

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

**BRIEF OF ACT | THE APP ASSOCIATION AS
AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTIONS PRESENTED

1. Whether under the rule of reason, an antitrust plaintiff is required to prove that less restrictive alternatives could accomplish the procompetitive benefits of the challenged conduct, as three circuits have held, or whether there is no such requirement, as six circuits have held.

2. Whether a court may impose a duty on an antitrust defendant to deal directly with its competitors without first determining that such court-mandated dealings will remedy the consequences of conduct found to violate the antitrust laws.

3. Whether the court must assess a private plaintiff's Article III standing with respect to each proposed remedy before awarding injunctive relief.

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INTEREST OF THE *AMICUS CURIAE*¹

Founded in 1998, ACT | The App Association (“ACT”) is a not-for-profit advocacy and education organization representing the small business developer, innovator, and entrepreneur community that creates countless software applications used on mobile devices and in enterprise systems. The software application economy represented by ACT is valued at approximately \$1.8 trillion and is responsible for 6.1 million U.S. jobs.²

As ACT has consistently explained—in comments to the Federal Trade Commission,³ testimony before Congress,⁴ and amicus briefs—curated online marketplaces like the Google Play store (Play store) have created immense value for app developers and end users. Before online marketplaces, app developers engaged in time-consuming marketing campaigns to reach users. These costs imposed formidable barriers to entry, resulting in

¹ No party’s counsel authored this brief in whole or in part; no person, other than the *amicus*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief. All parties received timely notice of *amicus curiae*’s intent to file this brief.

² State of the App Economy, ACT | The App Association (2023), available at <https://perma.cc/PC23-YPF2>.

³ Comments of ACT | The App Association to the Federal Trade Commission on Competition and Consumer Protection in the 21st Century (Question 3) (Aug. 20, 2018), at 3-4 (“ACT FTC Comments”), available at <https://perma.cc/L58G-GRYU>.

⁴ Testimony of Morgan Reed, President ACT | The App Association, Before the U.S. House of Representatives Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law (2019), at 3-6 (“ACT Congressional Testimony”), available at <https://perma.cc/2JGG-H8TH>.

higher prices, less adoption, and fewer apps being developed in the first place. Now, online marketplaces provide one-stop shops where developers and end users transact directly. This has significantly lowered barriers to entry and freed up capital that developers now use to improve their apps and expand their offerings.

The relationship between developers and online marketplaces, like the Play store and Apple’s App Store (App Store), is mutually beneficial.⁵ Developers create mobile software tools, platforms, and services, which draw consumers to the online marketplaces, while the marketplaces provide developers with low overhead costs, simplified market entry, consumer trust, dispute resolution, data analytics, flexible marketing and pricing models, and strengthened intellectual property (IP) protections.

Because of its members’ reliance on curated online marketplaces, ACT has a deep interest in ensuring the antitrust laws are properly and uniformly applied to these marketplaces to promote competition and increase output. This interest is longstanding. One of the first amicus briefs ACT ever filed was in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), where the Department of Justice sought to break up Microsoft and the Court discussed Microsoft’s “platform[] for software applications,” *id.* at 53. More recently, ACT closely followed Epic’s litigation against Apple that parallels this case and filed an amicus brief before the U.S. Court of Appeals for the Ninth Circuit that explained the ways in which the App Store is important to developers and end users.

⁵ See ACT FTC Comments, at 2.

ACT writes here: (1) to underscore how vigorous competition between online marketplaces benefits app developers, and how the Ninth Circuit’s opinion threatens that generative competition; (2) to explain how the overreaching remedy here does not just address purportedly anti-competitive conduct, but instead changes much of what makes the Play store valuable; and (3) to provide voice to the many app developers (beyond Epic) who derive value from online marketplaces, and who Epic lacks standing to represent.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit has sanctioned a complete restructuring of one of the major app marketplaces at the behest of a single app developer—and over the vocal objection of hundreds of thousands of other developers. The unprecedented injunction entered by the district court requires Google to give other Android online marketplaces access to the Play store’s entire catalog of apps and to otherwise redesign the Play store to benefit what are essentially knock-off Play stores. The hundreds of thousands of small app developers that rely on the Android ecosystem do not want this, as ACT has explained at every turn in this case.

Apps play a central role in the social and commercial lives of Americans—enabling users to communicate with neighbors, find their next vehicle, collaboratively draft and edit work product, and perform myriad other tasks. Most people likely use dozens of different apps each day.

Apps have existed for decades. But they historically had to be purchased individually from developers, either

over the internet or in physical copy in brick-and-mortar stores. Direct purchases over the internet included no assurance of quality, requiring purchasers to bear significant risk of downloading software that would not work, would steal their information, or would even harm their devices. Direct purchases also involved a series of onerous steps required for installation. These frictions and risks increased consumer costs and limited adoption. It was difficult for an individual with a promising idea to create a commercially viable application for others, and so fewer apps were developed.

That all changed with the rise of curated online marketplaces. These online marketplaces provide one-stop shops where developers and consumers can transact directly. Today, the process is nearly seamless. A smartphone user identifies a need—a to-do list tracker, perhaps, or a directory of dog walkers. Confident in the safety and efficacy of apps they discover in the marketplace, they search the marketplace for relevant apps. They select their chosen app with just a few clicks and after a short wait, the app is downloaded and ready for use.

Not only are these online marketplaces beneficial to consumers, but they have enabled the democratization of the modern app ecosystem by significantly lowering the barriers to entry. The marketplaces make it easier for small and mid-sized app developers to get their apps to market and free up capital for developers to expand output. Developers no longer have to attract users to their own websites and then design and maintain app download pages. Instead, developers can upload their apps straight to their chosen online marketplaces and have those marketplaces handle the logistics of consumer sales.

For instance, the online marketplaces help apps reach new consumers, providing easy-to-use search functions and compiling app features and positive reviews. The marketplaces also handle dispute resolutions. They provide meaningful analytics on consumers purchasing the apps. And the marketplaces police bad actors, ensuring that customers continue to trust the marketplaces and the apps they find there. These services allow developers to focus on what they do best—innovating the apps themselves.⁶ These benefits have enabled the app economy to prosper and transformed the economy as a whole by bringing new app-driven efficiencies to consumers and virtually all industries.

Google's Play store is one of the main app marketplaces. The Play store provides a best-in-the-business search feature and offers personalized app suggestions to consumers, directing them to apps that match their interests and needs. The Play store also offers rapid service for developers, allowing developers to upload new apps within hours. Most importantly, the Play store allows developers to reach an unprecedented number of potential customers, leading to more than a billion downloads annually. For the approximately 84 percent of apps that are free and make money from the sale of *real world* goods and services, the developer pays no commission whatsoever to the Play store. The only cost for these developers is the \$25 annual fee to be a registered Android developer. For the approximately 15 percent of apps that are not free in the Play store, the developer receives 85 percent of the revenue; Google receives 15 percent for its services. And finally, for the less-than-one percent of apps that are

⁶ ACT FTC Comments at 3-4.

monetized by selling digital-only goods and services (such as skins in video games, sales of the app itself, and dating app features), and which make over \$1 million per year on those sales, the developer keeps 70 percent of the revenue, and the Play store keeps 30 percent for its services. Epic seeks to represent that final group of developers and to replace the progressive fee structure with a far more regressive one (where they pay nothing) via this lawsuit.

The Play store has created enormous value for small business app developers and is a central part of the massive disintermediation of apps to end users, which has made apps cheaper for the consumer, faster to create, and open to more developers of all sizes. The Play store also serves a critical role in ensuring that small app developers receive the benefit of competition between curated online marketplaces.⁷

There are dozens of online marketplaces. But Google and Apple offer the two biggest—and most widely available—stores.⁸ The Google Play store is the primary alternative to and competitive constraint on Apple's App Store. The competition between online marketplaces has spurred competition on multiple vectors, including the services offered to developers, the safety and security of the marketplaces, and price.

The decision below threatens all of this. The Ninth Circuit affirmed an unprecedented injunction requiring Google to give knock-off Play stores access to the Play store's entire catalog of apps and to redesign the Play

⁷ ACT Congressional Testimony at 3.

⁸ *Id.* at 6-8.

store to benefit knock-off Play stores. Suddenly, apps will now automatically be available in knock-off stores unless the app developers affirmatively opt out of that sharing. Not only does that violate the developers' contractual rights, but it also threatens to take away or irreparably damage the developers' IP. Developers know what to expect when they sell through Google Play and they know they can get value in return for Google's right to distribute their IP. The injunction gives developers no opportunity to negotiate or understand the value they get in return for the alternative stores' right to distribute their IP—it simply takes the side of each alternative store, giving them the right to distribute developers' apps for free.

Similarly, the knock-off stores lack the resources and experience necessary to police the store and ensure that malicious actors do not harm customers. Customers harmed in knock-off stores are likely to blame the app, not the store, devastating apps' reputations. The injunction also disrupts the vigorous competition that currently exists between Google and Apple—competition that benefits app developers, ensuring lower prices, better features, and better access—because no parallel requirements will apply to Apple.

In affirming this novel and disruptive injunction, the Ninth Circuit created or entrenched three circuit splits. Google well explains why the Ninth Circuit is on the wrong side of each of these splits. ACT writes separately to emphasize the importance of resolving these splits in this case.

First, the courts of appeals are deeply split on whether an antitrust plaintiff seeking to hold a market

participant liable under the rule of reason—which analyzes whether the anticompetitive effects of a challenged practice outweigh its procompetitive benefits—must show that the competitor can achieve its procompetitive goals through less restrictive means. The answer is yes. Yet the Ninth Circuit joined several other circuits in concluding to the contrary. This case illustrates why that is the wrong answer. Google and Apple are engaged in non-stop competition that improves outcomes for app developers and consumers. Apple uses a closed ecosystem—and one that the Ninth Circuit has upheld as legal. To compete, Google must impose limitations on its Play store. Epic did not identify any less restrictive alternative that achieves the same competitive benefits secured by Google. There is none. By allowing Epic to bypass this essential step, the Ninth Circuit reached a result that will harm competition, not help it.

Second, the Ninth Circuit has split from the D.C. Circuit on the required connection between the purportedly anticompetitive conduct and a remedy requiring a market participant to deal with its competitors. The D.C. Circuit rightly demands a strong tie between the conduct and the remedy. The Ninth Circuit, in comparison, requires only an attenuated relationship. That is a problem, as this case demonstrates. App developers prefer Google’s Play store in large part because of the network effects it offers. Yet the courts below did not bother to separate out the consequences of purportedly anticompetitive conduct from the legitimate advantages of Google’s competitive efforts. Again, that failure results in a remedy that does more harm than good.

Third, the ruling below highlights a deep divide on whether a plaintiff can obtain injunctive relief to remedy harms it does not suffer. The Ninth Circuit said yes here; the Fourth, Fifth, and Sixth Circuits disagree. This Court's precedents make clear that the answer is no: A plaintiff only has standing to remedy its own harms, and a district court does not have the power to enter injunctive relief that extends past those harms. Epic is a single app developer that brought this suit in an effort to promote its own bottom line, and without regard for how its campaign would damage other app developers. Those harms are serious, as app developers must now combat having their apps mandatorily placed on knock-off Play stores. Had the Ninth Circuit properly limited the injunction to resolving only Epic's proven harms, then app developers may not be facing these repercussions. The many app developers represented by ACT—who have apps in the Play store and intend to add more apps there—should have a say in deciding the future of the Play store.

Absent this Court's intervention, the injunction threatens irreparable damage to the currently thriving ecosystem for apps. This Court should grant the petition for certiorari.

ARGUMENT

The Ninth Circuit’s decision created or entrenched three different circuit conflicts. Its resolution of each worked to prejudice the app developers that ACT represents and the customers they serve. For that reason, among others, the Court’s review is warranted.

I. Competition Between Google and Apple Benefits App Developers, and Epic Identifies No Less Restrictive Alternatives to Achieve Those Same Benefits.

App developers like and benefit from the current neck-to-neck competition between Google and Apple. Google implemented many of the features of the Play store at issue in this litigation in order to compete more vigorously with Apple’s App Store. Those restrictions result in significant benefits for app developers and customers. The Ninth Circuit, joining six other circuits, allowed Epic to challenge those restrictions as anticompetitive without proving that there is a less restrictive alternative to obtain those benefits. In doing so, the court of appeals has permitted a remedy that artificially reshapes the existing vigorous competition between curated online marketplaces and harms the parties that benefit from that competition.

Conduct with some anticompetitive effects can have strong procompetitive justifications. The rule of reason accounts for this by requiring that there be a less restrictive alternative that can achieve the same competitive benefit. A rule-of-reason plaintiff bears an initial burden of proving a substantial anticompetitive effect from a challenged restraint. *Ohio v. Am. Express Co.*, 585 U.S.

529, 541 (2018). The defendant then must show a procompetitive rationale for the restraint. *Id.* If it does so, “the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies *could be reasonably achieved through less anticompetitive means.*” *Id.* at 542 (emphasis added).

The Ninth Circuit allowed Epic to skip that final requirement. In doing so, the Ninth Circuit joined six other circuits in permitting freewheeling balancing of anticompetitive effects and procompetitive conduct. That approach is incorrect, as Google ably explains. It is also dangerous. Identifying less restrictive alternatives is key to ensuring that the rule of reason does not inadvertently discourage competitive outcomes, as this case well illustrates.

Epic challenged Google’s restrictions on app distribution and in-app billing and agreements with OEMs and other potential entrants into the app distribution market as anticompetitive. In response, Google identified procompetitive rationales for its actions—mainly, that its restrictions are necessary to allow it to compete with Apple while maintaining an open ecosystem. *See* Pet. 13 (summarizing procompetitive justifications). Apple and Google have long responded to innovations in the other’s store. *See, e.g.*, 5-ER-1003-06; 5-ER-1107-09; 6-ER-1313-18; 6-ER-1351-57; 6-ER-1411.

That competition, in turn, significantly benefits developers on several vectors:

Developer support: Developers benefit from Google’s and Apple’s efforts to attract developers and

their end use customers, including the marketplaces' investments in customer support services; secure payment processing; robust options for building, testing, and gathering pre-release feedback for apps; tools to manage updates and distribution; and game performance insights. When working on improvements like these, Google is "very regularly speaking with developers" in order "to understand what developers [are] most looking for" and "to stay competitive relative to Apple's app store." 6-ER-1316. The rationale for these investments is clear. Google and Apple provide and continuously improve their services because, if they did not, developers would gravitate to the other store.

Safety and security: Relatedly, Google and Apple also compete on the safety and security of their stores. Google "deeply invested" in its parental controls as part of its efforts to compete against Apple. 5-ER-1107-08. Also, as part of its competition with Apple, Google reviews all apps on the Play store for malware before they are published. 5-ER-1107-08; 5-ER-1233. Google informs itself about Apple's security and privacy efforts and tries to make sure its security is as good or better than Apple's. 5-ER-1138-39.

Price: Google lowered service fees on subscriptions in response to a reduction made by Apple. *See* 6-ER-1317-19. Similarly, Google lowered commissions on revenue generated from digital-only goods and services where the developer makes less than \$1 million per year on digital-only sales, again at least in part in response to Apple's decision to do so. For less than one percent of apps on the stores, both Google and Apple charge a 30 percent service fee on digital transactions like those in Epic's games. *See*

6-ER-1274. Google and Apple pay close attention to the prices the other is charging and respond accordingly. In other words, they compete on price.

Put simply, the competition between Google and Apple—enabled by Google’s challenged conduct—resulted in a marketplace with lower prices, increased output of apps, and other benefits for app developers and their customers. That is exactly the kind of thriving market that the antitrust laws are intended to promote.

Faced with those procompetitive benefits, Epic had to identify less restrictive alternatives to achieve those same benefits to app developers and customers. It did not even try, presumably because there are no such alternatives. Instead, Epic was allowed to bypass this key requirement, and the jury was instructed that they could freely weigh the purported anticompetitive harms with the procompetitive benefits. In failing to require a “viable” alternative, *1-800 Contacts, Inc. v. Fed. Trade Comm’n*, 1 F.4th 102, 121 (2d Cir. 2021), the Ninth Circuit disregarded the myriad benefits that the Play store provides to app developers. That is the reason that this third step exists, to ensure that procompetitive benefits are not lost in the fray.

App developers benefit from Google’s restrictions on its Play stores. The Ninth Circuit’s approach threatens the very competition that has enabled app developers to flourish. Because the Ninth Circuit’s treatment of the rule of reason conflicts with this Court’s precedents and exacerbates an existing circuit split, review is warranted.

II. The Injunction Is Not Narrowly Tailored to Remedy Anticompetitive Conduct but Instead Seeks to Destroy Network Effects That Benefit App Developers.

Not only did the Ninth Circuit err on the merits, but it has sanctioned a devastating and inappropriate remedy. The injunction in this case requires Google to aid its competitors, making the contents of the Play store available to any knock-off marketplace. Even setting aside the tension between the remedy and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), *see* Pet. 28, the remedy does not limit itself to the purportedly anticompetitive aspects of Google’s conduct, but *purposely* attacks procompetitive aspects of the Play store. The Ninth Circuit approved this, reasoning that there only needs to be an attenuated relationship between the anticompetitive conduct and a remedy requiring the market participant to deal with its competitors. As Google explains, that mistaken holding opened a split with the D.C. Circuit, which correctly requires narrow tailoring between the conduct and a duty to deal. Pet. 24. The Ninth Circuit’s error also means that a single district court in California can rewrite and centrally manage much of the app economy. The Ninth Circuit should not have approved this extraordinary and overbroad remedy.

Like the Apple App Store, the Google Play store has significant “network effects.” The Play store sees a lot of customers, attracting more app developers, which attracts more customers, and so on. App. 85a; Pet. 23. These network effects are the virtuous circle that allows

app developers to thrive. Indeed, leading online marketplaces, like the Play store, are valuable to app developers *because of* their ability to attract and retain users.

The district court, in requiring Google to allow its marketplace to be copied by imitators, attempted to diminish those network effects. That is alarming. Network effects are not bad in and of themselves—quite the contrary. Again, app developers like that they can go to the Play store and know that they are going to reach hundreds of millions of customers in a single site. That is the allure of an online marketplace. The injunction threatens to derail all that, forcing developers to spend more time and money shopping its products around at different marketplaces.

That threat to the app economy is especially concerning because the trial court never determined which (if any) of Google’s network effects were derivative of the challenged conduct. App. 87a. In other words, the district court sought to reduce Google’s ability to draw app developers and users to its online marketplace without determining whether developers and users are coming to the marketplace because of Google’s anticompetitive conduct or instead—as is the experience of app developers—because Google has offered competitive pricing, security, and service. *See supra* § I.

The remedy here seeks to solve a “problem” (*i.e.*, the Play store’s network effects) that was achieved at least in part through procompetitive and lawful means. The district court was aiming at the wrong target. That error has consequences for app developers, severely threatening their ability to connect with their users on the Play store.

The Ninth Circuit’s opinion creates a circuit split concerning the appropriate breadth of antitrust remedies, with great impact on the app economy as a whole, and merits further review.

III. Epic Lacks Standing to Seek the Requested Relief—“Relief” That Harms the Multitude of Other App Developers.

Finally, and most egregiously, the opinion below gives Epic an outsized role in shaping the future of the app economy, anointing it as a representative to seek relief from “harms” that it has not suffered. Epic is one vocal voice in the app economy, but it does not represent the multitude of other developers. The lower courts nevertheless allowed Epic to demand a complete reshaping of the Play store, including features that threatened no harm to Epic. In doing so, the Ninth Circuit split from its sister circuits and ignored the requirement that a plaintiff must always show standing for each aspect of its requested relief. This case is a classic example of why that black-letter requirement is essential. Epic has been permitted to implement changes that will not benefit it but will harm the hundreds of thousands of other app developers that use the Play store.

1. Core to standing is that a plaintiff can only seek relief for its own injuries. Pet. 30-33; *see, e.g., Gill v. Whitford*, 585 U.S. 48, 68 (2018) (a “remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established” (citation omitted)); *accord Trump v. CASA, Inc.*, 606 U.S. 831, 862 (2025) (Thomas, J., concurring) (“In no circumstance can a court award relief beyond that necessary to redress the plaintiffs’ injuries.”).

This case illustrates why this is the rule, as Epic lacks standing for several of the injunction’s requirements. Most fundamentally, Epic sought—and the district court granted—an injunction that would require the reworking of the Play store. Epic, however, does not offer apps in the Play store and failed to demonstrate that it intended to offer apps in the Play store in the future. Pet. 35. Likewise, the Court ordered Google to share the Play store’s app catalog *with other online marketplaces*, but there was no evidence that this requirement remedied any injury established *by Epic*. Pet. 35-36. Because these aspects of the district court’s injunction did not remedy any injury felt by Epic, Epic did not have standing to seek them. *Gill*, 585 U.S. at 73 (“A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.”).

2. Epic’s lack of standing to seek those alterations is especially consequential here because other app developers don’t want the alterations for which Epic advocates. The injunction will push app developers’ apps to hundreds of knock-off Play stores. This works an egregious violation of ACT’s members’ rights. Currently, developers contract with Google to distribute their apps through the Play store. When they do so, they grant *Google* a nonexclusive license to use their intellectual property. *See, e.g.*, 2-ER-399 (granting Google license to “display Developer Brand Features ... for use solely within Google Play”). This license granted to Google neither provides parallel grants to other online marketplace operators nor grants Google the right to sublicense the developers’ intellectual property out to others. *See* 2-ER-397-99. By instructing Google to make developers’ apps available on other online marketplaces, the district court’s order entirely disregards developers’ intellectual property and rights.

Developers who do not want their apps shared on the knock-off Play stores must take yet-to-be-determined affirmative steps to “opt out” from that default rule. 1-ER-5. But this gets it backwards—no knock-off Play store should have access to developers’ apps until the developer licenses their apps to that store. The court’s order effectively requires developers to license their apps to *all* knock-off Play stores unless they take affirmative steps to prevent it. 1-ER-5. Practically, and importantly, many small developers that ACT represents may not have the resources to monitor every new knock-off Play store and then take the requisite steps to opt out. This perversely disregards the wishes, interests, rights, role, and autonomy of app developers. App developers should be allowed to choose which stores they do (and do not) offer their apps through.

That mandate threatens lasting harm to app developers. Some of these knock-off Play stores will almost certainly have inadequate resources and lack the experience to screen for safety, security, and inappropriate content. Indeed, in the past, entire knock-off Play stores have been created by hackers to steal sensitive information. *See, e.g.*, CA9 Dkt. 48.2 at 19 (citing example of “a state-sponsored hacking group” that built “a seemingly legitimate third-party app store, with the sole purpose of concealing spyware”). There is significant expense and effort required to continuously monitor for threats, which smaller upstart app stores may not be able to adequately resource.⁹ These risks are exacerbated by the limits the

⁹ *See, e.g.*, ACT Congressional Testimony at 9 (“[T]he game of cat-and-mouse between cybersecurity professionals and hackers will never end, and security must continue to evolve to meet and beat the threats. . . . [D]evelopers want the platform’s security features to

Court imposed on Google’s ability to screen the knock-off Play stores—app developers will now bear that screening burden.

If an app developer does not have the resources to monitor adequately the various knock-off Play stores for threats, they and their customers will likely suffer even more harm. A user whose security is compromised will face the expensive and unsettling experience of trying to re-secure their digital identity. App developers are also at risk because a user who is hacked or who is simply dissatisfied when downloading an app from a knock-off Play store may not know to assign blame to the store, rather than the app developer. App developers will be harmed by these security risks.

3. In declining to properly police standing, the Ninth Circuit has given Epic an unearned role in the future of the app economy. Epic is an enterprising litigant, but it does not represent other app developers, and, in several ways, its interests are adverse to other app developers. Its outsized role in the panel’s remedy is thus likely to harm—not help—competition.

App developers largely have a mutually beneficial and symbiotic relationship with Google. Developers provide digital content, which draws consumers to the Play store, and pay a portion of digital in-app purchases to Google;

work seamlessly with any relevant hardware and that they account for all attack vectors. Platforms should continue to improve their threat sharing and gathering capabilities to ensure they protect developers across the platform, regardless of where threats originate. Moreover, they should approve and deploy software updates with important security updates rapidly to protect consumers as well as developers and their clients and users.”).

Google provides developers with low overhead costs, simplified market entry, consumer trust, dispute resolution, data analytics, flexible marketing and pricing models, and strengthened IP protections.¹⁰ App developers thus have largely found Google to be a responsive and collaborative business partner, who—like the developers—is incented to make sure end users can safely and securely access and use apps listed in the Play store.

Epic does not share these incentives. Epic is a large, self-interested app developer that is not directly incentivized to look out for these small, startup developers. Epic has greater brand recognition and a reputation of its own and does not rely on the Play store. Epic's Fortnite, for example, has massive live events and is a household name. Epic is significantly better capitalized than many of the small and mid-sized developers that are members of ACT. If Google needs to increase prices to replace the lost revenue from in-app purchases (whether in the form of higher commissions, yearly licensing fees, or per-download fees), Epic would be able to absorb these increases much more easily than would small and mid-size developers.

Contrast that with the hundreds of thousands of small developers that use the Play store on a daily basis. Small developers rely on the trust that Google has created in its secure and stable Google Play ecosystem. Up-and-coming apps do not have similar marketing power and so rely on users finding them in a trusted marketplace, *e.g.*, the Play store. Epic's interests mean that it has different incentives concerning how to steer the app ecosystem than

¹⁰ See ACT FTC Comments, at 2.

the overwhelming majority of app developers. As an established, incumbent developer, Epic has every incentive to prevent nascent apps from developing into fully formed competitors.

Despite these divergent interests, the panel’s remedy elevates Epic from market participant to one of three stewards tasked with *steering* the app economy going forward. Under the injunction, Epic will appoint one of the three members on the technical committee, who will liaise with Google’s appointee to appoint a third member. This technical committee will then have power to affect not just Epic and Google, but any party that uses the Play store—namely, app developers. In particular, “the Technical Committee will review disputes or issues relating to the technology *and processes* required by” the provisions of the permanent injunction. 1-ER-5 (emphasis added). Thus, the technical committee’s jurisdiction could extend to disputes concerning how knock-off Play stores do or do not gain access to the Play store’s catalog of apps. *See* 1-ER-4. This directly impacts the developers that created those apps and retain IP in them.

Additionally, the decision whether to offer an app in a new curated online marketplace must reside with the individual developer, not be foisted upon them by a competitor or a federal district court. If or when app developers do want to distribute their apps on new knock-off Play stores that enter the market, they can make that choice themselves. The injunction makes that decision for them, leaving app developers scrambling to protect their property. These problematic results flow directly from the Ninth Circuit’s departure from its sister circuits in refusing to analyze standing.

The impact of the decision below cannot be overstated. Hundreds of thousands of developers rely on the current Google Play infrastructure to reach customers and sell products. Absent review and reversal by this Court, developers will now be left scrambling to opt out of having their apps sent to knock-off Play stores and to protect and restore their reputations and goodwill. Epic's singular voice should not be allowed to drown out the preferences and needs of hundreds of thousands of other developers.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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