No. 25-521

In the Supreme Court of the United States

GOOGLE LLC, ET AL., *Petitioners,*

v.

EPIC GAMES, INC., A MARYLAND CORPORATION

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

BRIEF OF *AMICUS CURIAE* ANTITRUST EDUCATION PROJECT SUPPORTING PETITIONERS

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*[1]

Judge Robert Bork long ago explained that "[t]he whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare." Robert H. Bork, *Antitrust Paradox: A Policy at War with Itself* 91 (1978). And for as long, this Court's antitrust jurisprudence has emphasized economic analysis of consumer welfare, recognizing that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Bork, *Antitrust Paradox* 66); accord *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977).

In this important case, the Ninth Circuit lost sight of the consumer welfare standard in its rulings on both liability and relief. First, by excusing respondent Epic from proving a less restrictive means of accomplishing the procompetitive benefits of the challenged conduct, the Court of Appeals removed a critical, objective limitation on liability in favor of unguided balancing by the factfinder. Such balancing tends to favor the injured competitor who is present in court over the consumers who benefit from vigorous competitive conduct.

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus curiae*, its members or its counsel has made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of *amicus'* intent to file this brief.

Second, the injunction affirmed below effectively restructured markets by means of a sweeping requirement that Google share its Play Store platform and all Play Store apps with any would-be competitor—not just Epic. This Court disfavors the imposition of duties to deal with competitors because such duties restrain innovation and competition rather than rewarding it, to the ultimate detriment of consumers. Yet the duties imposed here are not only broad, but universal. And thus they make every competitor a judicially mandated parasite and Google the unwilling host while depriving the market of incentives for genuine competition—all to the severe detriment of consumers.

This case presents an excellent vehicle to rein in recent departures from the consumer welfare standard in the lower courts and to combat confusion between extracting lawful profits and genuine anticompetitive behavior. Antitrust law is designed to protect consumers from harm, not to punish businesses for their size and success. Bork, *Antitrust Paradox* 66-69.

This Court's intervention to reaffirm the consumer welfare standard is further warranted in light of attacks on that standard by members of Congress as well as federal enforcement officials. For example, in 2022 a congressional subcommittee called for "legislative action and reform" to overturn at least six Supreme Court precedents and thereby erase the consumer welfare standard.[2] More recently, the

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[2] Majority Staff of H. Subcomm. on Antitrust, Commercial & Admin. L. of the H. Comm. on the Judiciary, 117th Cong.,

federal enforcement agencies' revised merger guidelines do not even mention the consumer welfare standard.[3] In the last Administration, moreover, the Federal Trade Commission shifted the traditional emphasis from protecting consumers to judging business deals by their impacts on workers, creators, and suppliers.[4] And, although the current heads of the enforcement agencies support a broad understanding of the consumer welfare standard, their commitment so far is largely untested and may face political challenges.[5]

Amicus the Antitrust Education Project (AEP) has an acute interest in these developments, and in this case. AEP promotes the consumer welfare standard as the long-standing centerpiece of American antitrust jurisprudence. Following the legacy of the late Judge Robert Bork, AEP educates the current generation of

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Investigation of Competition in Digital Markets, CP 117-8 pt. I, at 2, 330-337 (Comm. Print 2022), https://tinyurl.com/2bj3uw7d.

[3] Robert H. Bork, Jr., *Robert Bork's Response to Louie Gohmert*, Antitrust Education Project (May 15, 2025), www.antitrusteducationproject.org/robert-borks-response-to-louie-gohmert/; see DOJ & FTC, Merger Guidelines (2023), https://www.justice.gov/atr/2023-merger-guidelines.

[4] Robert H. Bork, Jr., *The Supreme Court Must Save the Consumer Welfare Standard This Week*, Antitrust Education Project (Oct. 14, 2025), www.antitrusteducationproject.org/the-supreme-court-must-save-the-consumer-welfare-standard-this-week/.

[5] See *ibid.*; see also *A Conversation with FTC Commissioner Andrew Ferguson Hosted by Alden Abbott*, Mercatus Ctr. (June 13, 2024), https://tinyurl.com/yfw4hrbk; *Antitrust in the Trump 2.0 Era: Ferguson and Slater Discuss*, FGS Glob. (Apr. 15, 2025), https://tinyurl.com/yc5hfak6.

American law students, practitioners, and jurists about that standard and advocates for its continued application by enforcement agencies and the courts.

AEP accordingly has a strong interest in ensuring that antitrust precedent—including binding precedent in the largest circuit—continues to apply the consumer welfare standard both in evaluating liability and in imposing remedies. Because the highly publicized decision below did neither, AEP urges the Court to grant review to clarify the governing pro-consumer standards and, in so doing, to provide necessary guidance to the lower courts.

ARGUMENT

This Court's recognition that antitrust law's "'consumer welfare prescription,'" *Reiter*, 442 U.S. at 343 (quoting Bork, *Antitrust Paradox* 66), has long guided the formulation of standards for antitrust liability and remedies.[6] A structured, economics-driven analysis is necessary to distinguish benefits for consumers from benefits for competitors alone. And measuring impacts on market efficiency through the consumer welfare standard is the best way to protect a competitive economy capable of delivering the best

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[6] Scholars of many perspectives agree that the antitrust laws are rooted in concern for consumer welfare. See, *e.g.*, Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7, 10 (1966) ("[T]he legislative history, in fact, contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare."); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 435-442 (2009) (recognizing case law, legislative history, and sound policy support "consumer welfare" standard).

prices, choices, and innovation to consumers. See Douglas H. Ginsburg, *Wither The Consumer Welfare Standard?,* 46 Harv. J.L. & Pub. Pol'y 69, 71-72 (2023).

In this case, however, both the liability finding and the remedy were untethered from consumer welfare. As a result, the jury was allowed to impose liability even if Google's challenged conduct was the least restrictive means to reach a procompetitive end. And the animating principle of the injunctive remedy rested on a supposed duty on Google's part to open its Play Store to competitors—an approach far more likely to benefit competitors than the competitive process. These deep errors on issues of exceptional importance—and the conflicts on these issues in the courts of appeals—warrant this Court's prompt intervention.

I. Certiorari Is Warranted Because the Ninth Circuit's Liability Standard Penalizes Procompetitive Exploitation of Lawfully Earned Market Power.

Tough competition that rewards marketplace success benefits consumer welfare. And every competing firm aims to achieve market power. See *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). The mere acquisition of market power, of course, is not illegal. "In the end a very successful firm will wind up with the whole market. The objective is to find ways to separate this from the kind of exclusion that injures consumers." Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 973 (1986). Yet the premise of the decision below seemed to be that, having lawfully obtained market power, Google could not lawfully exploit it if *competitors* were harmed. But that is fundamentally wrong.

A. Under the consumer welfare standard, properly understood, there is nothing inherently wrong with exploiting market power.

One reason is that this position unfairly impugns the exploitation of market power. Such exploitation is and should be lawful so long as it is efficient rather than predatory. See Bork, *Antitrust Paradox* 171. Predatory conduct—where the monopolist or other holder of market power excludes competition without contributing to efficiency—harms consumers because it thwarts the competition that would otherwise drive down prices, expand quality, and increase consumer choice. See *id.* at 144-160. Short-circuiting the competitive process through exclusionary conduct eliminates those benefits. Conversely, efficiency—and the profits it produces—leads to new technologies, streamlined processes, lower prices, better products, and more consumer choice. See Richard Posner, *Antitrust Law: An Economic Perspective* 193-195 (1976).

Judge Easterbrook explained why even monopolists should be permitted to compete vigorously even after achieving market dominance: "Aggressive, competitive conduct by a monopolist is highly beneficial to consumers. Courts should prize and encourage it under the antitrust laws." Easterbrook, 61 Notre Dame L. Rev. at 972. Dynamic efficiency often derives from economies of scale that may result in an ability to weather risks from innovation. See Dennis W. Carlton & Ken Heyer, *Extraction vs. Extension: The Basis for Formulating Antitrust Policy Towards Single-Firm Conduct*, 4 Competition Pol'y Int'l 285 (2008). In contrast, "[a]ggressive, exclusionary conduct by a monopolist is deleterious to consumers." Easterbrook, 61 Notre Dame L. Rev. at 972.

Yet "[t]here is only one problem. Competitive and exclusionary conduct look alike." *Ibid.* Thus, the question for an antitrust court is whether the dominant firm's practice has "a good business justification (one 'consistent with efficiency')." *Id.* at 975. "Always, '[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" *National Collegiate Athletic Ass'n* v. *Alston*, 594 U.S. 69, 81 (2021) (quoting *Ohio* v. *American Express Co.*, 585 U.S. 529, 541 (2018)).

Determining whether purportedly exclusionary conduct in fact is predatory or efficient is not easy: sometimes "efficiencies" that benefit consumers are "hard-to-see." *Id.* at 89. To be anticompetitive, conduct must be "injurious to consumers." Easterbrook, 61 Notre Dame L. Rev. at 973. As this Court explained (in a single-firm conduct case), "it is relevant to consider [the conduct's] impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (citing 3 Phillip E. Areeda & Donald F. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*

78 (1978)). Yet the courts below read "unnecessarily restrictive" out of the governing test.

B. The Ninth Circuit's excision of the less-restrictive-means element from Rule of Reason liability inappropriately risks penalizing procompetitive conduct.

That is no small error. The Ninth Circuit recognized that, in this monopolization case, Google's conduct should be evaluated under the Rule of Reason. See Pet. App. 33a.

1. As this Court has repeatedly explained, analysis under that Rule uses "a three-step, burden-shifting framework" designed to "distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Alston*, 594 U.S. at 81 (quoting *American Express*, 585 U.S. at 541). Under that framework, plaintiffs first must show that the defendant's exclusionary conduct caused substantial anticompetitive effects. See *id.* at 96. If the defendant can "show a procompetitive rationale" at the second step, for the third step plaintiffs must "demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* at 96-97 (quoting *American Express*, 585 U.S. at 541-542); see also *American Express*, 585 U.S. at 553 (Breyer, J., dissenting) (agreeing with three-step framework).

This Court hastened to add that the less-restrictive-means element "does not require businesses to use anything like the *least* restrictive means of achieving legitimate business purposes."

Alston, 594 U.S. at 98 (emphasis added). Thus, although the Court has explained that the "three steps do not represent a rote checklist" that may serve "as an inflexible substitute for careful analysis," that flexibility means that more sophisticated analysis may be necessary before business conduct is condemned and subjected to potential treble-damages liability. *Id.* at 97. It does not mean that the conduct may be condemned even if there is no less restrictive means of achieving its procompetitive benefits. See *id.* at 97, 100-101.

This Court, moreover, has never suggested that the less-restrictive-means element may be dispensed with in favor of open-ended balancing of benefits and harms by the factfinder. On the contrary, the Court intimated that the question of less restrictive means is at the core of the Rule of Reason: "[H]owever framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits." *Id.* at 100 (citing 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1505, at 428 (4th ed. 2017) (A "legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative[.]")).[7] And

[7] Thus, one commentator aptly locates the less-restrictive-means factor at the "heart of the rule of reason analysis." Erika M. Douglas, *Data Privacy as a Procompetitive Justification: Antitrust Law and Economic Analysis*, 97 Notre Dame L. Rev. Reflection 430, 471 (2022); see also C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 Colum. L. Rev. 927,

rightly so: requiring proof of less restrictive means to achieve the challenged conduct's efficiency benefits prevents the courts from depriving consumers of those benefits merely because a sympathetic competitor may have been harmed.

Instead, the less-restrictive-means step operates as a critical screen to avoid condemning procompetitive conduct that benefits consumers even if it harms competitors. It thus helps ensure that the results of antitrust litigation serve "the purpose of the antitrust injury requirement": "the protection of *competition,* not *competitors*." *Atlantic Richfield Co.* v. *USA Petroleum Co.,* 495 U.S. 328, 338, 342 (1990) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). That analytical element puts the exclusionary conduct and procompetitive justifications into context and provides necessary objective structure to the analysis of overall effects on competition and consumer welfare.

Moreover, according to Areeda & Hovenkamp, "anticompetitive exclusion" is characterized by "harms disproportionate to any resulting benefits." 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶651a, at 98 (4th ed. 2015). And under that framework, the less-restrictive-means element serves as a disproportionality test that prevents condemnation of salutary competition—and does so by imposing a higher burden on plaintiffs. See *ibid.*

937-942 (2016) (discussing in detail the use of the less-restrictive-means test).

2. By adhering to the structure added by the less-restrictive-means element, then, "[c]ourts can avoid the balancing inquiry by analyzing alternatives to the charged conduct and determining whether a defendant could achieve the same outcome through a less restrictive alternative[.]" Aditya Trivedi, Note, *Anticompetitive Privacy: Taking A Bite Out of Apple*, 26 N.Y.U. J. Legis. & Pub. Pol'y 861, 879 (2023).

Skipping that step to go directly to open-ended balancing of harms and benefits increases the likelihood that the factfinder will be unduly swayed by the hardship of a competitor-plaintiff while losing sight of the conduct's procompetitive and pro-consumer benefits. Yet the Ninth Circuit did exactly that. Pet. App. 33a n.10.

And, as Petitioners explained (at 17-18), the Ninth Circuit is not alone. To be sure, some circuits properly will not impose antitrust liability without proof of a less restrictive means to provide the competitive benefits of allegedly exclusionary conduct. See Pet. 18-20. But more courts of appeals, including the Ninth Circuit, skip the less-restrictive-means step and impose liability so long as the factfinder is persuaded that the challenged conduct's harm outweighs its procompetitive benefits. See Pet. 17-20.

Those decisions invite the jury (and allow the judge in a bench trial) to engage in a largely unconstrained balancing exercise that risks condemnation of business conduct based on its harm to competitors rather than any harm to the competitive process. This widespread omission of a key element under the Rule of Reason substantially impairs antitrust analysis—and risks harming consumers—by giving courts and juries too much leeway to reward the sympathetic competitor-plaintiff in the courtroom at the expense of absent consumers.

The conflict among the circuits on this issue (see Pet. 17-20) requires this Court's resolution, not only to restore uniformity of decision, but to provide businesses and consumers throughout the nation the protections of the less-restrictive-means guardrail. The issue is undeniably important: the Rule of Reason governs the great bulk of antitrust claims in the federal courts. Although a factfinder *may* reach the correct result even when the balancing test displaces the less-restrictive-means element, see, *e.g.*, *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc), including that element makes a proper focus on protecting consumers far more likely.

II. The Ninth Circuit's Remedies Restrict Proconsumer Conduct, Reinforcing the Need for This Court's Review.

Under the consumer welfare standard, the Ninth Circuit's remedies are equally problematic. As to antitrust remedies generally, this Court recently reaffirmed both that the goal of antitrust remedies is "enhancing consumer welfare," and that "[j]udges must remain aware that markets are often more effective than the heavy hand of judicial power" to achieve that goal. *Alston*, 594 U.S. at 106. For that reason, the "[m]ere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition." 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*

¶650a, at 67 (1st ed. 1996). Another reason for judicial humility stems from the "limited success" of antitrust remedies in unraveling existing accumulations of market power. See William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration,* 74 Iowa L. Rev. 1105, 1144-1148 (1989). Thus, in seeking to deter similar deleterious conduct, to compensate victims of antitrust violations, and to repair the damage done by anticompetitive conduct, courts must seek to promote consumer welfare. Otherwise, the ends do not justify the means.

Here, the radical forced-sharing decree entered below fails the consumer welfare test. And the Ninth Circuit's decision affirming it creates a circuit conflict. See Pet. 23-27.

A. The Ninth Circuit's embrace of equitable remedies that harm or ignore consumers misses the point of antitrust law.

It is axiomatic that remedies as much as liability standards should protect "competition, not competitors." *Atlantic Richfield*, 495 U.S. at 338. And one reason for adopting the consumer welfare standard is that it shifts the remedial focus from the "protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency." *Olympia Equipment Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (Posner, J.).

As then-Judge Gorsuch put it for the Tenth Circuit, "[f]orcing monopolists to 'hold[] an umbrella over inefficient competitors' might make rivals happy but it usually leaves consumers paying more for less." *Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013) (quoting *Olympia*, 797 F.2d at 375). Similarly, "[f]orcing firms to help one another would also risk reducing the incentive both sides have to innovate, invest, and expand—again results inconsistent with the goals of antitrust." *Id.* at 1073.

Here, the lower court's injunction forces Google to hold an umbrella not only over Epic but over every app store and developer. The Ninth Circuit on the one hand acknowledged "caution is key," Pet. App. 39a (quoting *Alston*, 594 U.S. at 106), but with the other hand it affirmed the district court's foray into central planning. Yet the courts below had nothing to say about how the injunction would affect consumers—continuing a trend in Ninth Circuit decisions blindly affirming antitrust decrees imposing duties to deal with competitors. See*, e.g.*, *Optronic Technologies, Inc.* v. *Ningbo Sunny Electronic Co.*, 20 F.4th 466, 486 (9th Cir. 2021).

Instead, the Ninth Circuit justified the injunction here by explaining that it "allow[s] other app stores to compete," Pet. App. 37a—but without tying that competition to lower prices, more secure products, or any other consumer benefit. And the mere fact that "the available injunctive relief is broad," Pet. App. 39a (quoting *Optronic*, 20 F.4th at 486), does not automatically justify the breadth of any injunction. Rather, as this Court has said, the remedy should always promote consumer welfare. See *Alston*, 584 U.S. at 106.

B. Duty-to-deal remedies restrain pro-consumer conduct while arbitrarily restructuring the relevant market.

The risk of consumer harm is heightened here, where the remedy imposed a duty to deal through the back door. Sweeping duty-to-deal remedies like the injunction here not only do not enhance consumer welfare, but they also suppress innovation by market leaders and would-be competitors alike—all the while necessarily injecting courts into what should be market processes. As then-Judge Gorsuch put it in *Novell,* "[i]f forced sharing were the order of the day, courts would have to pick and choose the applicable terms and conditions. That would not only risk judicial complicity in collusion and dampened price competition," but would require courts to act as "'central planners.'" 731 F.3d at 1073 (quoting *Trinko*, 540 U.S. at 407).

Application of these principles here is straightforward: Google has spent two decades enhancing the Android operating system for smartphones—the main competitor to Apple's iOS. As long as Google refrains from enhancing its market power through anticompetitive conduct, it is entitled to profit from its own inventions—because those innovations benefit the consumer. But the injunction imposed below violates the consumer welfare standard in three critical respects.

1. An injunction imposing a duty to deal is inappropriate where liability does not rest on that duty.

The Ninth Circuit reached the remarkable conclusion that a competitor who has defeated liability for refusal to deal nonetheless may be compelled to deal with competitors as a remedy once liability has been found for other reasons. See Pet. App. 42-43a. That is exactly what happened here: Google won summary judgment precluding a duty to deal as a basis for liability, yet the district court imposed—and the Ninth Circuit approved—an exceptionally broad duty to deal as a remedy. See Pet. 27-28. "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise." *Trinko*, 540 U.S. at 415 (quoting Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989)). Yet that is what the Ninth Circuit did here.

Under the consumer welfare standard, that was wrong: Because the purpose of antitrust laws is to promote consumer welfare by providing incentives to compete and earn profits, with rare and narrow exceptions antitrust law has declined to impose on dominant, successful companies any duty to deal with their competitors. As this Court has recognized, forced sharing of the fruits of successful competition violates the dominant firm's right to choose trading partners and destroys its incentives to innovate. See*, e.g.*, *Trinko*, 540 U.S. at 409.[8]

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[8] The only modern exception in this Court's modern antitrust jurisprudence—*Aspen Skiing*—is nearly *sui generis*. As this

In contrast, this Court has "long and emphatically rejected" the idea that "a monopolist must lend smaller rivals a helping hand." *Novell*, 731 F.3d at 1072. Instead, "the proper focus of section 2 isn't on protecting competitors but on protecting the process of competition, with the interests of consumers, not competitors, in mind." *Ibid*. That is because a "monopolist might be deterred from investing, innovating, or expanding (or even entering a market in the first place) with the knowledge anything it creates it could be forced to share; the smaller company might be deterred, too, knowing it could just demand the right to piggyback on its larger rival." *Id.* at 1073 (citing Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 300-306 (2003); A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 Berkeley Tech. L.J. 1247, 1254 (2005)).

That is why in another case the Seventh Circuit "decline[d] to hold AT&T liable for a refusal to make available its full nationwide network to a competitor." *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1149 (7th Cir. 1983). There, AT&T had made significant capital investments in its telephone connection infrastructure, which it might not have done if its ability to profit had been undercut. *Id.* at 1093. And thus, the court held, a finding of

Court has noted, the "limited exception recognized in *Aspen Skiing*" (for when, unlike here, competitors have a long history of collaborating and suddenly change course) is "at or near the outer boundary of §2 liability." *Trinko*, 540 U.S. at 409.

liability would likely reduce consumer welfare in the future. *Id.* at 1149.

It follows that, where there is no liability for refusing to deal, the remedy should not prescribe such a duty. Antitrust laws seek to promote aggressive competition through innovation because "the benefits of innovation to society as a whole greatly exceed the benefits to the firms that develop the innovation." Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 Antitrust L.J. 575, 576 (2007).

Here, Google has spent decades developing the Android operating system and Play Store in order to maximize prospective profits—including the profits that lawfully attend market dominance. See *Caribbean Broadcasting System, Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998) (Ginsburg, J.); Areeda, 58 Antitrust L.J. at 845. To achieve these aims and avoid harming consumer welfare, antitrust relief should be tailored to the conduct found to be anticompetitive.

That is especially so where a duty to deal—disfavored under antitrust law—is at issue. No such duty should be imposed unless the defendant's liability rests on the breach of a legitimate pre-existing duty to deal. The Ninth Circuit's contrary approach impermissibly separates the remedy from the alleged wrongs done. Pet. App. 42a-43a. And that approach is entrenched in recent Ninth Circuit precedent approving similar remedies divorced from liability, see, *e.g.*, *Optronic,* 20 F.4th at 486-487, underscoring the need for review here.

The resulting consumer harm is acute: Diluting the profit incentive by imposing a duty to deal with competitors restricts technological innovation rather than promoting it. And imposing such a duty without even requiring a showing that the procompetitive benefits of the conduct supposedly prompting the duty to deal might be achieved through less restrictive means greatly increases the likelihood that consumers will be harmed by the resulting antitrust decree—all while competitors alone benefit.

2. Rather than curtailing anti-competitive conduct, the Ninth Circuit's quasi-structural remedy penalizes the lawful result of Google's market success.

The market-restructuring injunction here also warrants review because it directly discourages Epic and others from creating rival app stores for the Android platform in order to avoid using the Play Store—since all comers can free-ride on Google's Play Store infrastructure and consumer reach. Indeed, the injunction indirectly discourages the giants of the app industry from funding development of an alternate smartphone operating system to compete with Android and Apple's iOS. Yet consumers would likely benefit from an additional competitor at the level either of app stores or mobile operating systems.

The injunction indirectly discourages the creation of rival app stores by imposing (for a limited time) a quasi-structural remedy on Google. As the D.C. Circuit warned in its *Microsoft* decision (which conflicts with the decision here), courts should be wary of structural remedies, especially when a monopoly results from market success rather than the acquisition of competitors. 253 F.3d at 74. There must be a causal relationship between injunctive relief and anticompetitive conduct—and "a significant causal connection between the conduct and creation or maintenance of the market power." *Id.* at 80. It is inappropriate to use an antitrust remedy to undermine a market position and network effects obtained through innovation rather than exclusionary conduct. *Ibid.*[9]

Even if time-limited, the relief here is effectively structural. Rather than merely restrict what Google can do with Play Store, the injunction converted Play Store into a platform for competing app stores while also requiring Google to provide any competitor with access to any app available on Play Store. And, rather than confining equitable relief to the plaintiff before the court, see *Trump* v. *CASA, Inc.*, 606 U.S. 831, 841 (2025), the injunction here opens Play Store (and all apps on it) to the world. It is as if, in response to a lawsuit by Toyota, General Motors were required to allow dealers for Fords, Chryslers, and every other

[9] In contrast, the remedy proposed in the parties' November 2025 settlement motion—which the district court has not yet approved—was appropriately tailored to prevent the conduct adjudicated to be unlawful without distorting the market structure to the potential detriment of customers. See Jt. Mot. to Modify Prelim. Inj. at 7, *In re Google Play Store Antitrust Litig.*, No. 3:21-md-02981-JD, 2024 WL 4438249 (N.D. Cal. Oct. 7, 2024), ECF 756 (Nov. 4, 2025). Epic's founder and CEO commented that the settlement was an "awesome proposal." Tim Sweeney (@TimSweeneyEpic), X (Nov. 4, 2025, 11:03 PM), https://x.com/TimSweeneyEpic/status/1985920786545123613.

make into GM dealerships, while also allowing competitors to slap their own logo onto GM vehicles.

The injunction here, moreover, openly aimed to obliterate the network effects attending the success of the Android system and the Play Store, without considering to what degree those effects were the lawful product of lawful competition, and to what extent they were enhanced or preserved by exclusionary conduct. The district court could not have been more open about targeting network effects. See Pet. App. 84a-88a. And the Ninth Circuit was as forthright in affirming the injunction. See Pet. App. 45a-48a.

But network effects are a mark of success in many markets. And that is especially so in two-sided markets like those at issue here, where two distinct and complementary categories of market participants—consumers and app providers—find the platform more desirable if there are more users on the other side. See Pet. App. 5a (citing *American Express*, 585 U.S. at 535). As this Court put it in *American Express,* "[t]o optimize sales, the network must find the balance of pricing that encourages the greatest number of matches between" the two sides. 585 U.S. at 545. Thus, in two-sided markets, anticompetitive conduct cannot be inferred from a firm's expanding its network effects. *Ibid.*[10] That's what all successful competitors do.

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[10] See generally Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. Econ. Persps. 125 (2009); Mark Armstrong, *Competition in Two-Sided Markets*, 37 Rand J. Econ. 668 (2006).

Yet the Ninth Circuit wrongly affirmed "relief targeted to those effects" without considering which effects were the lawful result of market success—and thus which benefit consumers—and which could be attributed to unlawful conduct. Pet. App. 47a. Much less did the courts below try to limit relief to network effects in the latter category. Indeed, the Ninth Circuit explicitly targeted *all* network effects arising from the Play Store's dominance, including those arising as the legitimate result of non-exclusionary business practices benefiting consumers. Pet. App. 45a-47a.

Most troubling, the Ninth Circuit expressly disavowed any obligation to tailor antitrust remedies to those necessary to prevent unlawful conduct and reverse its effects. Rather, the court declared that its precedent "does not require that an injunction only touch the consequences of a defendant's conduct." Pet. App. 46a. But never did the court describe how consumers would be better off if Google was forced to open Play Store, and every app on it, to any would-be app distributor. Yet, by drastically reducing Google's incentive to improve an app store that is now open to competitors, the decree directly harms consumers.

That is not the only consumer harm. As other *amici* supporting certiorari have explained, by vitiating Google's ability to enforce security standards on Play Store, the decree threatens to expose consumers to harmful software embedded in apps by unscrupulous vendors and even foreign governments. See Br. of *Amicus Curiae* The Center for Cybersecurity Policy and Law; Br. of *Amici Curiae* Former National Security Officials and Scholars; Br. of Computer Security Experts John Mitchell et al. as *Amici Curiae*.

That is a deadweight loss to consumer welfare—the antithesis of a proper antitrust remedy.

In short, the injunction approved below attacks lawfully obtained network effects that benefit consumers, while subjecting consumers to intensified security risks. Certiorari is warranted to retether the law of antitrust remedies to consumer welfare.

3. The Ninth Circuit's price regulation term inevitably harms consumer welfare.

Another aspect of the injunction affirmed further below underscores why certiorari is warranted. In connection with the required duty to deal, the injunction set the price of Google's security services at "a reasonable fee" that "must be based on Google's actual costs." Pet. App. 70a; see Pet. App. 48a-51a. But courts are poorly adapted to serve as regulators of prices, let alone cost-based prices. And this Court has long recognized that setting prices is beyond the proper functions of an antitrust court. See *Alston*, 594 U.S. at 102 (citing *Trinko*, 540 U.S. at 408); *Pacific Bell Tel. Co.* v. *linkLine Communications, Inc.*, 555 U.S. 438, 452-453 (2009).

This poor functional fit is also clear to commentators, see Kovacic, 74 Iowa L. Rev. at 1145, and is a matter of common sense. Markets set prices that optimally benefit consumers. Artificial prices, cost-based or otherwise, inevitably distort the quality and volume of supply. That such intervention attended the Ninth Circuit's imposition of a duty to deal with competitors is unsurprising but no less harmful to consumers. *Trinko*, 540 U.S. at 415. And it provides yet another reason for this Court's review.

CONCLUSION

The decision below departed from the consumer welfare standard in two substantial ways: (1) by imposing liability without considering whether the procompetitive benefits of the conduct could be achieved by less restrictive means, and (2) by imposing remedies that stretch far beyond any harm to the plaintiff while penalizing Google for its lawful success as well as its adjudicated unlawful conduct. Certiorari is warranted not only to resolve conflicts and to clarify governing principles, but to reinvigorate the consumer welfare standard that underlies antitrust law, yet has been attacked directly and indirectly in recent years. The petition for a writ of certiorari should be granted and the judgment reversed.

Respectfully submitted,

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