No. 25A354

In the Supreme Court of the United States

EPIC GAMES, INC.,
Plaintiff-Appellee,

v.

GOOGLE LLC, *et al.*,
Defendants-Appellants.

**BRIEF OF AMICUS CURIAE
THE COMMITTEE FOR JUSTICE IN SUPPORT OF APPELLANTS' APPLICATION FOR STAY PENDING CERTIORARI
TO THE HONORABLE ELENA KAGAN, CIRCUIT JUSTICE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

John M. Reeves
REEVES LAW LLC
7733 Forsyth Blvd., Suite 1100–#1192
St. Louis, MO 63105
(314) 775-6985
reeves@appealsfirm.com
Attorney for Amicus Curiae
The Committee for Justice

October 2, 2025

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

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

CFJ has a critical interest in the outcome of this litigation. The Ninth Circuit's opinion affirms a radical form of liability and an extreme remedy upon Google that penalizes it for rising to the top of the market in the area of selling smartphone apps using innovation and business acumen by forcing it to open its Play Store to its competitors, something this Court has repeatedly admonished against in the antitrust context. The opinion creates a watershed change in antitrust law, warping it from a law that fosters competition for the benefit of consumers into a law that mandates businesses deal with their rivals, to consumers' detriment. A stay of such an extreme remedy pending

[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person—besides *amicus curiae* and its counsel—contributed money that was intended to fund preparing or submitting this brief.

disposition of Google's forthcoming petition for a writ of certiorari is appropriate.

ARGUMENT

I. This Court is likely to grant certiorari and reverse the Ninth Circuit due to a split with other Circuits, and a failure to follow this Court's precedent.

Google's stay application thoroughly discusses the existence of a circuit split that warrants the granting of certiorari. CFJ will not repeat Google's discussion of those cases here. Rather, it directs this Court's attention to how the panel opinion also conflicts with the Tenth Circuit's holding in *Novell v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013) (Gorsuch, J.). What's more, the panel opinion cannot be reconciled with this Court's holding in *Verizon v. Trinko*, 540 U.S. 398 (2004). This makes it not only likely that certiorari will be granted, but also that Google has—at the very least—a fair chance at obtaining reversal.

A. Absent extraordinary circumstances not present here, courts cannot order businesses to deal with their competitors.

The panel opinion is quite striking in what it affirms Google must do. It mandates that Google open up its app store—something that it created through its own ingenuity and business acumen—to its competitors for no cost. It also orders Google to distribute its entire Play Store catalogue to its competitors so that they may sell such apps via their own stores. And it even requires Google to make available, in its own app store, app stores developed by other rivals. In other words, the panel opinion mandates that Google deal with its competitors. This is directly repugnant to the Tenth Circuit's holding in *Novell.* It is also repugnant to this Court's precedent holding that, absent the most extraordinary of circumstances, a company has no duty to deal with its competitors. See *Trinko*, 540 U.S. at 407.

1. The panel opinion conflicts with the Tenth Circuit.

The Tenth Circuit came to a similar conclusion in *Novell*. There, the future Justice Gorsuch noted that "[i]f the law were to make a habit of forcing monopolists to help competitors by . . . sharing their property . . . courts would paradoxically risk encouraging collusion between rivals and dampened price competition—themselves paradigmatic antitrust wrongs—injuries to consumers, and the competitive process alike." *Novell*, 731 F.3d at 1073. Nor is that all. "If forced sharing were the order of the day, courts would have to pick and choose the applicable terms and conditions." *Id*. This would require courts "to become 'central planners,' a role for which we judges lack many comparative advantages and a role in which we haven't always excelled in the past." *Id*. As will be discussed in more detail below, Google developed the Play Store to serve its users thru its own ingenuity, intellectual labor, investment, and business acumen. The Play Store, then, is unquestionably

Google property. Therefore, as in *Novell*, courts may not compel Google to share such property with others.

2. The panel opinion conflicts with this Court's precedent.

Trinko articulates an important clarification from this Court as to the ultimate purpose of antitrust law—its purpose is not to do away with monopoly power as such, but rather to ensure that firms only acquire or use that power in a manner that does not harm consumers. There, a Verizon phone customer brought suit against the company alleging that, by failing to open its service area to its competitors as part of a new mandate under the Telecommunications Act, it had attempted to gain an unlawful monopoly in the telecommunications market. *Trinko*, 540 U.S. at 401-05. The Court would have none of it. A monopoly alone is insufficient to create antitrust liability. It "requires, in addition to the possession of monopoly power in the relevant market, the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id*. at 407 (cleaned up).

In other words, "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, it not only not unlawful; it is an important element of the free-market system." *Id*. And "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."

Id. In language that seems tailor-made for Google's app store, the Court emphasized that "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." *Id*. That is exactly what Google did here by creating a one-stop shop for all apps that is safe, secure, and convenient. The ease of use and peace-of-mind that results from the Play Store is not only a great benefit to Play Store's users but also a source of competitive advantage for Google. "Compelling such firms [i.e., Google] to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id.*

Google came to the dominance of the Android app market with its Play store through its own business ingenuity and acumen. It did not do so as a result of any anticompetitive conduct. As such, Google had every right to leverage this dominance as a means of reaping the fruits of its labor and recovering the cost of Play store's development. But instead of allowing Google to realize these earned benefits, the panel opinion affirmed that it must essentially do away with the very costly infrastructure it created and which was responsible for its legitimate success in the first place. And even worse, the panel opinion mandates that a court-supervised commission be set up to monitor whether Google is, in fact, literally giving its app store away to its competitors. But such "[e]nforced sharing . . . requires antitrust courts to act as central planners . . . a role for which they are ill suited." *Trinko*, 540 U.S. at 408. Courts have no business getting involved in planning the already-stable, consumer-friendly Android app market as only the market possesses such knowledge.

While this Court has also recognized that there can be circumstances in which a business can be forced to deal with its competitors, such circumstances are "at or near the outer boundary of [Sherman Act] liability." *Id.* at 409 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)). If, for example, a defendant unilaterally stops voluntarily dealing with its competitors, when, up to that point, it had been doing so at a profit, this could "suggest a willingness to forsake short-term profits to achieve an anticompetitive end." *Id*. But such circumstances are not present here as at no time did Google voluntarily withdraw itself from or change in any way its previous dealings with any of its competitors.

In short, the panel opinion mandates that Google deal with its competitors under circumstances far beyond the outer limits of this court's decision in *Aspen Skiing*. This, along with its conflict with the Tenth Circuit in *Novell*, make it likely that this Court will grant certiorari here.

B. The rule of reason mandates that the plaintiff prove the defendant could have achieved its procompetitive benefits through less restrictive means.

The Sherman Act outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. But restraints like the one at issue here—vertical restraints at different levels of distribution—are evaluated under the rule of reason. *Ohio v. American Express Co.*, 585 U.S. 529, 540-41 (2018). The rule of reason's "goal is to 'distinguis[h] between restraints with anticompetitive effects that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" *Id.* at 541 (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)).

Typically, the rule of reason involves a three-step, burden-shifting test. Under Step 1, "the plaintiff has the initial burden to prove the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* If the plaintiff demonstrates this, the burden then "shifts to the defendant [under Step 2] to show a procompetitive rationale for the restraint." *Id.* If the defendant shows that a procompetitive rationale justified the restraint under Step 2, "the burden [then] shifts back to the plaintiff to demonstrate [under Step 3] that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* at 542.

While this Court later clarified that "[t]hese three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis," *NCAA v. Alston*, 594 U.S. 69, 97 (2021), it emphasized that "however 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. Thus, Steps 2 and Steps 3 could "be collapsed into one," given that 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 Philip Areeda and Herbert Hovenkamp, *Antitrust Law*, ¶ 1505, at 428 (2017), *quoted in Alston*, 594 U.S. at 100. In other words, while the three-step analysis is not a "rote checklist," it is still essential that, if the defendant demonstrates a pro-competitive rationale for the restraint, the plaintiff must demonstrate that less restrictive means are available to supply the identical pro-competitive rationale in order to eliminate the restraint. The lower courts wrongly relieved Epic of this burden to demonstrate a less restrictive means Google could have employed to achieve the procompetitive benefits.

II. Absent a Stay, Google Will Suffer Irreparable Harm.

A. This injunction will cause Google irreparable reputational harm.

The district court's injunction threatens irreparable reputational harm to Google by undermining the trust and goodwill it has built with consumers, developers, and regulators. Courts recognize that "intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm" because they cannot be undone by later monetary relief. *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

Google has invested billions in creating and maintaining the Google Play Store as a secure, curated marketplace. Its reputation for safety and reliability is a key competitive differentiator. The injunction's compelled catalog access and store distribution remedies—forcing Google to distribute rival app stores and provide access to its vast app catalogue built up over a decade would allow malicious actors to present themselves as legitimate, dramatically heightening the risk of malware, spyware, ransomware, and other threats.

Even isolated breaches would irreparably tarnish Google's reputation as a trusted steward of Android security. Courts have repeatedly held that the loss of consumer trust and goodwill constitutes irreparable harm. *Stuhlbarg*

Intern. Sales Co., Inc. v. John D. Brush and Co., Inc., 240 F.3d 832, 841 (9th Cir. 1991) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."). Once consumers, developers, and regulators perceive Google as unable to protect user data, no damages award could restore that confidence.

This reputational injury extends to Google's relationships with developers and device manufacturers, many of whom partner with Google precisely because of its rigorous security standards. If the Play Store is compromised, those partners may defect to rival platforms, further diminishing Google's standing. Moreover, regulators—already focused on app-based cybersecurity vulnerabilities—may view Google as incapable of maintaining its ecosystem's integrity, compounding the reputational harm with additional oversight costs.

Thus, the injunction would cause irreparable harm by eroding consumer and developer trust and damaging Google's goodwill in ways that monetary remedies cannot repair.

B. This injunction will irreparably harm Google's ability to compete in the smartphone marketplace.

The injunction also imposes irreparable competitive harm by compelling Google to share the fruits of its innovation with rivals under terms devised by judicial fiat. As noted above, this Court has warned that "[e]nforced sharing

… requires antitrust courts to act as central planners, a role for which they are ill suited." *Trinko*, 540 U.S. at 408. Forced access is "at or near the outer boundary" of Sherman Act liability, permissible only in "extraordinary" circumstances such as *Aspen Skiing*. *Trinko*, 540 U.S. at 409. Those circumstances are absent here, where Google has never voluntarily distributed its app catalog to competitors.

By mandating catalog sharing and compelled distribution of rival stores, the injunction effectively requires Google to act as marketer and distributor for its competitors. This forced dealing deprives Google of the competitive returns on its multibillion-dollar investments in Play and allows rivals to free-ride on its infrastructure. Courts have long recognized that losses of this nature—market share, business opportunities, and dilution of competitive advantage—constitute irreparable harm. See *Rex Med. L.P. v. Angiotech Pharms. (US), Inc.*, 754 F. Supp. 2d 616, 621 (S.D.N.Y. 2010) (competitive disadvantage constitutes irreparable harm.

The competitive harm is compounded by security risks. If Google is compelled to distribute rival app stores that propagate malware or harmful content, consumers may exit the Android ecosystem altogether, undermining Google's ability to compete with Apple and others. In this way, the injunction penalizes Google for maintaining an open platform while perversely rewarding rivals that bear no equivalent responsibility for ecosystem-wide security.

Moreover, the injunction risks setting a precedent whereby successful technology companies are compelled to cede their platforms to rivals. As the D.C. Circuit explained in *United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001) (en banc), antitrust remedies must be "tailored to eliminate the consequences of the illegal conduct." Here, the injunction sweeps far beyond that principle by stripping Google of its legitimately earned competitive advantages. That outcome reduces incentives to innovate, paradoxically risking "encourage[ed] collusion between rivals and dampened price competition—themselves paradigmatic antitrust wrongs . . . ." *Novell*, 731 F.3d at 1073.

Such distortions to the competitive process are the very definition of irreparable harm. Again, this Court has emphasized "[t]he antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'" *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328, 338 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). By forcing Google to deal with rivals in ways that undermine its ability to compete long-term through reduced innovation, the injunction subverts that principle of the Sherman Act and causes harm that cannot be remedied after the fact.

III. The public interest and the balance of the equities favor a stay.

A. Antitrust policies that incentivize innovation serve the public interest.

The consequences of the panel opinion's error extend well beyond app distribution. By nullifying the rewards of successful innovation, the decision removes incentives to compete in the first place. If the lesson to firms is that building a better platform will result not in rewards but in forced sharing with rivals, rational actors will reduce investment in innovation. As Hayek and his successors warned, such intervention dulls entrepreneurial discovery and suppresses the trial-and-error process by which markets advance. That chilling effect could not come at a worse time for American technological leadership. The Trump Administration's "Winning the AI Race: America's AI Action Plan," unveiled July 23, 2025, emphasized that U.S. dominance in AI and related technologies is not only an economic imperative but a national security priority. *See* Trump Administration, *Winning the AI Race: America's AI Action Plan* (2025), *available at* bit.ly/4gVmKgT. Weakening the incentives of firms like Google to innovate directly threatens America's ability to maintain technological superiority in AI, cybersecurity, and other domains critical to national security. If allowed to spread, the logic of the panel's decision risks killing American innovation in toto.

It also bears emphasis that Google achieved its success legitimately. It did not steal the Play Store concept or copy another firm's technology. It built its ecosystem through hard-won innovation, technical and business know-how, and substantial financial investment. Google got in on the ground floor of the app market—indeed, it practically created the market for apps in the first place. That is the quintessential path by which antitrust law permits a firm to achieve dominance. Compelling such a firm to share the fruits of its success reduces incentives for any firm to take risks and innovate. See *Trinko*, 540 U.S. at 408. Far from promoting the competitive process, forced sharing ensures that rivals need not compete vigorously; they can simply petition courts to reallocate what they failed to earn in the marketplace.

Thus, policy considerations strongly counsel in favor of granting a stay. Once the genie is out of the bottle and Google is forced to open up its app system to its competitors, there is no way to undo its effects. All of Google's hard work and innovation over more than a decade-and-a-half will be wiped out immediately. This will disincentivize technological innovation going forward on numerous fronts—in both the civilian and military context—as other amici have correctly noted.

The American public has come to expect this level of innovation. This injunction risks those expectations going unrealized. If there is no guarantee that technological innovators will be able to enjoy the fruits of their hard work and use the advantage that such innovation brings to them to gain a competitive edge in the market, then why even bother innovating in the first place? It will not be worth spending one's lifetime and resources innovating if a court can comply come in, punish such innovators for being successful, and micromanage how they are to deal with their competitors.

B. The balance of the equities in the antitrust context favors promoting competition, not individual competitors.

Antitrust law protects competition, not individual competitors. *Atlantic Richfield*, 495 U.S. at 338. In other words, it does not serve to punish businesses like Google for rising to the top of their respective industries as a result of their innovation and legitimate business decisions. So long as a business like Google has achieved its market dominance through conduct that is not itself anticompetitive and that does not itself violate the rule of reason, they may continue to maintain this market dominance even if the result is that other market participants—such as Epic—are unable to achieve the same level of success, and even if such participants are eventually unable to continue their business at all. *See id* at 337-38.

Given this underlying purpose of antitrust law, and how the panel opinion effectively punishes Google for being legitimately earning its success, the balance of equities favors a stay.

CONCLUSION

This Court should stay the injunction while the petition for certiorari is pending and, if granted, until the court renders its decision.

Respectfully submitted,

/s/ John M. Reeves
John M. Reeves
REEVES LAW LLC
7733 Forsyth Blvd., Suite 1100–#1192
St. Louis, MO 63105
(314) 775-6985
reeves@appealsfirm.com
Attorney for amicus curiae The Committee for Justice