No. 25A354

In the Supreme Court of the United States

GOOGLE LLC, *et al.*,

Applicants,

v.

EPIC GAMES, INC.,

Respondent.

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

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

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL CENTER FOR LAW & ECONOMICS IN SUPPORT OF APPLICATION FOR STAY

WESLEY R. POWELL
Counsel of Record
MATTHEW FREIMUTH
WILLKIE, FARR & GALLAGHER
787 SEVENTH AVENUE
NEW YORK, NEW YORK 10019
TELEPHONE: (212) 728-8000
WPOWELL@WILLKIE.COM

JONATHAN PATCHEN
COOLEY LLP
3 EMBARCADERO CENTER
20TH FLOOR
SAN FRANCISCO, CA 94111

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The International Center for Law & Economics ("ICLE") is a nonprofit, nonpartisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law and economics methodologies and economic learning to inform policy debates and has longstanding expertise evaluating antitrust law and policy.

ICLE has an interest in ensuring that antitrust law promotes the public interest by remaining grounded in sensible rules informed by sound economic analysis. That includes advising against improperly excessive antitrust remedies that could deteriorate the quality of mobile ecosystems, thereby harming the welfare of consumers and app developers.

SUMMARY OF ARGUMENT

Courts are not central planners. Broad, market-altering injunctions should rarely be granted in antitrust cases. And such injunctions should be exceedingly rare in single-plaintiff, private antitrust suits. Yet here the district court issued an injunction that would fundamentally reshape the Google Play ecosystem for all participants. And the Ninth Circuit affirmed that injunction. This Court should grant Google's application to partially stay the district court's injunction for three reasons.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief.

First, the injunction imposes a duty to deal with competitors, a measure rejected by this Court in all but the most extreme circumstances. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). In affirming that injunction, the Ninth Circuit brushed *Trinko* aside, stating that it addressed the question of "liability" for a refusal to deal, not the question of an appropriate "remedy" after a finding of liability. But the Court has recently made clear that its concerns in *Trinko*—deterring investment, inviting regulatory supervision, and enlisting courts as "central planners"—apply equally to remedies. *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 102-03 (2021) (quoting *Trinko*, 540 U.S. at 415). *Trinko*'s skepticism about forced sharing is rooted in both the difficulty of crafting and supervising such remedies and the market distortions they are likely to produce. 540 U.S. at 408, 411, 415. The complex and burdensome order below only underscores such difficulties.

Second, the district court's injunction mandates that Google make fundamental changes to the Google Play ecosystem without establishing the requisite causal relationship between the ordered relief and the conduct that was found unlawful. As a general rule, courts reject remedies untethered from the conduct they are supposed to address. Thus, courts properly require a significant causal connection between a particular violation and the terms of the order that may be imposed to remedy it. *See United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001).

Here the district court's order establishes no such connection: Its rationale for the app-store distribution provision is a single paragraph focused on a single witness; its catalog-access provision is justified largely by loose and highly generalized network-effects rhetoric—not by proof that the mandate will remedy the violation, least of all for developers not party to the suit. Based on a finding of harm to a single plaintiff, the injunction would require a universal redesign of Google Play. While this may benefit some developers, it would manifestly harm many others. Yet the court did not establish that this intervention was either proportionate or necessary to remedy the adjudicated injury.

Third, the overbroad injunction exceeds the scope of relief appropriate for private antitrust litigation, *see Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111–13 (1986), and it exceeds the scope of the district court's authority it issue injunctions designed to provide "relief" to non-parties, *see Trump v. CASA, Inc.*, 606 U.S. 831 (2025). *CASA* emphasizes the general impropriety of sweeping, system-wide relief affecting non-parties with heterogeneous interests. And its focus on the "party-specific principles that permeate [the Court's] understanding of equity," *id.* at 844, applies with particular force in private antitrust suits governed by procedural limits (antitrust injury) that aim to ensure that courts address only direct injuries to specific plaintiffs.

The injunction here would not only force Google to aid its direct competitors by granting them a privileged position in its Android operating system, but it would also

redesign Android for more than 100 million non-party U.S. users and 500,000 non-party app developers. In turn, that remedy would potentially expose users and app developers to lax data security, ecosystem fragmentation, increased risks of fraud and piracy, and the degradation of platform value these mandated changes would entail.

The harms threatened by the injunction are immediate and irreversible: a fundamental restructuring of the Android ecosystem, an erosion of user trust, and a permanent alteration of relationships with developers and device manufacturers. By imposing novel, quasi-regulatory duties on Google that are not borne by its chief competitor, the injunction threatens to distort the competitive landscape, chill incentives for platform innovation, and, ultimately, harm consumers by degrading a major product in the market. Accordingly, a stay is warranted both to protect Google from irreparable harm and to help ensure that a contested remedy does not itself become a source of anti-competitive instability before its legal and economic implications are fully reviewed.

ARGUMENT

I. THE DISTRICT COURT'S DUTY-TO-DEAL INJUNCTION IS IMPROPER

The district court's injunction mandates that Google deal with rivals. *Trinko* strongly cautions against such mandates. The Ninth Circuit addressed *Trinko* by suggesting that it does not apply because the *Trinko* Court was concerned solely about *liability*, not *remedies*. App. 45a-46a. That is wrong. Rather, as this Court

explained in *Alston*, *Trinko*'s concerns about chilling investment, facilitating collusion, and forcing courts to act as "central planners" "apply" when courts craft antitrust remedies. 594 U.S. at 102 (quoting *Trinko*, 540 U.S. at 415). *Trinko*'s reluctance to impose a duty to deal rests not only on the problems of finding liability for a refusal to deal, but also of imposing a viable remedy mandating such a duty: "The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency." 540 U.S. at 415 (cleaned up). Indeed, the risk of a remedial morass fundamentally animates the decision because it is the *remedy* (forced sharing) that raises the specters of blunted future incentives (for the defendant and for rivals), ongoing judicial oversight, and the suppression of procompetitive innovation. *See id.* at 407-08; 414-15; *see also Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (Gorsuch, J.).

Compelling a firm to deal with rivals on court-supervised terms creates the very anticompetitive harm that refusal-to-deal doctrine protects against, effectively short-circuiting the rule-of-reason analysis. A remedy that mandates the distribution of app stores is tantamount to a determination that the *failure* to distribute constitutes a violation of the law; and imposing a duty to deal without a showing of anticompetitive effect imposes liability by inference. *See* Herbert Hovenkamp, *Unilateral Refusals to Deal, Vertical Integration, and the Essential Facility Doctrine,* U. Iowa

Leg. Stud. Rsrch. Paper No. 08-31, 28 (Jul. 14, 2008), http://bit.ly/33Q5fIM ("[Unilateral refusal to deal under §2] comes dangerously close to being a form of 'no-fault' monopolization."). Such a remedy also risks mistakenly condemning legitimate business arrangements, which is "'especially costly, because [it] chill[s] the very' procompetitive conduct 'the antitrust laws are designed to protect.'" *Alston*, 594 U.S. at 99 (quoting *Tinko*, 540 U.S. at 414).

II. THE DISTRICT COURT'S INJUNCTION IS NOT TAILORED TO THE HARM FOUND AT TRIAL

To ensure properly tailored remedies, courts have long required clear evidence of a strong casual connection between the competitive injury and the corresponding cure. Here, the Ninth Circuit observed that "the available injunctive relief" in antitrust cases "is broad." App. 42a-43a (quoting *Optronic*, 20 F.4th at 486). But that observation ignores that not all *available* remedies are *proper* ones. To the contrary, injunctive relief must rest on a "clear indication of a significant causal connection between the conduct enjoined or mandated and the violation found," and must be a reasonable method of remedying the proven harm. *Microsoft*, 253 F.3d at 105. The district court's injunction fails both the causal nexus and proportionality requirements.

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

In *Microsoft*, the D.C. Circuit vacated the district court's remedy because the district court failed to explain how the ordered relief would "unfetter [the] market from anticompetitive conduct," and because structural relief "designed to eliminate

the monopoly altogether" required a clearer indication of causation. 253 F.3d at 103, 106–07 (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972)). Here, the district court's remedy should have met the same fate. The court's justification for the app-store-distribution mandate is a single paragraph, anchored in one witness' testimony about sideloading friction and the number of steps some users encountered. Order re UCL Claim and Injunctive Relief, 12, *In re Google Play Store Antitrust Litig.*, 3:20-cv-05671-JD, Dkt. No. 701. App. 83a That explanation does not demonstrate that forcing Google to carry rival stores (as opposed to less intrusive alternatives) is causally tied to any proven violation.

The "catalog access" provision fares no better. The district court relied on network effects, but those are a feature of platform markets, not anticompetitive conduct to be rectified. *Id.* Treating network effects as a license for compelled access improperly converts a mundane, inherent market feature into a causal nexus. *See Microsoft*, 253 F.3d at 106–07 (requiring specific, demonstrated causal connection at the remedy stage, not conjecture); Catherine Tucker, *Network Effects and Market Power: What Have We Learned in the Last Decade?* ANTITRUST, 72–79 (Spring 2018) ("[N]ew findings suggest that network effects are not the guarantor of market dominance.").

More fundamentally, neither the district court nor the Ninth Circuit explained how either remedy is causally related to the alleged harm. Users can and do obtain apps through multiple channels, and rivals can compete for distribution of specific

apps without mirroring the entire catalog. In fact, the connection between the conduct to be remedied and the alleged harm was specifically disclaimed by Jury Instruction No. 24 at trial: "It is not unlawful for Google to prohibit the distribution of other app stores through the Google Play Store, and you should not infer or conclude that doing so is unlawful in any way." Final Jury Instrs., 33, *In re Google*, 3:20-cv-05671-JD, Dkt. No. 592.

The district court's injunction therefore lacks a causal nexus to Epic's alleged anticompetitive harm—and that applies *a fortiori* to third parties.

B. The injunction is disproportionate to the harm identified

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

The district court's injunction here goes far beyond "stopping" the allegedly exclusionary act; it mandates that Google create and maintain new modes of business—hosting rival stores and exposing Play's catalog—under continuing judicial supervision. But ordering a firm to expand or reconfigure facilities puts courts "nearly in the shoes of the regulator." Hovenkamp, *supra*, at 25. Such a remedy could be

proportionate only to the most severe, widespread, and pervasive anticompetitive conduct—nowhere near what was presented on the facts here.

A critical distinction also separates this case from *Microsoft* (and from classic precedents like *Associated Press v. United States*, 326 U.S. 1 (1945)): those cases addressed discriminatory restrictions that prevented others—intermediaries or members—from dealing with rivals. The appropriate remedy in those cases was to *prohibit* the discrimination and require equal terms for similarly situated actors. *See also Optronic*, 20 F.4th at 486 (injunction curing discriminatory terms). Here, by contrast, the district court's injunction mandates that Google provide a brand new form of access it has never offered: distribution of rival app stores in Play and wholesale access to its curated catalog. *Trinko* precludes a court from ordering a defendant to provide access to a competitor if the defendant is not already providing access elsewhere. *See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004). And this Court in *Associated Press* refused to embrace a "public utility concept" obliging a firm to deal with all newcomers; its remedy simply forbade discriminatory denial of admission. *See* Hovenkamp, *supra*, at 10–11.

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

This Court's precedents require that a remedy be tailored to the plaintiff's injuries—not those of non-parties. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111–13 (1986) (requiring antitrust injury "'that flows from that which

makes defendants' acts unlawful'" for injunctive relief under Section 16) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

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

The injunction thus runs counter to the rule that relief in private antitrust enforcement actions must be tailored to the plaintiffs' injury. Antitrust injunctions can incidentally affect non-parties. But the classic examples involve nondiscrimination obligations—in which equal treatment requires an order running across similarly situated customers or suppliers. *See, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483–86 (1992); *Optronic*, 20 F.4th at 486 (approving relief that eliminated discriminatory terms and ensured access on comparable terms). The district court's order here is categorically different: it imposes a new duty to provide across-the-board access where no such access was previously ever offered.

This Court's decision in *CASA* confirms that injunctive relief must be tailored to the parties before the court—not used to deliver *de facto*, class-wide remedies to non-parties. In *CASA*, the Court drew a sharp line between (i) injunctions that afford "complete relief *between* the parties," even if they "incidentally" advantage others, and (ii) injunctions designed to confer direct relief "to nonparties." *CASA*, 606 U.S.

at 851 (citation omitted); *see Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.").

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

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

Again, while a party-specific remedy here may properly yield *incidental* marketplace effects, equity forbids crafting an order for the purpose of conferring direct benefits on non-parties. Yet that is what the injunction does by mandating platform-wide entitlements for "all developers." The injunction thus exceeds its proper bounds even independent of the serious question whether it would confer benefits or harms on non-parties *on net*.

In that respect, the Ninth Circuit's reliance on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), is misplaced. *See* App. 62a. *Zenith* does not confer unfettered discretion to impose any remedy that may promote competition. Rather, while the antitrust remedy in that case went beyond the specific source of harm identified, it still applied to the same *locus* of harm—i.e., against likely conduct *by the same defendant against the same plaintiff*. *Zenith*, 395 U.S. at 131; *see id.* at 132 (citing *NLRB v. Express Publ'g Co.*, 312 U.S. 426, (1941)). But a broad injunction to prevent an end-run around the court's ruling *with respect to the specific plaintiff* is far afield from a market-wide injunction based on the claim of a single market participant.

Similarly, the Ninth Circuit erred in relying on this Court's statement that "district courts are 'clothed with "large discretion" to . . . pry open to competition a market that has been closed by defendants' illegal restraints.'" App. 42a (quoting *Ford Motor*, 405 U.S. at 573, 577–78). This Court has distinguished between the

government's role in obtaining broad, structural relief (as in *Ford Motor*) and the constraints on *private plaintiffs*—who must show antitrust injury, and whose relief must be tethered to their threatened loss. *See, e.g.*, *Cal. v. Am. Stores Co.*, 495 U.S. 271, 295-96 (1990) ("In a Government case, the proof of the violation of law may itself establish sufficient public injury to warrant relief. . . . A private litigant . . . must prove 'threatened loss or damage' to his own interests.") (citing *Cargill*, 479 U. S. 104). (And even government plaintiffs face limits. *See Microsoft*, 253 F.3d at 103, 106–07 (vacating remedy obtained by the Department of Justice)).

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

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to grant Google's application.

Respectfully submitted,
/s/ Wesley R. Powell
WESLEY R. POWELL

WESLEY R. POWELL
Counsel of Record

MATTHEW FREIMUTH
WILLKIE, FARR & GALLAGHER
787 SEVENTH AVENUE
NEW YORK, NEW YORK 10019
TELEPHONE: (212) 728-8000
WPOWELL@WILLKIE.COM

JONATHAN PATCHEN
COOLEY LLP
3 EMBARCADERO CENTER
20TH FLOOR
SAN FRANCISCO, CA 94111

Counsel for Amicus Curiae