *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Indeed, “[i]n no circumstance can a court award relief beyond that necessary to redress the plaintiffs’ injuries.” *Trump v. CASA*, (Thomas, J. & Gorsuch, J. concurring), 606 U.S. at 862. See also *Lewis v. Casey*,

518 U.S. 343, 360 (1996) (“[G]ranting a remedy beyond what [is] necessary to provide relief to [the plaintiff is] improper.”). Doing otherwise creates constitutional concerns. *See, e.g., United States v. Texas*, 599 U.S. 670, 693 (2023) (Gorusch, J., concurring); *Trump v. Hawaii*, 585 U.S. 667, 713 (2018) (Thomas, J., concurring).

That logic applies with full force in the anti-trust context. Indeed, Section 16 of the Clayton Act, authorizes injunctions to prevent “threatened loss or damage” to the plaintiff, not to redesign an industry for the benefit of non-parties. *See Zenith Radio Corp. v. Hazeltine Rsch., Inc. (“Zenith”)*, 395 U.S. 100, 130 (1969) (“[Section] 16 of the Clayton Act, 15 U.S.C. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of ‘threatened’ injury.”).

It is true that antitrust injunctions can *incidentally* affect non-parties. But the classic examples involve nondiscrimination obligations—in which equal treatment requires an order running across similarly situated customers or suppliers. *See, e.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483–86 (1992); *Optronic*, 20 F.4th at 486 (approving relief that eliminated discriminatory terms and ensured access on comparable terms).

Thus, a broad injunction may be warranted when it is difficult to separate the parties affected by the enjoined conduct from those that are not. *See CASA*, 606 U.S. at 852 (“[W]hile the court’s injunction

might have the practical effect of benefiting nonparties, ‘that benefit [is] merely incidental.’”) (quoting *Trump*, 585 U.S. at 717 (Thomas, J., concurring)). But the district court’s order here is categorically different: it imposes a new duty to provide across-the-board access where no such access was ever offered before. And the identity of the parties that have supposedly been found to have been harmed is clear—they are, at most, Epic and the approximately 100 developers that use the Epic Store. Even if the district court’s conclusions regarding harm to Epic and other developers with apps on the Epic Store were correct, it would be easy—and necessary—to carve a much narrower remedy than the one the district court imposed. See *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 591 U.S. 610, 633 (2020).

Under the principles reaffirmed in *CASA*, any injunction should be limited to eliminating the challenged restraints as to the named plaintiff’s proven antitrust injury; market-wide relief for *all* app developers or *all* app store providers is improper. Approximately 97% of the developers on Google’s Play Store offer only free apps and pay no commission on the distribution of those apps through the Play Store, and the large majority of the remaining 3% who do pay commissions are also non-parties to the suit here. Google’s business model is supported by the fees charged for app downloads and in-app purchases. That model would be jeopardized by the district court’s overbroad injunction.

Again, while a party-specific remedy here may properly yield *incidental* marketplace effects, equity forbids crafting an order for the purpose of conferring

direct benefits on non-parties. Yet that is what the injunction does by mandating platform-wide entitlements for “all developers.” The injunction thus exceeds its proper bounds even independent of the serious question whether it would confer benefits or harms on non-parties *on net*.

In that respect, the Ninth Circuit’s reliance on *Zenith*, to affirm the injunction was misplaced. See App. 62a. *Zenith* does not confer unfettered discretion to impose any remedy that may promote competition. Rather, while the antitrust remedy in that case went beyond the specific source of harm identified, it still applied to the same *locus* of harm—i.e., against likely conduct *by the same defendant against the same plaintiff*. *Zenith*, 395 U.S. at 131; see *id.* at 132 (citing *NLRB v. Express Publ’g Co.*, 312 U.S. 426, (1941)). But a broad injunction to prevent an end-run around the court’s ruling *with respect to the specific plaintiff* is far afield from a market-wide injunction based on the claim of a single market participant.

Similarly, the Ninth Circuit erred in relying on this Court’s statement that “district courts are ‘clothed with “large discretion” to . . . pry open to competition a market that has been closed by defendants’ illegal restraints.” App. 42a (quoting *Ford Motor*, 405 U.S. at 573, 577–78). This Court has distinguished between the *government’s* role in obtaining broad, structural relief (as in *Ford Motor*) and the constraints on *private plaintiffs*—who must show anti-trust injury, and whose relief must be tethered to their threatened loss. See, e.g., *Cal. v. Am. Stores Co.*, 495 U.S. 271, 295-96 (1990) (“In a Government case the proof of the violation of law may itself establish

sufficient public injury to warrant relief. . . . A private litigant . . . must prove ‘threatened loss or damage’ to his own interests.”) (citing *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U. S. 104, 107 (1986)). And even government plaintiffs face limits. *See Microsoft*, 253 F.3d at 103, 106–07 (vacating remedy obtained by the Department of Justice)).

The district court’s injunction that effectively regulates a national platform and imposes costs on non-parties with divergent interests is at odds with traditional equitable principles and this Court’s precedent.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to grant Google’s petition for certiorari and reverse.

Respectfully submitted,

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