No. 25A___

IN THE

Supreme Court of the United States

GOOGLE LLC, *et al.*,

Applicants,

v.

EPIC GAMES, INC.,

Respondent.

APPLICATION FOR PARTIAL STAY OF PERMANENT INJUNCTION PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Applicants are Google LLC, Google Payment Corp., Google Commerce Ltd., Google Ireland Ltd., and Google Asia Pacific Pte. Ltd. (collectively, "Google").

Respondent is Epic Games, Inc. ("Epic").

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

INTRODUCTION

This case asks the Court to evaluate the lawfulness of an unprecedented antitrust injunction awarded at the request of a single, private plaintiff that will restructure the entire Android ecosystem, relied on by over 100 million U.S. users and over 500,000 app developers. As multiple *amici* confirm, the injunction exposes these users and developers to substantial new safety and security risks and compels Google to act as both supplier and distributor for its direct competitors. The Ninth Circuit's decision affirming this injunction is on the wrong side of three different circuit splits and violates this Court's twin commands that antitrust injunctions must avoid "mistaken condemnations of legitimate business arrangements" and that antitrust courts "make for poor central planners and should never aspire to the role." *Nat'l Collegiate Athletic Ass'n* v. *Alston*, 594 U.S. 69, 99, 103 (2021) (quotation marks omitted). Google seeks a stay of the provisions of the injunction that are the most intrusive and raise the greatest security concerns while this Court evaluates the substantial legal questions presented by this sweeping, nationwide injunction.

This case concerns the multibillion-dollar markets for mobile devices, operating systems, applications ("apps"), and purchases within apps. For nearly two decades, Google has been locked in fierce competition with Apple within these markets. Google and Apple have taken fundamentally different approaches. Apple operates as a closed "walled garden"—it manufactures all its own devices for which the only source of apps is Apple's proprietary App Store. Google takes the opposite

(and more open) approach: It makes its operating system, Android, available for free to any device manufacturer, allows anyone to operate an Android app store, and allows users many ways to download apps, including directly from the Internet.

Google also offers its own app store, called the Play store, which offers enhanced security screening for apps, tools for app developers, software update management services, and much more. For the 97% of developers who offer only free apps on the Play store, Google makes these services available for free. It sustains this business model by charging a service fee when developers charge users for app downloads or in-app digital goods.

Google's open system for Android offers consumers the massive advantage of choice, but it means Google must work harder to maintain security in the Android ecosystem and to provide users with the kind of seamless, out-of-the-box experience that they expect. To that end, Google has entered into contracts with device manufacturers, mobile carriers, and others to help ensure that Android devices are equipped with Play and other baseline apps, to make sure developers are willing to make the investments necessary to offer their apps on Android, and to incentivize business partners to stay up to date with the latest security and other software updates.

The plaintiff here, the multibillion-dollar gaming company Epic Games, sought to compel Google and Apple to allow Epic to distribute its apps through their stores without compensating Google and Apple for their services. Epic lost its antitrust claims against Apple, after the Ninth Circuit affirmed findings that Apple's "walled

garden" approach was a form of lawful competition against Google and other Android app stores. *Epic Games, Inc.* v. *Apple Inc.*, 67 F.4th 946 (9th Cir. 2023). In this case, however, the Ninth Circuit affirmed a jury verdict holding Google liable under the Sherman Act for the very policies designed to allow Google to effectively compete with Apple. The court then affirmed a sweeping injunction completely overhauling the Play store—not just as to Epic, but as to all users, developers, and Android business partners across the United States.

Most notably, the injunction compels Google to deal directly with its competitor app stores in two different ways. First, Google must act as a supplier for those stores by making Play's catalog of two-million-plus apps available on demand through competitors' app stores. Google must then act as a distributor for its competitors by allowing competitor stores to be available for Play's users to download directly from Play. Google must also permit app developers to include external links ("linkouts") in their apps on Play that send users to unknown and potentially untrustworthy sites to complete purchases or download apps.[1]

As Google's forthcoming certiorari petition will explain, three aspects of the Ninth Circuit's decision affirming this injunction warrant this Court's review:

First, the Ninth Circuit's precedent permitted Google to be held liable under the Sherman Act's Rule of Reason without requiring the jury to find that Google could

[1] These obligations arise from ¶¶ 9-12 of the injunction. App. 69a-70a. The injunction also requires Google to modify its contracting practices with business partners in various ways and to allow developers to offer payment processing systems other than Google Play Billing (in ¶¶ 4-10). App. 68a-69a. Google does not seek to stay those provisions of the injunction. Google also does not seek a stay of ¶¶ 9-10 to the extent they require Google to permit developers to "communicate" with users about off-Play payment options that do not involve linkouts.

achieve its procompetitive goals by less restrictive means. The Ninth Circuit itself previously stated that it is "skeptical of the wisdom" of its precedent, *Apple*, 67 F.4th at 994, and there is a worsening circuit split as to whether plaintiffs must prove less restrictive alternatives under the Rule of Reason, with three circuits siding against the Ninth Circuit to hold that such proof is mandatory and five other circuits taking the Ninth Circuit's side. The Ninth Circuit's approach is incompatible with this Court's precedents, *see, e.g.*, *Ohio* v. *Am. Express Co.*, 585 U.S. 529, 541-542 (2018) (*Amex*), and its erroneous approach went to the heart of this case by allowing the jury to find Google liable *even if* it concluded there was no less restrictive way for Google to effectively compete with Apple.

Second, the Ninth Circuit held that the District Court could impose on Google duties to deal with Play competitors in order to diminish Google's competitive advantages *even if* Play's advantages were not a "consequence" of Google's anticompetitive conduct. In so holding, the Ninth Circuit broke from the D.C. Circuit's pathmarking precedent in the *Microsoft* antitrust litigation and circumvented this Court's precedents constraining the role of antitrust law in imposing duties to deal directly with competitors. *See, e.g.*, *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004). The Ninth Circuit's approach improperly allows courts to appoint themselves as "central planners." *Alston*, 594 U.S. at 103.

Third, the Ninth Circuit held that Epic bore *no* burden to establish Article III standing to seek remedies that applied to every developer and business partner

nationwide and that any questions about the scope of the injunction necessarily went to the District Court's discretion on the merits rather than Article III's limitations. That ruling violates bedrock limitations on the constitutional powers of federal courts, breaks from three other circuits, and threatens to turn every private antitrust plaintiff in the Nation's largest circuit into a de facto marketwide regulator.

Google seeks to stay only the portions of the injunction most likely to cause irreparable harm, including harm to millions of Android users and thousands of developers. Absent a stay, the injunction's linkout provisions will take effect on Wednesday, October 22. As computer security experts, former national security officials, and industry experts have all warned in *amicus curiae* briefs below, the mandated linkouts make it more likely that malicious actors—including foreign adversaries, scammers, and blackmailers—will be able to deceive Android users into sharing highly sensitive information. These bad actors can use that information to inflict irreparable financial harm and invade the intimate details of users' online lives. The linkouts requirement will also make it substantially easier for developers to avoid compensating Google for the many services Play offers *other* than payment processing. All this, in turn, makes it more difficult for Google to sustain the business model that has allowed it to provide those services for free to the vast majority of developers who offer their apps and digital content for free.

The duty-to-deal provisions will also create enormous security and safety risks by enabling stores that stock malicious, deceptive, or pirated content to proliferate. Although those remedies will not take effect until next summer, Google must

immediately undertake substantial design and engineering resources to comply with that timeline. Those measures will come at an enormous cost in terms of lost time and expenditures at least in the tens of millions of dollars. A stay pending this Court's review is therefore essential to ensure that any relief this Court affords will truly be effective, and to avoid unnecessary harm for the over 100 million non-party users and hundreds of thousands of non-party developers who will be affected by these remedies.

Pending disposition of Google's forthcoming petition for certiorari, Google respectfully requests that this Court stay Paragraphs 9 and 10 of the permanent injunction to the extent those provisions require Google to allow linkouts, and Paragraphs 11-12 of the injunction in full. Google has committed to filing its certiorari petition in half the allotted time, no later than October 27, 2025, which would allow this Court to consider this case on the merits during this Term. Because the linkouts requirement is scheduled to take effect on Wednesday, October 22, 2025, Google respectfully requests a ruling on this application no later than Friday, October 17, 2025.

STATEMENT OF THE CASE

A. Legal Background

Sections 1 and 2 of the Sherman Act bar unreasonable restraints on trade and unlawful monopolization. 15 U.S.C. §§ 1-2; *see also Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007) (Section 1); *Pac. Bell Tel. Co.* v. *linkLine Comm'ns, Inc.*, 555 U.S. 438, 447 (2009) (Section 2). Courts consider "the

circumstances, details, and logic" of the challenged conduct "to ensure that it unduly harms competition before [the] court declares it unlawful." *Alston*, 594 U.S. at 97. As this Court has explained, "antitrust courts must give wide berth to business judgments before finding liability." *Id.* at 102. This reflects "[t]he heart of our national economic policy," which has long maintained "faith in the value of competition." *Nat'l Soc. of Pro. Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978) (*NSPE*) (quotation marks omitted).

Congress "did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations." *Id.* at 688. Instead, courts frequently rely on the "Rule of Reason" to gauge the boundaries of antitrust liability. *Id.*; *Alston*, 594 U.S. at 88. The Rule of Reason framework provides a calibrated approach to assessing whether challenged conduct in fact promotes valid procompetitive objectives.

This Court has specified that the Rule of Reason analysis involves a three-step, burden-shifting framework. First, a plaintiff must "prove that the challenged restraint has a substantial anticompetitive effect." *Amex*, 585 U.S. at 541. If the plaintiff carries that burden, the "burden then shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* Finally, if the defendant makes this showing, the burden "shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* at 542; *accord Alston*, 594 U.S. at 96-97 (explaining that applying the "substantially less restrictive alternative" test was a "straightforward application of

the rule of reason").

In general, antitrust law does not impose liability for a firm's refusal to deal with its competitors. *Trinko*, 540 U.S. at 408-409. As this Court has explained, exposing firms to antitrust liability for refusing to deal with their rivals is in "tension with the underlying purpose of antitrust law," as it "may lessen the incentive for the monopolist, the rival, or both to invest." *Id.* at 407-408. Forced sharing also stretches courts beyond "the practical limits of judicial administration: 'An antitrust court is unlikely to be an effective day-to-day enforcer' of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket." *Alston*, 594 U.S. at 102 (quoting *Trinko*, 540 U.S. at 415). "Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited." *Trinko*, 540 U.S. at 408. Although the Court first articulated these principles in cases concerning antitrust liability, the Court has since clarified that "[s]imilar considerations apply when it comes to [a] remedy." *Alston*, 594 U.S. at 102.

B. Factual Background

1. Google and Apple have long been locked in competition concerning all aspects of their mobile ecosystems, including mobile devices, operating systems, and apps. Apple launched its operating system, "iOS," as a walled garden—a self-contained ecosystem where Apple retains control over its devices and ecosystem. 5-ER-1082-84; 5-ER-1154-55.[2] To contrast with Apple's approach, Google has created

[2] Citations to the "ER" are to the Excerpts of Record filed in the Ninth Circuit.

and maintained an open ecosystem. 6-ER-1302. It designed its Android operating system to be publicly available and free for anyone to access, modify, and distribute. 5-ER-1060. The competitive dynamic between Apple and Google ultimately benefits consumers: When either Google or Apple innovates, the other responds by modifying content, features, and pricing of its products, including for its app store and in-app payment solutions. 5-ER-1003-06; 5-ER-1022-23; 5-ER-1107-09; 6-ER-1313-18; 6-ER-1351-57; 6-ER-1411-12.

The companies' differing philosophies have direct consequences on how they compete. Android's openness creates greater user choice in the competition over mobile devices. Because multiple original equipment manufacturers (OEMs) can use Android as the operating system for their devices, users can choose from a range of Android products, with a variety of features, at every price point. 5-ER-1064-66. Apple does not license iOS to anyone, which allows it to enjoy a price premium given that customers wanting an iOS phone have one choice: the iPhone.

This competitive dynamic extends to the companies' approaches to apps and app stores. Apple's closed system means that there is no iOS app store besides Apple's App Store. Apple exercises full control over user security: iOS users cannot access an app unless it is screened by Apple and made available through Apple's App Store. 5-ER-1082-83; 6-ER-1369-71. Apple decides what apps are preloaded on every iPhone, allowing Apple to prioritize its own apps and give every iOS user the same out-of-the-box experience. 5-ER-1073-74. And Apple controls how all iOS users make in-app purchases, making the process streamlined and secure. 6-ER-1274.

By contrast, Android has an open ecosystem that is built on the foundation of Android's open-source operating system. Android's openness allows users to download apps from a variety of sources, including Google Play; hundreds of third-party app stores, like Samsung's Galaxy store; and the Internet (via a web browser through a process known as "sideloading"). 2-ER-427-428; 5-ER-1009-10. As a result, investment, innovation, and strategic partnerships have been essential in allowing Google to offer an open ecosystem to compete with Apple without compromising safety and security. Google has negotiated with manufacturers to ensure that apps are compatible across all Android devices, that users promptly receive the latest security updates for the Android software, and that Android devices come equipped with a set of high-quality apps and at least one trustworthy app store (Google Play) for downloading additional apps. 5-ER-1054-55; 5-ER-1066-68; 5-ER-1071-73; 7-ER-1612-34. While users have the flexibility to download apps or app stores from the web, Google tells users about the risks of sideloading. 5-ER-1010-11; 5-ER-1139-40.

To ensure that Android is competitive with Apple and to protect users and developers, Google has continually innovated to attract users and developers to Play by, among other things, investing heavily in Play's security and being attuned to the user and developer experience. 7-ER-1639; *see also* 6-ER-1241-42; 6-ER-1256; 5-ER-1097. Google reviews all apps on Google Play for malware and enforces privacy, security, and content policies designed to protect users and developers. 5-ER-1138-50; 5-ER-1233. And it requires apps downloaded from Play to use Google Play Billing, an in-app payment solution (similar to Apple's comparable offering) that gives users

a simple, safe, and secure way to purchase digital goods. 6-ER-1392-1401.

2. Epic Games, a multibillion-dollar gaming developer and app store operator, wanted to take advantage of Play's app distribution services without paying Google a fee. 5-ER-1183; 5-ER-1201. Under Google's policy, a developer that charges users to download an app or purchase a digital good or service within the app must use Google Play Billing to complete the transaction and pay a service fee (generally 15-30%). 6-ER-1404-05; 6-ER-1274. This model was consistent with fees charged by others in the industry, including Apple, Microsoft's Xbox, and other digital gaming platforms. 5-ER-1195-97. Collecting a service fee for paid content has furthered Google's continuous investment in the Play store and ability to offer free services to the 97% developers who offer only free apps with no digital content sales. 5-ER-1096; 5-ER-1173; 6-ER-1296.

Epic, however, wanted to distribute its popular game *Fortnite* on Play without paying a fee to Google when consumers made in-game purchases. 5-ER-1215-16. By avoiding the need to compensate Google for its services, Epic, by its own telling, could increase its revenue by "billions." *Id.* Epic therefore launched a "highly choreographed attack on Apple and Google," dubbed "Project Liberty," seeking to impose "systematic change[s]" on each company that would result in "tremendous monetary gain and wealth" for Epic. *Epic Games, Inc.* v. *Apple Inc*., 559 F. Supp. 3d 898, 935 (N.D. Cal. 2021), *aff'd in part, rev'd in part,* 67 F.4th 946 (9th Cir. 2023); *see also* 5-ER-1216. Epic pretended to release *Fortnite* on Play in compliance with Play's policies but later released secret code allowing users to make purchases using Epic's

payment solution and allowing Epic to circumvent Play's service fee. 5-ER-987-988; 5-ER-991-992; 5-ER-1203-08. Google removed *Fortnite* from Play for violating the store's terms of service. 5-ER-991; 6-ER-1288.

3. Epic's Project Liberty also included filing this lawsuit, raising claims against Google under the Sherman Act. 4-ER-935-952.[3] Epic challenged as anticompetitive a range of policies and agreements that Google used to keep Android and Play competitive with iOS and the Apple App Store. 4-ER-935-951.

At trial, Google stressed the ways that the challenged conduct allowed it to compete with Apple while maintaining its commitment to an open ecosystem. *See supra* at 8-11. The jury also heard evidence that the challenged conduct and contracts were essential for Google to meet these objectives. Google's sideloading warnings, for example, enhanced safety on Android by providing guardrails against the inadvertent installation of malware. 5-ER-1010-11. Google's partnerships with app developers helped ensure that the same popular games and apps available in other stores, including the App Store, were also available on Play. 5-ER-1000-05. And Google's requirement that apps charging for digital goods or services use Google Play Billing facilitated Google's ability to provide its services for free to the 97% of developers who offered their apps at no charge to users. 6-ER-1393-97.

The jury instructions allowed the jury to ignore Epic's lack of plausible

[3] Epic also raised claims under the California Cartwright Act and California's Unfair Competition Law (UCL). 7-ER-1728. The parties and the court treated the Cartwright Act claims "as being coterminous with the Sherman Act claims for purposes of both liability and remedy." App. 77a. The trial court similarly resolved Epic's UCL claim based entirely on the antitrust jury verdict in Epic's favor. App. 73a-75a. As a result, neither state-law claim provides an independent basis for the judgment or injunction in this case.

alternatives and return a verdict for Epic, even when Google's conduct was the least restrictive option for achieving procompetitive benefits in the form of competition with Apple. Ninth Circuit precedent required the District Court, over Google's objection, to instruct the jury to simply "balance" those procompetitive benefits against "any competitive harms [the jury] found." App. 149a (Section 2 instruction); App. 157a (Section 1 instruction); *see also Apple*, 67 F.4th at 994. The instructions on both claims were clear: The jury was to undertake this "balanc[ing]" regardless of whether it concluded that Epic had satisfied its burden of proving that less restrictive alternatives existed to Google's conduct. App. 149a (explaining that, after considering the existence of less restrictive alternatives, the jury "must then" conduct the balancing step); App. 153a (similar). Applying this framework, the jury found in favor of Epic without providing any details regarding how it resolved each step of the Rule of Reason. 1-ER-52-57.

The jury's verdict form also left the parties and the District Court without specific factual findings to guide the remedial phase. Google asked that the parties have the opportunity to submit legal briefing on the appropriate remedy, but the District Court denied the request. *See* 8-ER-2009 (Dkt. 951); 3-ER-570. The court instead directed Epic to file a proposed injunction (without a supporting legal memorandum), and instructed Google to raise "objections." 4-ER-825. At no point before the injunction issued did the District Court require Epic—the party bearing the burden of proof—to file a legal brief in support of its proposed injunction.

The District Court then entered an injunction requiring fundamental changes

to the Play store. App. 68a-71a, 72a-88a. Most relevant here, the injunction requires Google to share its entire catalog of apps with competitors and to distribute directly competing app stores through Play. App. 69a-70a (¶¶ 11-12). The injunction also substantially curtails Google's ability to protect against security risks by limiting Google's ability to enforce security and content policies when distributing rival stores to measures that are "strictly necessary and narrowly tailored." *Id.* The District Court held that these remedies were justified by Google's "network effects," but concluded it was not "salient" whether Google's anticompetitive conduct actually caused them. App. 82a-85a. The injunction also bars Google from prohibiting developers from providing linkouts (¶¶ 9-10) and from requiring developers to use Google Play Billing for in-app transactions on Play (¶ 9).

Google immediately appealed. The District Court administratively stayed its injunction pending resolution of Google's stay request to the Ninth Circuit. 2-ER-181.

4. In expedited proceedings, a Ninth Circuit panel affirmed in full. App. 10a, 16a n.4, 17a. The court left the District Court's administrative stay in place throughout its consideration of the merits. On the balancing instruction, circuit precedent barred the panel from considering whether a balancing step comports with this Court's precedent. App. 37a n.10. The court relied on its decision in *Apple*, which had concluded that, when applying the Rule of Reason, a factfinder must engage in a "totality-of-the-circumstances" balancing analysis even when "the plaintiff fails to carry its step-three burden of establishing viable less restrictive

alternatives." *Apple*, 67 F.4th at 993.

On the injunction, the panel held that ordering Google to give its competitors access to Play's catalog and to distribute third parties' stores were permissible antitrust remedies. App. 43a, 48a-50a, 52a. The panel recognized that the District Court imposed these remedies to diminish Google's purported network effects, and held that was appropriate even if there was no finding that those effects were actually caused by Google's violation. App. 48a-49a. Instead, the panel held that an antitrust remedy need not "only touch the consequences of the defendant's conduct" so long as it bears some causal nexus to the defendant's conduct. *Id.* The panel also concluded that *Trinko*'s limitations on forced sharing are relevant only at the liability phase, not at the remedial phase. App. 46a-47a. The court also held that the District Court adequately addressed the security interests of non-parties because it had before it a "robust record" on those concerns—but did not cite any *findings* by the court on those issues. App. 64a-65a.

Finally, the panel altogether sidestepped the issue of Epic's standing. Google argued that Epic lacked an ongoing or threatened injury justifying billing and app-distribution remedies because it has no apps on Play and no plans to return to the Play store. CA9 Opening Br. 90-92; *see City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-106 (1983). Google also argued that Epic had failed to meet its burden of providing any evidence that hundreds of thousands of non-parties would react to the injunction's duty-to-deal remedies in a way that would redress an injury to Epic. CA9 Opening Br. 89-91; *see Murthy* v. *Missouri*, 603 U.S. 43, 57-58, 69-72 (2024).

Rather than assess whether Epic had established standing to seek these remedies, the panel dismissed Google's jurisdictional arguments as "merits" disputes and upheld the District Court's "exercise of discretion in crafting the injunction." App. 65a-67a.

Google sought rehearing and asked the Ninth Circuit to further stay the injunction pending its consideration of Google's rehearing petition and, if necessary, its certiorari petition to this Court. *See generally* CA9 Dkt. 206 (stay motion); CA9 Dkt. 211 (petition for rehearing). Eleven *amicus* briefs were filed in support of rehearing, including from the U.S. Chamber of Commerce, national security experts, antitrust and cybersecurity experts, affected app developers, and other concerned parties. The panel reinstated an administrative stay throughout its consideration of the rehearing petition, and denied that petition on September 12, 2025. CA9 Dkt. 203; *see also* CA9 Dkt. 201; App. 118a. Although the Ninth Circuit recognized it had "stayed the Injunction pending" its own consideration of the case, the panel denied Google's motion for a stay pending this Court's consideration of certiorari. App. 119a-124a.[4]

STANDARD OF REVIEW

Under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. § 1651, this Court may stay a permanent injunction entered by a federal district court. *See, e.g.*, *Trump* v. *Wilcox*, 145 S. Ct. 1415, 1415 (2025); *Merrill* v. *People First*

[4] In the same order, the panel modified the injunction's compliance deadlines, giving Google ten months from the date of the mandate to comply with paragraphs 11 and 12 of the injunction, and 30 days from the date of the mandate to comply with paragraphs 4-7 and 9-10. App. 121a-122a.

of Alabama, 141 S. Ct. 25, 25 (2020) (mem.). A stay is appropriate when the applicant shows a "reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; a "fair prospect" that this Court will reverse the judgment below; and a "likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). In "close cases," the Court will "balance the equities and weigh the relative harms." *Id.*

ARGUMENT

I. THIS COURT IS LIKELY TO GRANT CERTIORARI AND REVERSE.

A. The Ninth Circuit's Approach To The Rule Of Reason Conflicts With This Court's Precedents And Exacerbates An Existing Circuit Split.

There is a reasonable probability that this Court will grant certiorari and reverse the jury's verdict. The Ninth Circuit allows Sherman Act liability even when the plaintiff does not meet its Rule-of-Reason burden to show a less restrictive alternative was available to the defendant, conflicting with this Court's clear guidance on the Rule of Reason and taking the wrong side of a pronounced circuit split.

1. The Rule of Reason seeks to distinguish between conduct "with anticompetitive effect[s] that are harmful to the consumer" and conduct "stimulating competition that [is] in the consumer's best interest." *Alston*, 594 U.S. at 81 (quoting *Amex*, 585 U.S. at 541).[5] As explained *supra* at 7-8, the third step of this framework

[5] The parties agreed in this case that the Rule of Reason governed both the monopolization claim under Section 2 and the restraint-of-trade claim under Section 1. *See FTC* v. *Qualcomm Inc.*, 969 F.3d

requires the plaintiff "to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Amex*, 585 U.S. at 542; *accord Alston*, 594 U.S. at 96-97.

Yet the Ninth Circuit allowed Google to be held liable for Sherman Act violations even if Epic failed to meet its burden at step three, by allowing the jury to find an antitrust violation based on the jury's view of whether the competitive harms of Google's conduct outweighed the procompetitive benefits of that conduct—essentially doing away entirely with a plaintiff's step-three burden. App. 37 n.10; 6-ER-1435-36, 6-ER-1444. The panel explained that it was bound by an earlier Ninth Circuit decision, which held that "where a plaintiff's case comes up short at step three, the [factfinder] must proceed to step four and balance the restriction's anticompetitive harms against its procompetitive benefits." *Apple*, 67 F.4th at 994. Although the *Apple* court had expressed skepticism about the wisdom of this approach, *see id.*, by denying rehearing, the Ninth Circuit has cemented its position from *Apple* that step three is an optional burden for a Sherman Act plaintiff.

There is a deep and entrenched circuit split on this issue. Six circuits, including the Ninth Circuit, permit a factfinder to proceed to a free-for-all balancing step even where the plaintiff has failed to meet its burden under Rule-of-Reason step three—effectively overwriting that step and making it optional. *See, e.g.*, *United States* v. *Microsoft Corp.*, 253 F.3d 34, 59, 66-67 (D.C. Cir. 2001) (*en banc*) (if a defendant's

974, 991 (9th Cir. 2020) (noting this approach when, as here, the two claims are based on substantially overlapping allegations).

"procompetitive justification stands unrebutted," the plaintiff "must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit); *United States* v. *Am. Airlines Grp. Inc*., 121 F.4th 209, 220 (1st Cir. 2024) (the plaintiff at step three bears the burden of showing "procompetitive efficiencies could be reasonably achieved through less anticompetitive means, or that on balance, the restraint's harms outweigh its benefits") (quotation marks and internal citation omitted); *Mylan Pharms., Inc.* v. *Warner Chilcott Pub. Ltd. Co*., 838 F.3d 421, 438 (3rd Cir. 2016) (same); *Impax Labs., Inc.* v. *FTC*, 994 F.3d 484, 492 (5th Cir. 2021) ("if the [plaintiff] fails to demonstrate a less restrictive alternative way to achieve the procompetitive benefits, the court must balance the anticompetitive and procompetitive effects of the restraint"); *Viamedia, Inc.* v. *Comcast Corp*., 951 F.3d 429, 464 (7th Cir. 2020) (same).

By contrast, the Second, Sixth, and Tenth circuits have adhered to this Court's articulation of the Rule of Reason's three-step framework and held that to prevail on a Sherman Act claim, a plaintiff "*must* show that a less restrictive alternative exists that achieves the same legitimate competitive benefits." *See, e.g.*, *1-800 Contacts, Inc.* v. *FTC*, 1 F.4th 102, 120-122 (2d Cir. 2021) (emphasis added); *accord Expert Masonry, Inc.* v. *Boone County*, 440 F.3d 336, 343 (6th Cir. 2006) (similar); *Buccaneer Energy (USA) Inc.* v. *Gunnison Energy Corp.*, 846 F.3d 1297, 1310 (10th Cir. 2017) (similar).[6]

[6] The Eleventh Circuit has arguably conflicting precedent on this issue. *Compare Schering-Plough Corp.* v. *FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005) (using mandatory language for the less-restrictive alternatives), *with McWane, Inc.* v. *FTC*, 783 F.3d 814, 833 (11th Cir. 2015), *and OJ Com.,*

In opposing a stay pending rehearing, Epic argued that the Second, Sixth, and Tenth Circuits do not actually fall on the minority side of the circuit split. Stay Opp. 17-19. But the Second Circuit has repeatedly confirmed that a plaintiff's failure to make the step-three showing means the defendant cannot be held liable. *See, e.g.*, *Virgin Atl. Airways Ltd.* v. *British Airways PLC*, 257 F.3d 256, 265 (2d Cir. 2001) (affirming summary judgment for defendant where plaintiff failed to "show the same purpose could be achieved without restricting competition"). Likewise, the Sixth and Tenth Circuits have consistently used mandatory language to describe the step-three requirement. *See Expert Masonry*, 440 F.3d at 343; *Care Heating & Cooling, Inc.* v. *Am. Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005); *Nat'l Hockey League Players' Ass'n* v. *Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003); *Nilavar* v. *Mercy Health Sys.*, 244 F. App'x 690, 695 (6th Cir. 2007); *Buccaneer Energy*, 846 F.3d at 1310; *Gregory* v. *Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1205 (10th Cir. 2006); *Law* v. *NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998). These circuits' approach heeds this Court's clear guidance that the Rule of Reason "require[s]" the plaintiff "show that there are substantially less restrictive alternative [means]" before antitrust liability can exist. *Alston*, 594 U.S. at 100 (quotation marks omitted).

2. The Ninth Circuit's rule is wrong on the merits. Even the Ninth Circuit in *Apple* questioned "the wisdom of superimposing a totality-of-the-circumstances balancing step onto a three-part test that is already intended to assess a restraint's

LLC v. *KidKraft, Inc.*, 34 F.4th 1232, 1247 (11th Cir. 2022) (both suggesting the less-restrictive-alternatives element is not mandatory).

overall effect." 67 F.4th at 994. "[T]he three-step framework is already designed" "to pick out restrictions that have significant anticompetitive effects but only minimal procompetitive benefits," with its inquiries into procompetitive purposes and less restrictive alternatives. *Id.* Despite acknowledging these issues, *Apple* held that even when a plaintiff fails to meet its burden at step three, the court "must proceed" to balancing anyway—a view the Ninth Circuit adhered to again here. *Id.*

The Ninth Circuit found support for its approach in this Court's *Alston* decision, but its reading of *Alston* is exactly backwards. Nothing in *Alston*'s statement "that the first three steps of the Rule of Reason are not a 'rote checklist'" suggests that a plaintiff can entirely flunk the third step and still prevail. *Id.* (quoting *Alston*, 594 U.S. at 97). Rather, the import of that language is that a plaintiff's success on the first three steps does not guarantee that the plaintiff will ultimately prevail, because the circumstances of a case may provide good reason not to declare the defendant's conduct an antitrust violation. Thus, *Alston* emphasized that "[t]he whole point of the rule of reason is to furnish 'an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint' *to ensure that it unduly harms competition before a court declares it unlawful*." 594 U.S. at 97 (quoting *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 781 (1999)) (emphasis added).

Indeed, when this Court has cautioned that courts should consider the particular context of a case in applying the Rule of Reason, it has done so to ensure that the rule does not sweep up reasonable restraints that serve valid competitive interests. *See State Oil* v. *Khan*, 522 U.S. 3, 10 (1997) ("this Court has long recognized

that Congress intended to outlaw only unreasonable restraints," so "[a]s a consequence, most antitrust claims are analyzed under a 'rule of reason,'" under which a factfinder considers "a variety" of context-specific factors); *Bd. of Trade of Chicago* v. *United States*, 246 U.S. 231, 238-239 (1918) (courts look to the circumstances "because knowledge of intent may help the court to interpret facts and to predict consequences"); *id.* at 239-241 (finding no antitrust violation after looking to history and purpose of challenged restraint).

The Rule of Reason's third step ensures that courts "give wide berth to business judgments before finding liability." *Alston*, 594 U.S. at 103; *accord Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992) ("Liability turns * * * on whether 'valid business reasons' can explain [the defendant's] actions."). As this Court has repeatedly warned, "[m]istaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect." *Alston*, 594 U.S. at 99 (quoting *Trinko*, 540 U.S. at 414). The Rule of Reason's third step thus guards against stifling procompetitive innovations that have no less restrictive alternatives.

3. This case is an ideal vehicle for the Court to bring the circuits into alignment on those fundamental aims of antitrust law. The instruction was at the heart of Google's defense at trial, which rested on the necessity of its conduct to maintain competition with Apple and its commitment to an open ecosystem. *See supra* at 8-11. Epic's evidence on less restrictive alternatives was exceedingly thin. Although Epic contended that Google could have better tailored its sideloading warnings, D. Ct. Dkt.

867 at 87:20-89:13, it offered zero evidence of any meaningful alternatives to the other challenged conduct and contracts that would have yielded the same procompetitive benefits in Google's vigorous competition with Apple, a point Google stressed in its closing argument. *See* D. Ct. Dkt. 867 at 119:24-120:2, 126:7-10. Allowing the jury to overlook Epic's failure to show less restrictive alternatives thus allowed Epic to sidestep a critical weakness in its case. And because the jury verdict form provides no indication as to how the jury resolved the Rule of Reason analysis, 1-ER-53, 1-ER-55, it is impossible to know whether this legally erroneous instruction proved dispositive. This Court has recognized that reversal is warranted under such circumstances. *See Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459-460 (1993) (reversing where "the jury's verdict did not negate the possibility" that the verdict rested on legally impermissible grounds).

B. The Duty-To-Deal Remedies Create A Circuit Split And Violate This Court's Precedents.

This Court is likely to grant certiorari and reverse the provisions of the injunction compelling Google to allow its competitors to stock their stores with Play's catalog of apps and to distribute those competing stores directly through Play. These unprecedented, compelled duties to deal disregard this Court's precedents and create a split with the D.C. Circuit's seminal decisions in *Microsoft*.

1. The District Court imposed these extraordinary remedies to diminish Google's "network effects"—meaning, that because Google has a "greater number of developers" it attracts a "greater * * * number of users, and vice versa." App. 81a. But, as the court itself recognized, such network effects "are a feature of any two-

sided market" consisting of both sellers and buyers, like an app store. App. 82a. Thus, the critical question should have been whether the Play store's network effects resulted from Google's anticompetitive conduct, or whether they were instead the products of lawful innovation and investment.

That is the D.C. Circuit's approach to evaluating the lawfulness of a remedy that goes beyond ordering the cessation of the anticompetitive conduct. When that court sitting *en banc* initially reviewed the monopolization judgment against Microsoft, it substantially "modified the underlying bases of liability." *Microsoft*, 253 F.3d at 103. As a result, the court recognized it was also compelled to vacate the injunction because the district court was required to "exercise [its] discretion in order to remedy the properly determined wrong." *Id.* at 104. That meant the district court had to determine whether there was "a sufficient causal connection between Microsoft's anticompetitive conduct" and the "remedial goal" of diminishing Microsoft's "position in the [relevant] market." *Id.* at 105-106. Quoting the leading antitrust treatise, the court recognized that the "[m]ere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition." *Id.* at 106 (quoting 3 Areeda & Hovenkamp, *Antitrust Law* ¶ 650a).

Reviewing the revised decree after remand, the court reiterated these basic limits on antitrust injunctions—and repeatedly rejected arguments that the district court should have imposed relief that failed to satisfy this causal test. *See Massachusetts* v. *Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004) (*en banc*). Most relevant here, the D.C. Circuit held that the district court would have abused its

discretion to order Microsoft to make disclosures that would have effectively "enable[d] competitors to 'clone' Windows." *Id.* at 1218-20. Such remedies, the court recognized, would unlawfully "deny Microsoft the returns from its investment in innovation" rather than address the consequences of anticompetitive conduct. *Id.* at 1219 (quotation marks omitted).

In a similar vein, the D.C. Circuit held that the district court properly declined to compel Microsoft to alter its coding practices to make things easier for its competitors, recognizing that Microsoft's competitive advantages were due in part "to 'positive network effects'" that did not result from anticompetitive conduct. *Id.* at 1210-12. And the D.C. Circuit rejected the appropriateness of various other remedies designed to pave the road for Microsoft's competitors that "went beyond the liability" determination. *Id.* at 1215; *see also id.* at 1216 (rejecting a remedy because it was not directed to "eliminating the consequences of the illegal conduct" (quotation marks omitted)). As the D.C. Circuit explained, "it does not follow that, because a proposed requirement could reduce the * * * barrier[s] to entry, it must be adopted." *Id.* at 1226. Rather, even where a barrier existed "in part because of Microsoft's unlawful practices," the issue had to be addressed "in a manner traceable to" the liability determinations. *Id.* As the court summarized, "the fruits of a violation must be identified before they may be denied." *Id.* at 1232.

The approach taken by the Ninth Circuit and the District Court in this case stands in stark contrast to the D.C. Circuit's more cautious and measured approach. The District Court here held that the question of "whether Google's anticompetitive

conduct caused the network effects" was not "the salient question" when considering whether to impose a remedy seeking to undo those network effects. App. 82a. Instead, the District Court assumed that the jury's finding on a different question—whether Google's challenged conduct "had the consequence of entrenching and maintaining its monopoly power in a two-sided market"—meant that a remedy addressing network effects was appropriate. *Id.*

The Ninth Circuit embraced the District Court's loose approach to causation. Google argued that before remedies could target Google's network effects, the court would have to find that those network effects in fact resulted from the conduct found anticompetitive and tailor the injunction accordingly. But the Ninth Circuit faulted Google for "misconstru[ing] the responsibility of the district court" by asserting that an injunction should "only touch the consequences of a defendant's conduct." App. 48a. The appeals court held there was no such requirement, taking the position that a district court need find only that an injunction be "a 'reasonable method' of redressing problems with a 'significant causal connection' to that conduct." App. 48a-49a.

The Ninth Circuit thus endorsed a legal standard for antitrust remedies far less demanding than the D.C. Circuit's. Under the Ninth Circuit's rule, a party may seek to eliminate competitive advantages that are not "consequences" of the violation so long as those advantages bear some relationship to the violation. *See id.* This standard means that courts can use antitrust remedies to upend competitive advantages that entirely predate the unlawful conduct at issue and resulted entirely

from *lawful* methods of competition. *See Amex*, 585 U.S. at 541. The Ninth Circuit thus approves exactly what the D.C. Circuit condemns: remedies that "would deny [the defendant] the returns from its investment in innovation" rather than the fruits of unlawful conduct. *Massachusetts*, 373 F.3d at 1219. And it relied on that rule to bless an injunction that would compel Google to allow its competitors to "clone" Play by offering Play's entire catalog and then require Google to distribute those cloned stores through its own. *See id.*

2. The D.C. Circuit's approach is more faithful to both this Court's precedents and the goals of antitrust law. The Court has long directed that antitrust remedies should target the "fruits" of a violation. *Int'l Salt Co.* v. *United States*, 332 U.S. 392, 400 (1947). This means remedies should be aimed at "eliminating the consequences of the illegal conduct." *NSPE*, 435 U.S. at 698. And the Court has stressed the importance of ensuring that antitrust laws do not "lessen the incentive for the monopolist, the rival, or both to invest" and innovate. *Trinko*, 540 U.S. at 407-408. As *Trinko* explained, the "mere possession of monopoly power" and even the "charging of monopoly prices[] is not only not unlawful; it is an important element of the free-market system." *Id.* at 407. "The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Id.*

The Ninth Circuit's rule also creates an obvious end-run around this Court's precedents that sharply curtail when firms may be compelled "to share the source of their [competitive] advantage" directly with rivals. *Id.* This Court has recognized

that only in "limited circumstances" may a defendant be held liable for a "refusal to deal with its rivals"—circumstances that, Epic has never disputed, are not present here. *Pac. Bell*, 555 U.S. at 448. Yet the Ninth Circuit's rule makes it easy for courts to simply find an antitrust violation on some other basis and then impose a forbidden duty-to-deal by concluding that some competitive advantage possessed by the defendant enhanced its market power and therefore had a sufficient connection to the violation.

The Ninth Circuit brushed aside this Court's duty-to-deal precedents as irrelevant in assessing antitrust remedies, holding that *Trinko* dealt with liability, "*not* the legality of compelling a defendant already found liable under that statute to deal with its competitors." App. 45a-46a (emphasis in original). But this Court stressed in *Alston* that "similar considerations" apply at *both* the liability and remedial phases of the case, *see* 594 U.S. at 102, a holding that the Ninth Circuit simply ignored. *See* App. 45a-46a. Indeed, the primary reason this Court held that Sherman Act *liability* does not flow from a refusal to deal with rivals is that courts are ill-suited to impose or enforce a remedy that forces rivals to do business with each other. *See, e.g.*, *Trinko*, 540 U.S. at 408 ("Enforced sharing also requires courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited."). These concerns require scrupulous adherence to a court's proper role in prescribing remedies to ensure they do not become a tool to wrest entirely lawful competitive advantages from successful businesses.

After adopting its watered-down causation standard, the Ninth Circuit simply echoed the District Court's statement that Google's network effects for Play were "unfairly enhanced in a way that would not have happened but for [Google's] anticompetitive conduct." App. 49a (quoting App. 82a). But the District Court merely assumed this must have happened based on the jury's liability verdict in Epic's favor. *See* App. 82a. The jury, however, was only asked whether a Sherman Act violation occurred—not what the consequences of any violation were, much less whether those consequences included an enhancement to Google's "network effects." *See* 1-ER-53-55. Indeed, across the entire multiweek trial, the jury heard the term network effects exactly *once*. The accompanying portion of the trial record—cited by the District Court and the Ninth Circuit, App. 49a-50a, 82a—only confirms that Google already had substantial network effects at the beginning of the time period at issue in this case, making it even more urgent for the District Court to abide by the D.C. Circuit's requirement that "the fruits of a violation must be identified before they may be denied." *Massachusetts*, 373 F.3d at 1232.

3. This disagreement between the Ninth Circuit and the D.C. Circuit warrants this Court's review. This Court has explained that its practice "is to examine [a] District Court's [antitrust injunction] closely" and that it has "felt an obligation to intervene in" the remedial "phase of the case when [it has] concluded there were inappropriate provisions in the decree." *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961). That is particularly important here, given the unprecedented nature of the injunction: Neither court below, nor Epic, has cited any

case from this Court or any other imposing such a sweeping obligation to deal directly with competitors on judicially set terms, much less in a case brought by a single competitor. The Court should grant certiorari to ensure that antitrust remedies remain targeted at the consequences of illegal conduct rather than the legitimate advantages that result from lawful competition.

C. The Ninth Circuit's Refusal To Assess Epic's Standing To Seek Nationwide Relief Contravenes This Court's Precedents And Entrenches A Circuit Split.

The Ninth Circuit's refusal to assess Epic's standing to seek far-reaching remedies also conflicts with the decisions of this Court and at least three other circuits. There is a reasonable likelihood this Court will grant certiorari to clarify a court's duty to ensure Article III standing exists when fashioning relief.

1. Epic is the sole plaintiff in this case. But the injunction's linkout, billing, and duty-to-deal remedies extend far beyond Epic, restructuring Google's interactions with hundreds of thousands of non-party developers, mobile carriers, and OEMs. To seek such relief, Epic had to prove something specific, namely that it was likely to suffer a future injury related to Google's practices concerning those issues and that such an injury would be redressable by the particular remedies it sought. *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). But the District Court made *no* findings regarding Epic's standing and did not even acknowledge Article III's basic requirements. *See generally* 3-ER-434-572; 2-ER-220-374; 1-ER-7-23.

The Ninth Circuit waved away any need to assess Epic's standing to seek its

far-reaching remedies. App. 65a-67a. Applying circuit precedent, the panel concluded that challenges to the scope of an injunction are necessarily "merits" questions reviewed for abuse of discretion, rather than "jurisdictional" issues. *Id.* (citing *Seattle Pac. Univ.* v. *Ferguson*, 104 F.4th 50, 63 (9th Cir. 2024) and *Kirola* v. *City & County of San Francisco*, 860 F.3d 1164, 1175-76 (9th Cir. 2017)).

2. The Ninth Circuit's position is deeply wrong. The plaintiff bears the burden at every stage of the case to establish standing for each form of relief sought. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). That requirement applies just as much at the outset of the case as "when judgment is entered." *Uzuegbunam* v. *Preczewski*, 592 U.S. 279, 291-292 (2021). That is why this Court routinely evaluates the nature and scope of a plaintiff's requested relief as a jurisdictional question under Article III.

Lewis v. *Casey*, 518 U.S. 343 (1996), is a prime example. There, this Court addressed the "proper scope" of an injunction entered against prison officials after a three-month trial, concluding that the inmates who brought the suit had failed to establish standing to obtain certain challenged provisions. *Id.* at 359. While some of those provisions were "directed" at "the inmate population at large," they did not target the plaintiffs' actual injuries found by the court "[a]fter the trial," and thus "were not the proper object of th[e] District Court's remediation." *Id.* The relief issued, the Court explained, "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Id.* at 357.

This Court has carefully hewed to that rule in the years since. In *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006), for instance, this Court vacated a lower court's invalidation of a state law for failure to address the plaintiffs' lack of standing to seek that requested remedy. *Id.* at 340, 354. The Court stressed that plaintiffs must "separately" demonstrate standing "for each form of relief sought," and that the court was required to "limit[]" the remedy to the specific injuries the plaintiffs "established." *Id*. at 353 (quotation marks omitted). Likewise, in *Gill* v. *Whitford*, 585 U.S. 48 (2018), this Court vacated an injunction for lack of standing and instructed the district court to "tailor" the "plaintiff[s'] remedy" to "redress [any] particular injury" proved based on the evidence presented on remand. *Id.* at 73. And in *Murthy* v. *Missouri*, 603 U.S. 43 (2024), this Court reversed the Fifth Circuit for "affirm[ing] a sweeping preliminary injunction" where the plaintiffs failed to prove that "the judicial relief requested"—which depended on the reactions of independent non-parties—would redress "the injury suffered." *Id.* at 49, 73 (quotation marks omitted). The Ninth Circuit's refusal to consider Article III's constraints when analyzing the nature and scope of relief is impossible to square with these binding precedents.

3. The Ninth Circuit's outlier position also conflicts with the Fourth, Fifth, and Sixth Circuits, which faithfully apply the principles set forth by this Court. The Fourth Circuit recently rejected the precise type of reasoning the Ninth Circuit employed here. In *Maryland* v. *U.S. Department of Agriculture*, --- F.4th. ---, No. 25-1248, 2025 WL 2586795 (4th Cir. Sept. 8, 2025), the Fourth Circuit struck down a

preliminary injunction based on a "fatal disconnect between the plaintiffs' alleged injury and the sweeping relief they requested." *Id.* at *7. This issue, the court explained, was not "an error on the merits as to the 'scope of relief' granted by the district court," but "a redressability problem" under Article III. *Id.* Article III requires courts to "ensure[] that the proper parties are seeking the proper relief to redress their injuries." *Id.* (quotation marks omitted). When a plaintiff's "requested relief [is] ultimately aimed at vindicating the rights" of non-parties, Article III precludes courts from extending relief "far beyond the 'inadequacy that produced [the] injury in fact.'" *Id.* at *9 (quoting *DaimlerChrysler*, 547 U.S. at 353).

The Fifth and Sixth Circuits are in accord. The Fifth Circuit has invalidated broad injunctions that "accomplish more than remedying [the plaintiff's] injury." *Carter* v. *Local 556, Transp. Workers Union of Am.*, 138 F.4th 164, 205 (5th Cir. 2025). Such overbroad injunctions, the court observed, violate federal courts' "constitutionally prescribed role * * * to vindicate the individual rights of the people appearing before it." *Id.* (quoting *Gill*, 585 U.S. at 72-73). Similarly, the Sixth Circuit has repeatedly struck down—as a jurisdictional matter—injunctions that are not properly "limited to the inadequacy that produced" the plaintiff's injury. *See, e.g.*, *Universal Life Church Monastery Storehouse* v. *Nabors*, 35 F.4th 1021, 1031-34, 1037-38 (6th Cir. 2022) (quoting *DaimlerChrysler*, 547 U.S. at 353); *see also Tennessee Conf. of NAACP* v. *Lee*, 139 F.4th 557, 567-568, 570 (6th Cir. 2025); *Kentucky* v. *Yellen*, 54 F.4th 325, 341 n.12 (6th Cir. 2022).

This Court's intervention is urgently needed to bring the Ninth Circuit in line

with this Court's precedents and other circuits. This is not the first time the Ninth Circuit has incorrectly dismissed standing concerns as merits questions. *See, e.g.*, *Seattle Pac. Univ.*, 104 F.4th at 63. That court's continuing failure to properly apply Article III's constraints had momentous consequences here. The ruling below affirms a sweeping injunction impacting hundreds of thousands of non-parties at the behest of a single plaintiff who never purported to represent a Rule 23 class—with no court having squarely considered whether that plaintiff proved standing to obtain each form of relief.

That Epic did not prove its standing is not a close call. The injunction—per Epic's request—requires Google to make sweeping changes to its billing and anti-steering policies, which apply only to apps distributed through Play. *See, e.g.*, 5-ER-1008; 6-ER-1272-73. Yet Epic made *no* showing it was likely to be injured in the future by these policies because it has no apps on Play and offered no evidence of any plans to return to Play. *See, e.g.*, 5-ER-976; 5-ER-991. Meanwhile, the success of the injunction's catalog access and store-distribution remedies fundamentally depends on the reactions of third-party app stores, developers, OEMs, and users. 4-ER-771; 4-ER-775-777. But Epic put forth *no* factual evidence concerning how these independent actors would likely respond to its proposed measures. *Id.*

These failures should have precluded Epic's ability to seek these remedies. *See, e.g.*, *Murthy*, 603 U.S. at 57-58, 73. But the District Court declined to assess standing. *See generally* 3-ER-434-572; 2-ER-220-374; 1-ER-7-23. Nor did the Ninth Circuit engage in the required standing analysis. App. 65a-67a. With respect to

billing policies, the panel made no attempt to assess whether Epic had proven a "real and immediate threat of repeated injury" in "the near future," *Murthy*, 603 U.S. at 58; it noted only that Epic had suffered a single injury in the *past*, App. 66a. Nor did the panel identify any findings to support *Epic's* standing to seek the anti-steering remedy. App. 66a-67a (noting only that the district court found anti-steering restrictions hindered competition in the defined markets). And the panel expressly refused to evaluate Epic's standing to seek the duty-to-deal remedies. App. 66a.

This Court routinely reviews standing questions in cases with far-reaching consequences. *See, e.g.*, *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 417-418 (2021); *Murthy*, 603 U.S. at 48-50; *Carney* v. *Adams*, 592 U.S. 53, 58 (2020). There is a reasonable probability the Court will follow that course here.

II. ABSENT A STAY, GOOGLE AND THE ANDROID ECOSYSTEM WILL SUFFER IRREPARABLE HARM.

Google, developers, and consumers will all suffer immediate irreparable harm absent a stay. Given the prospect that this Court will review and reverse Epic's unprecedented injunction, preserving the status quo is the prudent course. The Ninth Circuit's denial of Google's request to stay the injunction pending certiorari fails to grapple with the undisputed record or the District Court's own statements.

An injunction threatens irreparable harm when its consequences would be "difficult—if not impossible—to reverse." *Hollingsworth*, 558 U.S. at 195. That is the case here, where the severe security risks of implementing the injunction threaten developers and users, and will additionally inflict reputational injury and competitive disadvantage to a brand that Google has spent nearly three decades and massive

resources to develop. A favorable ruling from this Court cannot undo the competitive disadvantage caused by this loss of goodwill and user and developer trust. *See Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) (identifying competitive disadvantage as a form of irreparable harm). Google's stay application is focused on the provisions of the injunction (¶¶ 9-12) that are most likely to cause irreparable harm while this Court's review is pending.

A. The Injunction Exposes Users And Developers To Substantial New Security Risks.

1. Linkouts. Google engineers, cybersecurity experts, and former national security officials have all detailed how the injunction provisions related to providing users external links make users vulnerable. As the Android head of security has explained, "[s]ophisticated malicious actors" will "engage in bait-and-switch strategies to gain users' trust before exposing them to harmful content via links." 2-ER-206. "These potential threats are real; they can threaten user privacy and security, and also disrupt businesses and government agencies." *Id.* Former national security officials agree: Malicious "state and non-state actors are continually developing ever more effective methods of persuading these users to click on malware." CA9 Dkt. 48.2 at 18.

Beyond the risk of stolen data, users can be subject to blackmail and surveillance that has irrevocable, real-world consequences on users' careers or personal lives. *Id.* at 12; CA9 Dkt. 55.1 at 14. Links can easily direct users to sites that "appear legitimate," but instead "trick[] users into installing malware, direct[] users to provide sensitive financial and personal information, steal[] users' data, [or]

track[] users' activities on the Internet." CA9 Dkt. 229.1 at 10; *see also* CA9 Dkt. 242.1 at 10-13 (Center for Cybersecurity Policy and Law discussing similar risks). As cybersecurity experts have explained, these problems are even more severe for the links ordered here: Because "Google has spent years cultivating a secure user experience within the Play Store and the applications available on Play," users are preconditioned to trust content provided in Play-distributed apps. CA9 Dkt. 49.3 at 21. The judiciary recently learned this firsthand, when malicious actors leveraged the CM/ECF system's trusted brand to send users to malicious sites that collected sensitive personal information and infected their devices with malware. CA9 Dkt. 229.1 at 7.

The risks of linkouts are all the more concerning because the injunction already requires Google to permit developers to exclusively use their own external payment system, which itself injects substantial security risks. Under both remedies, unvetted third parties can collect "highly sensitive information from users, including credit card numbers, addresses, email addresses, bank account numbers, and more." 1-ER-207. All this "[i]ncreased data collection yields increased opportunities for data breaches," even setting aside the many risks of third-party billing options run by bad actors. *Id.*

"Proactive measures are crucial" for abating these risks because "trying to undo compromised data is like putting toothpaste back in the tube." 2-ER-206. Yet, the injunction's linkout provisions deprive Google of "visibility into activity at the app level, hindering integrated cybersecurity risk management." CA9 Dkt. 230.1 at 11.

2. Catalog Access. The catalog-access requirement substantially compounds these problems. Google has never before offered to make Play's extensive catalog of millions of apps appear in third-party app stores. 2-ER-184. For good reason: There are hundreds of Android app stores, many of which contain content that is scammy at best and malicious or pornographic at worst. *See, e.g.*, CA9 Dkt. 49.3 at 29 (example of app that spoofed streaming service to steal sensitive data); CA9 Dkt. 230.1 at 11 (discussing how third-party app stores continued to distribute apps that the Play store deemed malicious). The injunction would only worsen this phenomenon. Unfettered access to Google's catalog of millions of apps would allow anyone with an internet connection to "set up a shell third-party 'store' and populate it with apps." 1-ER-208. As computer security experts have explained, the catalog-access remedy "will lead to the proliferation of substandard app stores that can rely upon Google's backend work to hawk their wares." CA9 Dkt. 229.1 at 12.

Moreover, if other app stores suddenly have Play's millions of apps, the stores can pose as legitimate (or even appear to be Play itself) without having to develop the capacity or reputation for security that leads to developer trust. 2-ER-427-429; 2-ER-208. This will undermine the user experience and Play's brand value. D. Ct. Dkt. 1020-2 at 5-6. The injunction does not provide any details about Google's ability "to vet third-party app stores, or otherwise set eligibility criteria" necessary to "obtain access to the apps in Google's catalog." 2-ER-184. Users would thus bear the burden of discerning between safe and unsafe stores without being able to use a store's catalog as a guide. 2-ER-208.

Developers too would be saddled with additional burdens, constantly monitoring dozens or hundreds of stores that might suddenly carry their apps without their knowledge. *See, e.g.*, CA9 Dkt. 68.2 at 13-15 (small developers explaining burdens from injunction). Developers would also have to monitor for "clone apps"—apps that disguise themselves as a popular app, but are actually malware, able to access a device's personal data, send and receive text messages, record audio, and operate the device's camera. CA9 Dkt. 229.1 at 13-14. A developer's decision to opt out of a particular store would not prevent pirated versions of its apps appearing alongside millions of legitimate apps.

3. Store Distribution. The store-distribution requirement goes even further, effectively requiring Google to endorse stores that might be full of harmful content, ranging from malware that can scam or extort users to pornography and hate speech. 2-ER-209-213. Well-meaning stores may create many of the same issues as malicious ones: unsophisticated store operators (like those propped up by the catalog-access remedy) who do not maintain robust security reviews "risk disseminating out-of-date apps with critical security deficiencies." CA9 Dkt. 229.1 at 15.

Although the injunction allows Google to engage in at least some vetting of the stores it must distribute, it hobbles Google's ability to effectively screen those stores by permitting only screening measures that are "strictly necessary and narrowly tailored." App. 70a. That standard is antithetical to the purpose of security screening, which is "prophylactic" and therefore "err[s] on the side of protecting users from potentially dangerous content and risky features in order to prevent security

breaches before they occur." 2-ER-211.

Even without the injunction's limits on Google's security measures, the store-distribution remedy would create substantial risks for users. Google cannot maintain full "visibility and signals from third-party store interactions" and stores may change their content *after* launch on the Play store. 2-ER-212. Moreover, creating an expanded security and enforcement program to reach other stores—and all their apps—"will reduce the resources available to allocate the Play store, making Google's customers less safe." *Id*.

B. The Injunction Will Inflict Irreparable Harm On Google.

These enormous vulnerabilities would irreparably harm Google by inflicting these harms and risks on over 100 million U.S. Play users and 500,000 app developers. Some users would blame the source of the app that caused them problems—the Play store—for failing to keep them safe. D. Ct. Dkt. 1020-2 at 4. These vulnerabilities will also "deteriorate user trust in the broader Android ecosystem and erode Google's reputation," making users "likely to stop using the Play store and * * * even switch away from Android devices to iPhones." *Id.*

Moreover, it is undisputed that implementing the injunction will require Google to incur immediate, substantial, and unrecoverable expenses in modifying its products—itself, an irreparable harm. *Nat'l Insts. of Health* v. *Am. Pub. Health Ass'n*, 606 U.S. ---, 2025 WL 2415669, at *1 (2025); *Ala. Ass'n of Realtors* v. *DHHS*, 594 U.S. 758, 765 (2021) (per curiam). Epic's own experts acknowledged these costs in the proceedings below, 2-ER-228; as did the District Court, 2-ER-238-239. Nor has Epic

ever suggested that, if Google prevailed on appeal, it could somehow recoup the costs of changing its policies, designing new products, and negotiating new agreements. To the contrary, the injunction's short compliance timeline all but guarantees that the costs of complying with the injunction would be "irrevocably expended" "before this Court will be able to consider and resolve applicants' claims." *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers). Similarly irreparable is the uncertainty and confusion that would be caused in the market if Google were to make the sweeping changes required by the injunction, only to revert them upon receiving a favorable decision from this Court.

Nor are these risks hypothetical. Apple already portrays Android as less safe than iOS. 5-ER-1230-32. Epic's own expert acknowledged that "Apple attacks Google for a lot of different reasons," and perpetuates a "marketing narrative" on iOS providing more users with more advanced security than Android. 5-ER-1231-32. This injunction would fuel that narrative.

The Ninth Circuit's disregard of these security risks is unjustified. The panel rejected Google's security arguments as inconsistent with "trial testimony," App. 123a-124a, and the District Court's conclusions, *id.*; App. 64a-65a. But the jury verdict *pre-dates* Epic's proposed injunction and thus has nothing to say about the security risks of these provisions. Thus, it is no surprise that neither the panel nor Epic have ever been able to cite *any* findings concerning the security risks that the injunction raises. On the contrary, the District Court *conceded* that the injunction posed "security and technical risks" that it could neither identify nor solve. App. 83a.

The court decided to defer all these issues for a technical committee to address in the first instance at some unspecified point in the future. *Contra* App. 123a. But cybersecurity problems like data breaches cannot be resolved later on—they must be anticipated and addressed at the front end because "trying to undo compromised data is like putting toothpaste back in the tube." 2-ER-206.

Google also faces the loss of its legitimately derived comparative advantages over other Android app stores. Although the panel acknowledged that at least *some* of Google's network effects arose out of Google's early-mover advantage, the panel greenlighted a remedy that dismantled Google's network effects without any meaningful effort to isolate whether or to what extent the network effects are consequences of anticompetitive conduct. *Supra* at 23-30; App. 48a-49a.

III. THE REMAINING EQUITABLE FACTORS FAVOR A STAY.

The public interest and the balance of the equities also strongly favor a stay. As the foregoing makes clear, these remedies will have enormous consequences for over 100 million U.S. Android users and over 500,000 developers. Former national security enforcers have warned that the injunction will "hamstring" Google's ability to serve as "an able partner in protecting Americans' cybersecurity" and that "[e]ven one mis-clicked link can have catastrophic results, allowing malicious actors to access Android devices and data." CA9 Dkt. 212.2, at 2, 7. And a group of cybersecurity expert academics have confirmed that "the harms to the security of Android users are drastic and cannot reasonably be limited through risk-mitigation strategies." CA9 Dkt. 229.1, at 6-7.

The market will also benefit from a stable backdrop while this litigation proceeds. Because Epic proceeded outside of Rule 23's strictures for class actions, there is no established mechanism for notifying all the thousands of non-parties affected by this injunction and providing them with guidance. It will cause substantial confusion for market participants to be subject to uncertainty while this Court's review proceeds. *Cf. Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Secs., Inc.*, 582 U.S. 497, 512 (2017) (noting "uncertainties" can "caus[e] destabilization in markets").

Epic cannot reasonably claim it faces substantial harm. Epic chose to relaunch its Android store before it even knew what the District Court's injunction would say and may continue to operate that store as it currently does throughout this Court's review, just as it has done throughout the Ninth Circuit proceedings. Moreover, Google is not seeking to stay the provision of the injunction requiring Google to allow developers to offer their own payment processing system in lieu of Google Play Billing. To further mitigate any harms to Epic, Google has committed to filing its certiorari petition in half the allotted time under this Court's rules, by no later than October 27. This will permit the case to be heard this Term.

CONCLUSION

This Court should enter a stay pending certiorari of Paragraphs 11-12 of the permanent injunction entered by the District Court in this case, and Paragraphs 9-10 of that injunction to the extent they require Google to allow developers to offer linkouts. Google respectfully requests a ruling on this case by Friday October 17, 2025, which is three business days before the first of the relevant remedies are

scheduled to take effect.

September 24, 2025

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