No. 25A354

IN THE
Supreme Court of the United States

GOOGLE LLC, *et al.*,

Applicants,

v.

EPIC GAMES, INC.,

Respondent.

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

GARY A. BORNSTEIN
Counsel of Record
YONATAN EVEN
LAUREN A. MOSKOWITZ
MICHAEL J. ZAKEN
M. BRENT BYARS
CRAVATH, SWAINE & MOORE LLP
Two Manhattan West
375 Ninth Avenue
New York, NY 10001
(212) 474-1000
gbornstein@cravath.com

PAUL J. RIEHLE
FAEGRE DRINKER BIDDLE & REATH LLP
Four Embarcadero Center
San Francisco, CA 94111
(415) 591-7500

KEVIN RUSSELL
DANIEL WOOFTER
RUSSELL & WOOFTER LLC
1701 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006
(202) 240-8433

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Counsel for Respondent

IDENTITY OF PARTIES

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").

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Epic states that it has no parent corporation and that Tencent Holdings Limited owns more than 10% of Epic stock.

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TO THE HONORABLE ELENA KAGAN, AS CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

INTRODUCTION

For over a decade, the Google Play Store (the "Play Store") has been the overwhelmingly dominant means for Android users to obtain apps and for Android app developers to find users—because Google has unlawfully suppressed competition from all competing stores and other distribution channels. Google has used this unlawfully maintained monopoly to extract tens of billions of dollars from app developers—and their users—who were forced to use Google's in-app payment solution ("Google Play Billing" or "GPB") and pay Google up to 30% of every in-app transaction involving the sale of digital goods (*e.g.*, subscriptions, upgrades, etc.). In December 2023, after a three-week trial, a unanimous jury found that Google's conduct violated the Sherman Act. Following further extensive proceedings spanning nine months, the district court issued a targeted injunction designed to end the violations and restore competition to the affected markets. When Google appealed, the United States and the Federal Trade Commission filed a joint amicus brief urging the court of appeals to reject Google's key arguments. A Ninth Circuit panel carefully considered Google's objections and unanimously affirmed in a lengthy, thoughtful opinion. Google then sought rehearing en banc, but no judge requested a vote.

Google has now filed an emergency application, asking this Court to stay three provisions of the injunction pending this Court's decision on a petition for certiorari that Google intends to file later this month. But as Google grudgingly acknowledges in footnotes and brief passages of text, two of those three remedies

(Catalog Access and Store Distribution) do not take effect until ***July 2026***, long after this Court will have ruled on Google's petition. Google faces no cognizable harm, much less irreparable harm, from keeping that effective date on the calendar while this Court considers the forthcoming petition.

As for the remaining remedy—which requires Google to end its ban on in-app hyperlinks that allow users to download other apps or purchase digital goods (the "Linkout" remedy)—Google raises purported security concerns that were carefully considered and unanimously rejected by the jury, district court and court of appeals. The degree of security risk is a distinctly factual issue that was addressed, as it should be, based on the record developed at trial and the post-trial remedy proceedings, which proceedings included fact and expert declarations, depositions and live testimony at two evidentiary hearings. Google's attempt to backfill the record through scaremongering amicus briefs should be rejected, as should its request for this Court to second-guess the lower courts' assessment of the record evidence. In any event, the sky will not fall if links appear in apps; indeed, Google already allows links for certain purposes, such as purchases of physical goods and services.

Google's other objection to the Linkout remedy is purely financial. Google admits that linkouts would make it substantially easier for developers to offer their users competitive alternatives to the Play Store (for obtaining apps) and to Google Play Billing (for purchasing digital goods). Google knows that the availability of those alternatives will threaten its ability to continue charging supracompetitive prices. Thus, the supposed irreparable harm that Google asks this Court to address

through a stay is not a harm at all; it is the natural and intended consequence of increased competition.

Not only has Google failed to show any risk of irreparable harm warranting an emergency stay, but it has also failed to identify any issue in the case that could plausibly lead this Court to grant review, let alone reverse the judgment below. *First*, Google advocates an unprecedented interpretation of the rule of reason that would allow a monopolist to inflict massive anticompetitive harms as long as it could show a tiny procompetitive benefit from its conduct that could not be achieved in a substantially less restrictive way. No court of appeals has applied the rule of reason in this way, and there is no serious prospect that this Court would take this case to upend antitrust law by blessing such a rule. *Second*, Google's criticisms of the Catalog Access and Store Distribution remedies (which, as noted, do not come into effect until next summer) run headlong into longstanding principles of antitrust remedies that vest courts with discretion to address the ongoing adverse effects of a lawbreaker's misconduct. *Third*, Google's standing arguments mischaracterize the Ninth Circuit's opinion and the factual record, which make clear that Epic has standing to obtain each of the challenged remedies.

This Court should deny Google's application. The only thing a stay would achieve is further extending the year-long delay in implementing the district court's much-needed injunction—itself entered nearly ten months after the jury verdict—allowing Google to continue to shield its app store from competition and to reap monopoly profits at the expense of Android developers and users.

STATEMENT OF THE CASE

I. Google's Anticompetitive Conduct.

This case concerns Google's systematic campaign to eliminate competition in two distinct markets—the market for Android app distribution and the market for payment solutions to handle digital goods transactions in Android apps. Google employed what its executives internally referred to as a "combination of tactics" designed to avoid "competing on price," which "is prone to be a race to the bottom." 7-SER-1246. Google executives knew that competition was on the horizon because "[t]he size and margins of the market are making it attractive for new entrants," and they strategized about what to do "in the face of increasing app store competition on Android, both from [original equipment manufacturers ("OEMs")] . . . and other large platforms (like Epic)." 7-SER-1246, 1248. Google recognized that if real competition developed, the Play Store would have to "deliver[] superior user & dev[eloper] outcomes." 7-SER-1241. But rather than compete, Google deployed a web of strategies to foreclose competition.

For example, Google made it harder to use competing app distribution channels. "Although an Android app developer can enable potential users to download its apps directly from a developer-specific website ('direct downloading' or, as Google refers to it, 'sideloading'), Google's Android operating system creates 'friction' that deters Android users from completing downloads this way." *See* App'x 12a; 6-SER-1029-32; 6-SER-1154-55; 5-SER-991; 5-SER-811. When downloading an app directly from a website, Google required users to navigate a

cumbersome "unknown sources" flow that involved changing phone settings and dismissing multiple scare screens. *See* App'x 12a; 5-SER-960-62; 6-SER-997-99. All told, a user wishing to download and install an app from the web—or a store that could compete with the Play Store—needed to tackle and click through at least 14 warning screens. *See* App'x 12a; 5-SER-798, 800; 5-SER-888,896. Importantly, "Android's scare screens do not reflect any security assessment of the intended download sources." *See* App'x 12a. Instead, as Google's own CEO testified at trial, Google triggered these warnings "whether the intended download source [wa]s a trusted developer's website or a hypothetical 'illstealyourinfo.com.'" *See* App'x 12a.; 5-SER-924; 6-SER-1002-03.

Google further impeded competition with contractual restrictions. *See* App'x 13a ("In its dealings with OEMs, Google also sought to obstruct access to alternative app stores."). Google required mobile phone OEMs licensing the commercially viable version of Android to install the Play Store on the home screen of every device assembled, ensuring the Play Store had at least as prominent a placement on every Android device as any other store. 5-SER-916-17; 5-ER-1078; 5-SER-855. Google entered into such agreements with every OEM selling commercial Android phones. 6-SER-1033; 5-ER-1049-51; 5-ER-55-56; 5-SER-857-60. Google then paid OEMs hundreds of millions of dollars not to compete, but rather to make the Play Store the exclusive app store on the OEMs' new devices. 5-SER-850-52; 5-SER-821; 5-SER-824-25.

Google also required developers that distributed their apps through the Play Store to use GPB for all in-app purchases of digital goods. 5-ER-1008. Free from any competitive threat, Google then charged developers up to 30% of every transaction handled by GPB. 5-SER-773-774,784.

Epic tried to resist Google's monopoly. In 2018, Epic launched its popular Fortnite app on Android outside the Play Store—the only major app ever to do so—by making it available to download directly from its website and through Samsung's Galaxy Store. App'x 9a; 5-ER-1201; 5-SER-881; 6-SER-1039. Google feared this could "'legitimize'" another Android app store and create "'contagion' leading other software developers to leave" the Play Store. *See* App'x 13a (quoting 5-SER-894). To defend against that scenario, Google initiated "Project Hug: a series of special agreements with 22 top game developers, including Activision (creator of the popular video game *Call of Duty*), under which the developers received cash payments and other benefits not to launch on any Android app store other than the Play Store." *See id.*; 5-SER-777. Indeed, Google paid Activision alone $360 million in cash and other benefits not to launch first or exclusively on a competing Android store. 5-SER-967-71; 8-SER-1397-99. Google also proposed "Project Banyan" to Samsung, under which Google would pay Samsung not to compete, but instead turn its app store (called the Galaxy Store) "into a throughway for more Play Store traffic." *See* App'x 13a; 7-SER-1255. As the evidence revealed, "Samsung's representatives expressly understood that the purpose of 'Project Banyan' was to 'prevent

unnecessary competition with the store.'" *See* App'x 13a (quoting 7-SER-1255 (cleaned up)).

Google's anticompetitive strategy was devastatingly effective. "Efforts to download Fortnite illustrate the practical import of barriers erected by Google"—"of the Android users who initiated the process to download Fortnite directly, 35% abandoned the process after encountering Google's 'warning messages.'" App'x 12a; 6-SER-1029-30. Other app stores and developers fared even worse. An Amazon executive testified that when Amazon tried to launch an app store that would compete with the Play Store, only 11% of the users who tried to install the Amazon store on their Android phone actually succeeded. 5-SER-991. When Amazon offered users a 15% discount on all purchases, Google noted in an internal document that even with that discount, the "switching hurdle [is] too high for most users" to download Amazon's app store. 7-SER-1268. As a result of Google's tactics, only 3% of Android phones in the United States have successfully downloaded an app store from the web. 6-SER-1085. Meanwhile, as "of 2021, the Play Store was turning a 71% operating profit." *See* App'x 14a.

II. Procedural History.

1. Epic Games, Inc. is a video game developer and the creator of Fortnite, one of the world's most popular games. App'x 9a; 5-SER-974-79. Fortnite is offered as a free download and generates revenue through players' optional purchases of in-game cosmetic enhancements. *See* App'x 9a; 5-SER-761-62. Epic also operates the Epic Games Store, which is an app store that competes with the Play

Store; and Epic provides an in-app payment solution for digital goods that competes with GPB. App'x 9a; 5-SER-870; 5-ER-975; 5-ER-1192-93.

As noted, when Epic launched Fortnite on Android in 2018, it initially distributed the game by making it available to download directly from its website and through Samsung's Galaxy Store, but not the Play Store. App'x 9a; 5-ER-1201; 5-SER-881; 6-SER-1039. For two years, Epic sought to build an Android user base through these alternative distribution channels. But in 2020, Epic "realized that Google Play was the only hope that Epic had for actually reaching" Android users and reluctantly placed Fortnite on the Play Store. *See* App'x 9a (quoting 5-SER-984) (cleaned up).

In August 2020, Epic began distributing through the Play Store a version of Fortnite that, unbeknownst to Google, could present users seeking to make an in-app purchase with a competitive choice: users could make the purchase using Google's GPB or, alternatively, users could make the purchase through Epic's competing payment solution at a 20% discount. *See* App'x 9a; 5-ER-1215-16. Hours after Epic activated this competitive choice, Google removed Fortnite from the Play Store. *See* App'x 10a; 4-SER-695. Epic responded by bringing this suit against Google, alleging violations of the Sherman Act and California law. *See* App'x 14a; *see also* 4-SER-684-747. The case went to trial in November and December 2023, and after 15 days of testimony, the jury delivered a unanimous verdict in favor of Epic on every count put to it. 1-ER-52-57; *see also* App'x 15a. The jury found that Google violated Sections 1 and 2 of the Sherman Act and California's Cartwright Act by

willfully acquiring and maintaining monopolies in the markets for Android app distribution and for Android in-app billing services for digital goods and services, entering into agreements that unreasonably restrained trade in those markets, and unlawfully tying the use of the Play Store to the use of GPB. 1-ER-52-57.

Following the jury verdict, the district court conducted rigorous proceedings to craft an appropriate injunction. The court accepted extensive briefing and written fact and expert testimony and held two evidentiary hearings in which the court heard testimony from four Epic experts and six Google experts and employees. On October 7, 2024, the district court issued its injunction. 1-ER-3-6; App'x 15a. Most relevant here are three of its provisions.

First, the district court required Google to allow developers to inform users in their apps of lower-priced alternatives for completing purchases, including by providing links that direct users to alternative purchase and download options outside the app. 1-ER-4.

Second, the court required Google to permit third-party app stores to display the Play Store's catalog of apps (the "Catalog Access" remedy). 1-ER-4-5; App'x 44a-45a. The Catalog Access remedy is intended to address the virtually insurmountable network effects Google has amassed through a decade of illegal conduct. App'x 44a-45a. The remedy was informed by clear evidence that for stores, it is nearly impossible to attract users without a large catalog of apps—and nearly impossible to attract developers to build a catalog of apps without a large user base (a "chicken and egg" problem). Importantly, the Catalog Access remedy allows

competing stores only to *display* the results of any search of Google's catalog; if the user wishes to *install* an app from Google's catalog, that installation would be handled by the Play Store, not by the third-party store—and any revenue from the purchase of an app or from in-app purchases within the app would pass to Google, not to the third-party store. 1-ER-4-5.

Third, the court required Google to allow competing stores to be distributed through the Play Store, so that users—who for years have been conditioned to look for apps only on the Play Store—can actually find competing stores and install them without the frictions and scare screens Google has imposed on downloads from other sources (the "Store Distribution" remedy). 1-ER-5; App'x 50a-52a. At Google's request, the court allowed Google to require that any store that wishes to be distributed on the Play Store (and any app distributed by such store) must submit to a Google security review, the cost of which would be borne by the third-party store (and not by Google).

The district court ordered that all three remedies would operate for only three years—half the time Epic requested. 1-ER-4-5. The district court allowed Google twenty-five days to bring itself into compliance with the injunction's most straight-forward requirements, including the Linkout remedy, and eight months for the Catalog Access and Store Distribution remedies. Those timelines are consistent with the baseline estimates that a Google witness stated would be necessary for compliance. *See* App'x 47a.

2. Google appealed the jury verdict and the injunction. The district court issued an administrative stay of the entire injunction, which remained in place during the appeal. *See* 2-ER-181. On July 31, 2025, the Ninth Circuit unanimously affirmed, *see* App'x 10a, rejecting a broad range of objections to the verdict and remedy, only a few of which Google now reprises in seeking a stay.

As relevant here, on the issue of liability, the Ninth Circuit affirmed the district court's instruction allowing the jury to weigh competitive harms and benefits, consistent with what Google acknowledged was binding circuit precedent. App'x 37a n.10.

Turning to the remedy, the court observed that while "caution is key," this Court "has repeatedly endorsed the principle that district courts are 'clothed with large discretion to fit the decree to the special needs of the individual case'—not just to 'unfetter a market from anticompetitive conduct,' but also to pry open to competition a market that has been closed by defendants' illegal restraints.'" App'x 42a (quoting *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 106 (2021), and *Ford Motor Co. v. United States*, 405 U.S. 562, 573, 577-78 (1972) (cleaned up)). The panel then concluded that the injunction in this case fell within that broad authority. The court rejected Google's contention that the Catalog Access and Store Distribution remedies impermissibly imposed a "duty to deal" with competitors. App'x 45a-46a. The court acknowledged this Court's decisions holding that unilateral refusal to deal with competitors generally does not violate the Sherman Act but recognized that once an antitrust violation has been proven, a court's authority to

remedy the violation is broader and can include requiring the violator to deal with others in appropriate circumstances. App'x 46a (citing, *e.g.*, *Ford*, 405 U.S. at 572).

The court further found that the remedy appropriately addressed a serious impediment to restoring competition, in the form of network effects that Google's unlawful conduct had entrenched. The Ninth Circuit rejected Google's complaint that the district court failed to find a sufficient causal connection between those network effects and its Sherman Act violations, finding ample record support for the district court's finding that "Google's anticompetitive conduct caused the creation or maintenance of its monopoly power and 'unfairly enhanced' the relevant network effects." App'x 49a-50a. Accordingly, ordering the Catalog Access and Store Distribution remedies, for a limited time, was an appropriate means to address the ongoing effects of Google's misconduct and to enable the emergence of new app stores to restore competition. App'x 50a-52a.

The court of appeals also rejected Google's security objections to the injunction. The panel observed that the district court "was quite cognizant of and addressed" security concerns after considering the "robust record on the potential security risks." App'x 63a-64a. The court emphasized that the injunction "explicitly addresses these risks" by allowing Google to adopt reasonable measures "to ensure that the platforms or stores, and the apps they offer, are safe from a computer systems and security standpoint," App'x 64a-65a, supported by a Technical Committee that "offers a helpful resource to attend to the 'nuts-and-bolts issues' that Google raises"

and "comports with federal courts' long history of utilizing appointed experts," App'x 58a.

Finally, the court rejected Google's objection to the scope of the injunction. The court acknowledged this Court's then-recent decision in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), regarding the extent of federal courts' equitable authority to award injunctive relief to non-parties. App'x 65a. But it held that the injunction here conformed to the principle, reaffirmed in *CASA*, that when necessary to provide full relief to the plaintiff, "'a traditional, parties-only injunction can apply beyond the jurisdiction of the issuing court.'" App'x 65a-66a (quoting *CASA*, 606 U.S. at 838 n.1). Here, Epic was injured in multiple ways relating to its various roles as an app developer, a competing app store operator and a competing in-app payment solution provider. *See* 5-ER-1182; 5-SER-981; 5-ER-1192-93. Epic faces injury as an app developer because its subsidiaries continue to offer apps on the Play Store, which are subject to Google's anticompetitive policies; and because Google's conduct inflates prices and reduces innovation in the relevant markets, where app developers like Epic are customers. Epic also faces ongoing injury as a store competitor because the Epic Games Store faces the chicken-and-egg problem that the injunction is intended to address, and because Google's policies prevent developers on the Play Store from linking to the Epic Games Store. 5-ER-976; *see Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 972, 1000 (9th Cir. 2023) ("*Apple II*") (upholding injunction against anti-steering provision "because Epic is a competing games distributor and would earn additional revenue but for Apple's restrictions"). And Epic faces ongoing injury as a

payment solutions provider because Google's policies prevent developers on the Play Store from linking to stores and websites where Epic's payment solution is used. In light of this, Epic had standing to seek remedies to restore competition for "Android in-app billing and Android app distribution, in which Epic is undisputedly a player." App'x 66a.

3. Google petitioned for rehearing en banc, but no judge called for a vote, and the petition was denied. App'x 118a. The court also denied Google's motion for a stay pending certiorari. Among other things, the court concluded that Google's arguments were based on "a misapprehension of essential antitrust principles" and that Google's claim that the injunction's supposed security risks threatened irreparable harm was "unfounded in light of trial testimony." App'x 123a-24a. The Ninth Circuit did, however, extend the effective date of the Catalog Access and Store Distribution remedies until ten months after issuance of the mandate, July 22, 2026, and most of the other deadlines for thirty days, until October 22, 2025. App'x 121a-22a.

ARGUMENT

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative

harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The burden of satisfying these criteria is on the applicant, and the "judgment of the lower court, which has considered the matter at length and close at hand, and has found against the applicant both on the merits and on the need for a stay, is presumptively correct." *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). Because the Ninth Circuit has considered the issue and denied a stay, and Google fails here to satisfy any of the requirements for a stay, its application should be denied.

I. Google Cannot Show Irreparable Harm.

As explained below, none of the merits issues on which Google intends to seek certiorari warrants further review, and even if certiorari were granted, there is no genuine prospect that this Court would reverse. But this Court need not reach the merits questions because Google so plainly fails to establish that it will suffer any irreparable harm absent a stay.

1. Google inexplicably seeks a stay of the Catalog Access and Store Distribution remedies, even though neither will become effective until July 2026—long after this Court's disposition of Google's petition for certiorari, which will be filed later this month. *See* Stay App. 5, 16 n.4; App'x 121a. Stranger still, Google argues that these remedies must be stayed now because they will pose a security risk to the Android ecosystem when they are implemented next summer. *See* Stay App. 35. Google never acknowledges, much less addresses, the illogic of this position.

Because these remedies will not go into effect until after a decision on the forthcoming petition, their supposed security implications are completely beside the point. As Google ultimately admits, the only possible justification for a stay of these remedies would be to avoid the vaguely estimated costs associated with planning for compliance, which Google would incur while the petition is under consideration. *See* Stay App. 5-6. But even that does not make sense. Unless Google were asking the Court to *postpone* its compliance deadline past July 2026 (which its stay application does not do), Google will need to prepare for the eventuality that this Court denies review or affirms, such that the remedies go into effect next summer. A stay pending decision on the certiorari petition would not affect that obligation. If Google *is* indeed asking the Court to postpone its compliance deadline, regardless of the outcome of its petition, simply to avoid whatever cost it might need to occur in the near term to prepare for eventual implementation, that is all the worse. Because of the district court's administrative stay, which was left in place until the Ninth Circuit issued its decision, these remedies have already been delayed for over a year (from June 2025 to July 2026). The need for one of the most valuable companies in the world to spend relatively modest amounts of money to prepare to comply with an injunction that has already been forestalled for more than a year is hardly an emergency warranting this Court's intervention—especially when considering the vast monopoly rents Google already has illegally collected from developers and consumers, and will continue to collect if allowed to further delay its compliance.

2. Google also seeks a stay of the Linkout remedy, which is scheduled to go into effect later this month. But Google's factual arguments about security risks from linkouts were repeatedly and rightly rejected below—and there is no reason for this Court to revisit this fact dispute.

Google's security objections were thoroughly addressed at trial. Google asserted security as a procompetitive justification for its challenged practices, including its insistence that developers and users rely exclusively on GPB to transact on the Play Store. *See, e.g.*, 2-ER-207-08; 5-ER-1138-56. Epic put on substantial contrary evidence, including evidence that Google had previously allowed linking out to complete payments and allows the use of alternative billing solutions for in-app purchases of physical goods—all without any adverse security effects. *See, e.g.*, 1-ER-44; 5-SER-766-70; 6-SER-996-1004.

The jury accepted Epic's position and ruled in its favor. 1-ER-52-57. And in denying Google's request for judgment as a matter of law, the district court found that based on the record evidence, the jury could reasonably have found Google's security objections pretextual. App'x 110a-11a.

The court then conducted extensive additional proceedings on the appropriate remedy, taking testimony from ten witnesses over two days, as well as substantial written submissions from the parties. *See, e.g.*, 2-ER-376-407; 3-ER-573-677; 4-ER-705; 2-SER-11-96. Google's security objections were a primary focus of the remedies hearings, addressed by witnesses on both sides. *See, e.g.*, 2-ER-233-34; 2-ER-247-49; 2-ER-261-62; 2-ER-288-91. The court was unpersuaded by Google's

evidence, although it was attentive to the importance of security concerns more broadly. It made clear that "Google will have room to engage in its normal security and safety processes." App'x 83a. And it provided for the creation of a Technical Committee of experts to facilitate the handling of legitimate security concerns and advise the court on such questions when necessary. App'x 87a.

On appeal, the Ninth Circuit considered the informed views of the district court and the decision of the jury, the extensive record, as well as additional briefing from the parties and from amici on both sides. *See* App'x 64a & n.19. The court concluded that the "remedial measures offer plainly articulated responses to the relevant factor of non-parties' security interests" and "reflect an engagement with the evidence presented in the record and, like all the injunction's remedies, a clear basis in that extensive factual record." App'x 65a. In denying a stay, the court further explained that "the Injunction 'explicitly address[es] these risks' through adoption of reasonable measures 'to ensure that the platforms or stores, and the apps they offer, are safe from a computer systems and security standpoint.'" App'x 123a (quoting App'x 64a-65a). "In addition, the Injunction provides for a Technical Committee to assist in resolving technical disputes, including security concerns." App'x 123a.

"Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts." *Easley v. Cromartie*, 532 U.S. 234, 242-43 (2001) (quoting *Neil v.*

Biggers, 409 U.S. 188, 193 n.3 (1972)). Google provides no basis for this Court to reach a different conclusion on an emergency (or any other) basis.

Even if this Court were to wade into the facts, it should reject Google's rehashed effort to use alleged security risks as a reason to avoid competition. While Google paints links as exceedingly dangerous, *see* Stay App. 36-37, that argument fares no better now than it did at trial, at the remedies hearings or on appeal. Google already allows developers, in their apps, to provide links to external websites for a host of purposes—as long as those links do not threaten Google's revenue stream. *See, e.g.*, Payment Policy FAQ, https://support.google.com/googleplay/android-developer/answer/10281818?hl ("Developers can refer users to administrative information—like an account management page, privacy policy, or to a help center—as long as the webpage does not eventually lead to an alternate payment method prohibited by the Payments policy."). Google *already* allows (indeed, requires) developers offering physical goods to use payment solutions other than GPB, and allows such developers to link to a website outside the app to complete such payments. *See* 3-ER-540; 5-ER-1008; App'x 109a. And Google *already* allows Android users to download apps directly from the Internet—and makes it abundantly clear to users that those apps are not reviewed or verified by Google. *See* App'x 12a; *see also* Amicus Br. of Electronic Frontier Foundation, CA9 Dkt. 144.1 at 10 ("Android contains warnings to users about installing and running untrusted applications.").

Google has not explained why the links addressed in the injunction are more dangerous than the links Google already allows. It is no answer to say, as

Google does, that "users are preconditioned to trust content provided in Play-distributed apps," Stay App. 37, because Play-distributed apps already contain links of various kinds and the injunction permits Google to apply reasonable measures to ensure safety and security, *see* App'x 64a-65a. There is no reason for this Court to disturb the Ninth Circuit's rejection of Google's claims of irreparable harm from the Linkout remedy. App'x 123a-124a (finding Google's claims for irreparable harm, including with respect to security risks, are "unfounded in light of trial testimony"); *see also* 2-ER-234 (noting that there were several safety mechanisms discussed at trial that prevent new security concerns from arising). Indeed, for the past five months, Apple has been required—over similar security objections—to allow developers to use similar purchase links, *see Epic Games, Inc. v. Apple Inc.*, 781 F. Supp. 3d 943, 1003-04 (N.D. Cal. 2025), and no adverse security effects have been reported.

3. Finally, Google vaguely asserts that without a stay, it will suffer the irreparable "loss of its legitimately derived comparative advantages over other Android app stores." Stay App. 42. But Google cannot lose any advantage, however derived, by merely having to *prepare* to implement the Catalog Access and Store Distribution remedies next summer. And Google also does not explain how complying with the Linkout remedy during the pendency of its petition could have that effect either. For one thing, Google's advantage was not "legitimately derived." And all that might happen is that the Play Store and GPB face enhanced competition during the pendency of the petition. If Google ultimately prevails, it would be able to

reinstate a prohibition on linkouts and return to the *status quo*. There is no irreparable harm.

II. This Court is Unlikely to Grant Certiorari or Reverse.

Google fails to show any reasonable probability that this Court will grant its petition for certiorari or any fair prospect of reversal if it does.

A. The Ninth Circuit's Approach to the Rule of Reason Accords with the Precedent of This Court and Other Circuits.

Google first argues this Court is likely to grant certiorari to decide if the district court erred in allowing the jury to weigh the competitive benefits and costs of its challenged practices. Stay App. 17-18. Google insists that in an antitrust litigation, *any* showing of procompetitive benefit, however meager, negates liability even for wildly anticompetitive conduct, unless the plaintiff is able to demonstrate that there is a substantially less restrictive alternative to achieve that meager benefit. *Id*. There is no reasonable likelihood that this Court will grant certiorari and accept that extreme position. The instructions allowing the jury to balance the magnitude of procompetitive and anticompetitive effects were consistent with the decisions of this Court and the law of other circuits.[1] Nor would accepting Google's position change the outcome of the litigation.

1. Google's position cannot be reconciled with decades of this Court's rule-of-reason jurisprudence. "In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the

[1] Indeed, the Court denied a petition seeking review of the Ninth Circuit's approach to balancing just last year. *See Epic Games, Inc. v. Apple Inc.*, 144 S. Ct. 682 (2024).

consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Thus, a factfinder must "weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* at 885; *see, e.g.*, *Eastman Kodak Co. v. Image Tech. Svcs., Inc.*, 504 U.S. 451, 486-87 (1992) (rule of reason requires a "judicial inquiry into the balance between the behavior's procompetitive benefits and its anticompetitive costs").

To be sure, when one side of the scale is empty, the weighing is easy. Courts have long agreed that the rule of reason is satisfied if there is no substantial harm to competition. *See, e.g.*, *Ohio v. Am. Express Co.*, 585 U.S. 529, 552 (2018) ("*Amex*"). Likewise, a practice with proven harm to competition that has no countervailing procompetitive benefits is necessarily unreasonable. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 100 (2021). And when there are substantially less restrictive alternatives that would allow a defendant to achieve any procompetitive benefits while avoiding or significantly reducing the harm to competition, the unreasonableness of continuing to inflict unnecessary harms to competition is obvious as well. *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 Colum. L. Rev. 927, 968 (2016) (when a less restrictive alternative exists, a party's decision to nonetheless engage in conduct "that harms consumers" likely results from a desire "to gain from the resulting consumer harm").

But at times there will be cases in which a practice with obvious anticompetitive effects has at least *some* countervailing benefit. In that

circumstance, Google contends that this Court engages in formalistic line drawing, in which the plaintiff must show a substantially less restrictive alternative to the conduct, or else the monopolist *necessarily* wins, and consumers must endure the costs of diminished competition—higher prices, reduced innovation and decreased choice—no matter how great those harms are and no matter how modest the benefit. Stay App. 7, 20. That rigid approach is not and never has been the law.

The question under the rule of reason is whether a restraint on trade is "reasonable," and a practice that imposes massive harms in exchange for minor benefits is not "reasonable" under any sensible definition of that term. *Cf. Calif. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (practice may fail "quick-look" rule-of-reason analysis when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"). Nor can a court or a jury decide if a practice is "harmful to the consumer" or "in the consumer's best interest," *Leegin*, 551 U.S. at 886, without considering the *net* effects of the defendant's conduct by weighing the benefits against the harms. *See, e.g.*, 7 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1502 (2023) ("[T]he harms and benefits must be compared to reach a net judgment whether the challenged behavior is, on balance, reasonable."). Moreover, the whole point of the rule of reason is to avoid the inflexibility and potential over- and under-inclusiveness of *per se* rules, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997), yet Google effectively argues for a rule of *per se* legality when there is

even a scintilla of competitive benefit that cannot be achieved in a less restrictive way.

Google insists that *Amex*, suddenly and with no analysis, turned the rule of reason into a mechanical three-part test under which the balance of competitive effects makes no difference, and even the most minor competitive benefit can immunize conduct that inflicts substantial competitive harms, so long as there is no less restrictive means to achieve that minor benefit. Stay App. 17-18. That is not so. To be sure, *Amex* noted that "the parties agree[d]" to a "three-step, burden-shifting framework" that did not mention balancing. 585 U.S. at 541. But the only part of the framework that mattered in that case was the first step, requiring proof of competitive harm, at which the plaintiffs fell short. *Id.* at 542. The Court thus had no occasion to decide whether the three-step framework the parties had agreed to was correct and complete, much less whether it exhausts the rule-of-reason analysis in every case. The Court did emphasize, however, that the "rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition." *Id.* at 541 (cleaned up). And all of the cases the Court cited as supporting the parties' framework acknowledged that to determine a conduct's "actual effect on competition", weighing is required—at least when a practice has both competitive benefits and harms. *See* Michael A. Carrier, *The Four-Step Rule of Reason*, 33 Antitrust 50, 53 (2019).

If *Amex* raised any doubt, it was put to rest by the Court's subsequent decision in *Alston*. There, the Court treated *Amex* not as a sea change, but as an

example of a case in which the Court has "spoken of a three-step, burden-shifting framework as a means for distinguishing between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." 594 U.S. at 96 (quoting *Amex,* 585 U.S. at 541) (cleaned up). The Court then cautioned that these "three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis." *Id*. at 97. To the contrary, "what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances." *Id*. The Court thus reaffirmed that the rule of reason requires the factfinder to "*weigh[] all of the circumstances of a case* in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id*. (quoting *Leegin*, 551 U.S. at 885) (emphasis added).

In the end, even Google seems to accept that *Amex*'s three-part test does not exhaust the rule-of-reason analysis in all cases. Stay App. 21 (referring to "the *first three* steps" of the rule of reason (emphasis added)). It argues, however, that the "weigh[ing]" described by *Alston* is exclusively for the benefit of the defendant. *See* Stay App. 21 (claiming that "import" of *Alston* 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"). But nothing in *Alston* suggested such a one-sided rule, which would represent a remarkable departure from this Court's precedents.[2]

Tellingly, Google itself recognized in the district court that balancing could assist the plaintiff. In fact, rather than embrace balancing as a pro-defendant exercise, Google opposed any balancing instruction. 1-ER-34-35. And as a fallback, Google argued that *if* balancing is permitted, the jury should be instructed that if Epic fails to prove a less restrictive alternative, it should return a verdict for Google "unless [Epic] prove[s] that the competitive harm of the challenged conduct substantially outweighs the competitive benefits". 3-SER-253-54. In other words, Google acknowledged that balancing (if required) could lead to liability rather than exoneration. It never argued to the district court or the court of appeals that balancing was a one-way pro-defendant ratchet. This Court is unlikely to accept a petition to decide an argument Google did not raise below. *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below.").

2. Google is also wrong to suggest the balancing test is the subject of a circuit split requiring this Court's intervention. Google acknowledges that "[s]ix circuits, including the Ninth Circuit", permit a balancing step absent a showing of a

[2] It is no surprise then that Google's position on balancing has been roundly rejected by scholars, state antitrust enforcers and the United States. *See, e.g.*, 7 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1507e (2023); *Carrier*, *supra*; Amicus Br. of United States and FTC, CA9 Dkt. 151.1 at 15-20; Amicus Br. of Utah and 34 Other States, *Epic Games, Inc. v. Apple Inc.*, No. 21-16506 (9th Cir. Jan. 27, 2022), Dkt. 42, at 18-25.

less restrictive alternative. Stay App. 18. But it claims that the Second, Sixth and Tenth Circuits apply a contrary rule. Stay App. 19. Not so.

Second Circuit. The Second Circuit has long allowed weighing when a practice has competitive benefits that cannot be achieved through less restrictive means. For example, in *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638 (2d Cir. 2015), the Second Circuit embraced the D.C. Circuit's "helpful framework" in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), a decision that Google admits permits weighing without requiring a showing of a less restrictive alternative. *See* Stay App. 18. The Second Circuit applied that framework to affirm a grant of a preliminary injunction against the defendant because, among other things, the plaintiff had "shown that whatever procompetitive benefits exist are outweighed by the anticompetitive harms." *Actavis*, 787 F.3d at 658; *see also Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc.*, 386 F.3d 485, 507-09 (2d Cir. 2004) (reversing grant of summary judgment for defendant where challenged practice "could freeze out competition to an extent that greatly outweighed any pro-competitive effects") (citing *Cap. Imaging Assoc., P.C. v. Mohawk Valley Med. Assoc., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993) ("Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior.")).

Google claims two Second Circuit cases establish a different rule, but neither does. Google first cites *1-800 Contacts, Inc. v. FTC*, 1 F.4th 102 (2d Cir. 2021), in which the court stated that "[b]ecause Petitioner has carried its burden of identifying a procompetitive justification, the government must show that a less

restrictive alternative exists that achieves the same legitimate competitive benefits." 1 F.4th at 120-21; *see* Stay App. 19. But in that case, the Federal Trade Commission did not argue that any procompetitive benefit was outweighed by countervailing harms to competition. *See* Brief for Respondent, *1-800 Contacts, Inc. v. FTC*, No. 18-3848 (2d Cir. May 28, 2019), Dkt. 110, at 85-98. Accordingly, the Second Circuit had no occasion to decide anything about a final weighing stage, received no briefing on whether such weighing was permitted, and did not purport (or have authority) to overrule prior circuit precedent on the question. And to the extent *1-800 Contacts* had anything to say about balancing, it was consistent with the other Second Circuit precedent described above. The court noted that "at the end of the day, our job is to 'weigh[] the competing evidence to determine if the effects of the challenged restraint tend to promote or destroy competition.'" 1 F.4th at 121 (quoting *United States v. Apple*, 791 F.3d 290, 329 (2d Cir. 2015)). And in its conclusion, the Second Circuit ruled for the defendant "[i]n light of the *strong* procompetitive justification" the defendant had proven. *Id.* at 122 (emphasis added). There is no reason to think the case would have come out the same way if the challenged practice had a more trivial benefit.

Likewise, *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001), did not address the question Google presents here. From all appearances, the plaintiff there had rested its case on trying to deny any competitive benefit from the challenged agreements. *See id.* at 265. There is no evidence that the plaintiff argued that any competitive benefit was outweighed by a countervailing

harm to competition. The panel did not discuss that possibility at all. *See id*. And as noted, subsequent Second Circuit decisions that did consider the issue embraced the circuit consensus that weighing is permitted.

Sixth Circuit. None of the Sixth Circuit decisions Google cites confronted or decided the proper role of balancing. Instead, each simply articulated a three-step test that Google claims is consistent with its proposed rule, on the way to resolving the case on unrelated grounds. *See Nilavar v. Mercy Health System-Western Ohio*, 244 Fed. Appx. 690, 699 (6th Cir. 2007) (no antitrust injury); *Expert Masonry, Inc. v. Boone Cnty., Ky.*, 440 F.3d 336, 348 (6th Cir. 2006) (no antitrust standing); *Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1014-15 (6th Cir. 2005) (no antitrust injury); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 720 (6th Cir. 2003) (no anticompetitive effect). None of these cases addresses the question that Google claims to be the subject of a circuit split.

Tenth Circuit. The same is true of Google's Tenth Circuit cases: they state a test at a high level of generality and reach a decision on other grounds, without addressing the proper role of balancing. *See Buccaneer Ener. (USA) Inc. v. Gunnison Ener. Corp.*, 846 F.3d 1297, 1319-20 (10th Cir. 2017) (no anticompetitive effect); *Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1205 (10th Cir. 2006) (plaintiff made "no argument that" the challenged practice "violates the rule of reason"); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019-24 & n.16 (10th Cir. 1998) (no procompetitive benefit).

In short, there is no circuit split; all appellate courts that have expressly considered the question have allowed some form of balancing. And certiorari is particularly unwarranted in the absence of a clear, considered conflict where, as here, the question rarely arises. As this Court has noted, "courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect." *Alston*, 594 U.S. at 97. Only a handful have ever reached the stage at which the balancing question arises. *Carrier*, *supra*, at 51 ("Between 1999 and 2009, courts dismissed 97 percent of cases at the first stage, reaching the balancing stage in only 2 percent of cases."). Google nonetheless insists that this case warrants review because the Ninth Circuit applied an erroneous understanding of the rule of reason to affirm a judgment of great importance in its own right. But as discussed above, the Ninth Circuit did not apply an erroneous rule—and even if it did, it is unlikely this Court would grant certiorari to engage in error correction on an issue that arises in a tiny fraction of antitrust cases.

3. Moreover, there is no reason to believe that the question presented played any meaningful role in the resolution of this case or that adopting Google's position would change the result.

First, there is no indication that the jury even reached the less restrictive alternative step of the rule of reason framework. When Google "challenge[d] the jury's implicit finding in favor of Epic on Step 3 of the Rule of Reason," the district court noted that "Google overlooks the fact that the jury might simply have rejected Google's proffered justifications," and therefore never reached

the less restrictive alternatives question, much less any balancing stage. App'x 110a. The court then found that the "jury had ample evidence" to reject Google's supposed procompetitive justifications as pretextual. App'x 110a; *see also* App'x 111a.

Second, even if the jury had reached the less restrictive alternative step, there is no reason to believe its verdict would differ even if it were instructed that the rule of reason analysis ends at that step, without any balancing. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (the harmless-error rule means that "the party that seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted"). Google tries to argue otherwise, insisting that "Epic's evidence on less restrictive alternatives was exceedingly thin." Stay App. 22. But the district court disagreed with that suggestion, concluding the jury could easily have found that any procompetitive objectives Google may have had could be achieved by less restrictive measures. App'x 110a. Just as one example, Epic presented clear evidence that it was overly restrictive for Google to defend against malicious downloads by presenting the very same warnings "whether the intended download source [wa]s a trusted developer's website or a hypothetical 'illstealyourinfo.com'." *See* App'x 110a; 5-SER-924; 6-SER-1002-03. Epic showed instead that Google already employed sophisticated mechanisms that assessed the actual threat of specific downloads and that it could easily "whitelist" safe app stores—but it chose not to do so. 5-SER-960-62. It is thus likely that the jury would have found for Epic even if it were told not to engage in balancing at all. And it is unlikely this Court would

consider an argument that at most would amount to harmless error on the part of the district court.

B. The Challenged Remedies Are Consistent with the Duty-to-Deal and Causation Precedents of This Court and Other Circuits.

Google argues that a stay is warranted because this Court is likely to review its contention that the Catalog Access and Store Distribution remedies violate this Court's duty-to-deal precedents and create a split with the D.C. Circuit on the required degree of causation to be applied in assessing antitrust remedies. Stay App. 23. Even if that were true (it is not), that would provide no basis for a stay. As discussed, the Catalog Access and Store Distribution provisions will not become effective until after this Court has ruled on Google's petition for certiorari. And Google does not claim that its duty-to-deal or causation arguments provide a basis for disturbing the Linkout remedy. Thus, this Court need not consider this argument any further.

In any event, there is no reasonable prospect of this Court granting certiorari and reversing on these grounds.

1. To start, there is no circuit conflict on causation. Google maintains that in evaluating the lawfulness of an antitrust remedy, the D.C. Circuit requires "'a sufficient causal connection between [a defendant's] anticompetitive conduct' and the 'remedial goal' of diminishing [the defendant's] 'position in the [relevant] market.'" Stay App. 24 (quoting *Microsoft*, 253 F.3d at 105-06). In this case, Google argues, where the challenged remedies were designed to address the

network effects insulating the Play Store from competition, that would require asking "whether the Play [S]tore's network effects resulted from Google's anticompetitive conduct, or whether they were instead the products of lawful innovation and investment." *Id.* Because the D.C. Circuit would supposedly require the district court to ask that question, and the Ninth Circuit purportedly did not, Google claims there is a split on causation standards that warrants this Court's review. Not so.

In this case, the Ninth Circuit *did* ask whether Google's network effects resulted from Google's anticompetitive conduct. The panel concluded the district court made "an unambiguous finding of a 'significant causal connection' between Google's illegal conduct and the strength of the network effects," specifically that "Google unfairly enhanced its network effects in a way that would not have happened but for its anticompetitive conduct." App'x 49a (quoting App'x 82a). The Ninth Circuit noted that Google did not challenge that unambiguous finding on appeal "[f]or good reason," given that "[t]he record was replete with evidence that Google's anticompetitive conduct entrenched its dominance, causing the Play Store to benefit from network effects." App'x 49a; *see* App'x 49a-50a ("[T]he record demonstrates substantial support for the district court's finding that Google's anticompetitive conduct . . . 'unfairly enhanced' the relevant network effects.").

Nor do the D.C. and Ninth Circuits apply different remedial causation standards. Indeed, the Ninth Circuit's test is drawn directly from *Microsoft* itself. *See Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 486 (9th Cir. 2021) (antitrust relief "must be based on a 'clear indication of a significant causal connection

between the conduct enjoined or mandated and the violation found directed toward the remedial goal intended'") (quoting *Microsoft*, 253 F.3d at 105); App'x 48a (court of appeals panel quoting, reaffirming and applying same standard). Accordingly, neither circuit would deny Google "'the returns from its investment in innovation' rather than address the consequences of anticompetitive conduct." Stay App. 25 (quoting *Microsoft*, 373 F.3d at 1219). And both circuits permit a court to take steps to address ongoing barriers to competition created by the kind of unlawful conduct in which Google engaged. *See Microsoft*, 253 F.3d at 103 ("[A] remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'") (quoting *Ford*, 405 U.S. at 577, and *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968)).

2. Even if this Court believed that a clarification of the proper causation standard for antitrust remedies was needed, this case would be a poor vehicle for providing it. Google foreshadows that it would use the alleged causation split as a vehicle for pressing this Court to address a different topic on which there is not even arguable circuit conflict—namely, the extent to which antitrust remedies may require defendants to deal with their competitors. Stay App. 27-28. *Microsoft* has nothing to say on that question, and Google's strained attempt to connect the two subjects, Stay App. 27-28, only highlights Google's real goal, which is to have this Court consider whether a defendant that has violated the antitrust laws may be

ordered, as a remedy, to deal with its competitors in some way—which is a question this Court has already answered and on which the circuit courts are in agreement.

3. As the United States and the Federal Trade Commission explained below, Google's duty-to-deal objection also fails on its own terms. *See* Amicus Br. of United States and FTC, CA9 Dkt. 151.1 at 8-16. Google admits that the principal case on which it relies, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), does not address a court's remedial power (much less the causation standard on which Google insists the courts are divided). And this Court has recognized that an antitrust injunction may go beyond simply prohibiting past unlawful conduct and require the defendant to deal with competitors in appropriate cases if needed to remedy ongoing harms. *See, e.g.*, *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 696-97 (1978). For example, as the Ninth Circuit noted, in *Ford*, this Court "affirmed an order forcing Ford not only to divest an illegally acquired spark-plug manufacturer, but thereafter to 'purchase one-half of its total annual requirement of spark plugs from the divested plant.'" App'x 46a (quoting *Ford*, 405 U.S. at 572).

Google tries to suggest that *Alston* held that the policy reasons why firms may generally refuse to deal with their competitors without incurring liability also preclude courts from requiring unlawful monopolists to deal with their competitors as part of a remedy for other anticompetitive conduct. Stay App. 28. But *Alston* created no such categorical rule, and Google cites no case from any court adopting its interpretation of that decision. There was no duty-to-deal objection in

Alston. And although the Court there cautioned that courts fashioning remedial decrees should be "sensitive" to the risks attendant to "highly detailed decrees" and the "practical limits of judicial administration," 594 U.S. at 102, that admonition does not categorically preclude the kind of relief this Court approved in *Ford* or the Ninth Circuit allowed here. Once an antitrust violation has been adjudicated, the district courts have broad discretion to craft a remedy that will address the violation's ongoing competition-suppressing effects. *See Ford*, 405 U.S. at 573, 577-78.

C. Google's Standing Arguments Are Contrary to the Findings and Record and Do Not Present a Certworthy Issue.

Google never disputed that Epic has standing to obtain *some* injunctive relief. Instead, after waiving certain objections to the scope of the injunction by failing to raise them in the district court, Google tried to avoid the consequence of its waiver by reimagining those objections on appeal as non-waivable Article III standing arguments. App'x 65a. The Ninth Circuit correctly determined that Google's quibbles with the precise scope of the injunction were a merits issue, not a jurisdictional one. App'x 65a-66a (citing *CASA*, 606 U.S. at 838 n.2 (noting that the individual plaintiffs' standing was not at issue in that case, which concerned the limits of courts' equitable authority to craft injunctions)). Google points to no issue worthy of certiorari. Indeed, the question of whether the injunction's scope is a standing question or a merits question has little practical significance outside rare cases, like this one, where a party waived the merits issue in the district court and seeks to salvage the point by labeling it jurisdictional.

Even apart from Google's waiver, its arguments are based on the fundamentally erroneous premise that Epic would not have standing to seek certain injunctive relief unless Epic had apps on the Play Store. Stay. App. 34. As an initial matter, the underlying factual assumption that Epic does not have apps on the Play Store is factually wrong: as Epic told the Ninth Circuit (and Google did not dispute), Epic subsidiaries still have apps on the Play Store that are affected by Google's policies. Appellee's Answering Br., CA9 Dkt. 135.1 at 97-98. And, as Google has conceded, Epic intends to offer its Epic Games Store app on the Play Store once the Store Distribution remedy becomes effective. Appellants' Opening Br., CA9 Dkt. 36.1 at 90 n.17. In any event, Google cannot deprive Epic of standing by removing Fortnite from the Play Store, which is part of the conduct that Epic has challenged as an antitrust violation. App'x 66a ("As for Google's suggestion that Epic has shown no risk of repeated injury caused by Play Store's billing policies because 'Epic has not distributed apps on Play for years,' we note that it was precisely Epic's attempt to launch Fortnite on the Play Store that led to this litigation."). Moreover, as shown below, the challenged portions of the injunction will redress Epic's injuries as both a competitor and a customer in the relevant markets, regardless of whether Epic has apps on the Play Store.

Linkouts. Google's anti-steering policies prohibit apps from including links that direct customers to competing app stores or payment solutions for digital goods. Broadly applying those restrictions to all developers plainly causes ongoing harm to Epic, which is the provider of both a competing app store (to which apps could

link to enable downloads) and a competing payment solution (to which apps could link to enable payments). App'x 66a-67a. Because Epic is injured as a competitor in both of these ways, the Ninth Circuit rightly rejected Google's argument that Epic needed to have apps on the Play Store in order to challenge Google's anti-steering provisions. App'x 66a (citing *Apple II* at 972 (upholding injunction against anti-steering provision "because Epic is a competing games distributor and would earn additional revenue but for Apple's restrictions")); *see* App'x 66a (noting that the anticompetitive effects of the anti-steering provisions "occurred in the defined markets of Android in-app billing and Android app distribution, in which Epic is undisputedly a player").[3]

Catalog Access and Store Distribution. These provisions do not become effective until July 2026, and thus present no basis for a stay for the reasons discussed above. In any event, Google's fact-bound challenges to Epic's standing to obtain these remedies have no merit.

Under the Catalog Access remedy, for a limited time, Google must make its catalog of apps available for other stores to display to users. This remedy was designed to help competing app stores overcome the network effects protecting Google's monopoly. 1-ER-4-5; 1-ER-16-17. Epic has standing to obtain that remedy because, as the provider of a competing app store, it was injured by the unlawfully

[3] Below, Google also challenged the portion of the injunction prohibiting Google's billing policy, under which Play Store app developers must exclusively use Google Play Billing to sell digital content. Google does not seek to stay that provision here, Stay App. 3 n.1., so that challenge is irrelevant.

maintained network effects and will directly benefit from being able to display Play Store apps to users.

For similar reasons, Epic has standing to obtain the Store Distribution remedy. That remedy requires Google, for a limited time, to distribute competing app stores through the Play Store. Because Google's anticompetitive conduct has conditioned the vast majority of users to go to the Play Store to find apps, the remedy will temporarily permit competing app stores to reach more users. 4-ER-732-34. As a provider of a competing app store, Epic can distribute its store through the Play Store and thereby benefit directly from the remedy.

Thus, for both Catalog Access and Store Distribution, Epic has standing as the provider of a competing app store. That is enough to reject Google's standing challenge. But Epic will also benefit as an app developer (and thus a customer of app distribution services). Both remedies will increase store-level competition and therefore drive down app distribution pricing and increase app distribution quality. Google attempts to dismiss those effects through an erroneous assertion that there was "no factual evidence" concerning how third-party competitors "would likely respond to its proposed measures." Stay App. 34 (emphasis omitted). But that is wrong: the district court heard extensive evidence about how these remedies would increase store-level competition, and its findings were based on common sense and economic principles indicating that competitors would avail themselves of new ways to reach Android users. *See* App'x 73a. And this Court's precedents establish that

standing can be proven by showing that third parties "will likely react in predictable ways to the defendant's conduct." *See Murthy v. Missouri*, 603 U.S. 43, 58 (2024).

Because each of the relevant remedies in the injunction will redress injuries suffered by Epic in its various market capacities, Epic has Article III standing to obtain each of those remedies—even under Google's reading of the law. Thus, the question of whether the Ninth Circuit should have treated the scope of injunctive relief as a merits issue or a jurisdictional issue—and the supposed circuit split on that point—is wholly academic. The outcome here would be identical either way. Accordingly, this issue does not warrant this Court's review.

In any event, Google has it wrong. This Court's precedent did not require the Ninth Circuit to treat Google's fact-bound objections to the scope of the injunction as a jurisdictional standing issue, rather than a merits one. Google cites *Lewis v. Casey*, 518 U.S. 343 (1996), as its "prime example" on the topic, Stay App. 31, but that case does not support Google's position. In *Lewis*, a class of "all adult prisoners who are or will be incarcerated" by the State of Arizona sought "systemwide" reform of the State's policies regarding inmate access to the courts and to counsel in a wide variety of circumstances, including illiterate inmates, non-English speakers, inmates in lockdown and the inmate population at large. 518 U.S. at 346-47. The Court found such "systemwide" relief inappropriate when the plaintiffs had shown injury only to two class members, both of whom were illiterate, and no injury to plaintiffs in other circumstances. *Id.* at 359. In finding that relief as to the other categories of inmates (besides illiterate inmates) was not appropriate,

Lewis applied the proposition that a plaintiff has standing to complain only of policies that caused him "actual injury," *id.*; it did not hold that, once actual injury has been established, any objection to the scope of the remedy must be treated as an Article III standing issue. Regardless, as shown above, Epic proved what the plaintiffs in *Lewis* could not: each remedy it obtained redresses an actual injury that Epic suffered.

Google's other precedent is even further afield. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), concluded that state taxpayers could not leverage unique municipal taxpayer standing rules to challenge state tax policy, notwithstanding that state tax policy could affect the municipal fisc, because they were not challenging any municipal action. *Id.* at 349. Epic, by contrast, is not attempting to "leverage" standing to bring one type of action into standing to bring a separate action. Nor is this case analogous to situations in which plaintiffs have failed to present evidence of *any* redressable injury resulting from challenged conduct. *See Murthy*, 603 U.S. at 49 (vacating because no plaintiff had proven a "substantial risk that, in the near future, they will suffer an injury that is traceable to a Government defendant and redressable by the injunction they seek"); *Gill v. Whitford*, 585 U.S. 48 (2018) (finding that no plaintiff presented evidence that his individual vote was diluted by the challenged gerrymandering and remanding for a hearing on such evidence).

Google is likewise wrong to suggest this case would have come out differently in other circuits. In *Maryland v. Department of Agriculture*, --- F.4th. ---, No. 25-1248, 2025 WL 2586795 (4th Cir. Sept. 8, 2025), on which Google relies, a

group of States complained about not receiving proper notice of the termination of certain federal employees. As a remedy for the lack of notice, the States requested the indefinite reinstatement of those employees to their jobs. The court found the States to lack standing to request that remedy because it could not redress the States' injury from the alleged lack of notice (even if it could conceivably redress other injuries suffered by the non-party employees). *Id.* at 9-10. That bears no resemblance to this case, where the injunction is tailored to redress the competitive injuries that Epic itself has suffered as an app developer, a competing app store operator and a competing payment solutions provider. The remedies in the injunction will redress those harms, as shown above. Thus, the outcomes in the Fourth Circuit and in this case are different not because of a circuit split, but because of dramatically different facts.

Similarly, cases Google cites from the Fifth and Sixth Circuits address situations of a complete mismatch between the harm alleged and the conduct challenged, raising redressability issues, Stay App. 33, but none of these cases suggest that standing is the right lens to examine challenges to the scope of an injunction when, as here, the injunction redresses the harm suffered by the plaintiff. As the Ninth Circuit concluded, once the "constitutional minimum" of redressability is met, the precise scope of the injunction that is entered presents a merits issue. *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 63 (9th Cir. 2024). Google points to no circuit in disagreement with that principle.

III. The Balance of Equities Favors Denying the Stay.

Finally, the balance of equities weighs decidedly in favor of denying a stay. Any financial or other cost Google might suffer if a stay is denied is more than offset by the harm Epic and the public would suffer from yet further delay in implementing the injunction.

Epic's harm is undeniable. Epic "is a competing games distributor and would earn additional revenue but for [Google's] restrictions." App'x 66a (citation omitted). A stay would also harm Epic as a competing in-app payment solution provider that would benefit from the linkouts that the injunction requires Google to allow.

The public, too, will be harmed by a stay in multiple ways. For one thing, a stay would delay the availability of linkouts that provide cheaper avenues for consumers to make purchases. In addition, there is a strong public interest in the enforcement of the antitrust laws. *See Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 130-31 (1969) (observing that "the purpose of giving private parties . . . injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws"). While Google contends the public would suffer from decreased Android security, that factual argument was rejected by the jury, the district court and the court of appeals. There is no reason for this Court to consider it anew.

On the other side of the coin, Google stands to suffer no real harm absent a stay; at most, it would need to invest modest amounts to prepare for compliance. As the Ninth Circuit observed, Google has already been allowed to continue its

profitable, illegal conduct for "more than twenty months" while the appeal was pending. App'x 122a. The Catalog Access and Store Distribution remedies will be delayed another ten months even *without* a stay from this Court. During that time, Google will continue to reap undeserved profits from supracompetitive fees it charges developers who have no realistic alternatives. Enough is enough. Google's request for a stay should be denied.

CONCLUSION

For the foregoing reasons, the application should be denied.

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Respectfully submitted,

GARY A. BORNSTEIN
Counsel of Record
YONATAN EVEN
LAUREN A. MOSKOWITZ
MICHAEL J. ZAKEN
M. BRENT BYARS
CRAVATH, SWAINE & MOORE LLP
Two Manhattan West
375 Ninth Avenue
New York, NY 10001
(212) 474-1000
gbornstein@cravath.com

PAUL J. RIEHLE
FAEGRE DRINKER BIDDLE & REATH LLP
Four Embarcadero Center
San Francisco, CA 94111
(415) 591-7500

KEVIN RUSSELL
DANIEL WOOFTER
RUSSELL & WOOFTER LLC
1701 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006
(202) 240-8433

Counsel for Respondent