No. 25-521

IN THE
Supreme Court of the United States

GOOGLE LLC, ET AL.,

Petitioners,

v.

EPIC GAMES, INC.,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

November 3, 2025

QUESTION PRESENTED

Whether a court may impose a duty on an antitrust defendant to deal directly with its competitors without first determining that such court-mandated dealings will remedy the consequences of conduct found to violate the antitrust laws.

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT................................. 3

REASONS FOR GRANTING THE PETITION 3

I. REVIEW IS NEEDED TO CLARIFY THE EQUITABLE LIMITS OF INJUNCTIVE RELIEF IN ANTITRUST CASES 3

II. REVIEW IS NEEDED TO RESOLVE THE NINTH CIRCUIT'S SPLIT WITH THE D.C. CIRCUIT ON THE QUESTION PRESENTED 7

III. WITHOUT THIS COURT'S INTERVENTION, THE DECISION BELOW WILL IMPERIL INNOVATION AND ECONOMIC GROWTH 9

CONCLUSION.. 12

TABLE OF AUTHORITIES

Page(s)

Cases:

Apple Inc. v. Pepper,
587 U.S. 273 (2019) 1

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 1, 2, 4, 5

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 1, 11

FTC v. Actavis,
570 U.S. 136 (2013) 1

Massachusetts v. Microsoft Corp.,
373 F.3d 1199 (D.C. Cir. 2004) 7, 8

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 10

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984) 10

Nat'l Collegiate Athletic Ass'n v. Alston,
594 U.S. 69 (2021) 3, 4, 6

Nat'l Soc'y of Prof'l Eng'rs v. United States,
435 U.S. 679 (1978) 8

Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.,
555 U.S. 438 (2009) 5

People Who Care v. Rockford Bd. of Educ.,
111 F.3d 528 (7th Cir. 1997) 5

Temple Univ. v. White,
941 F.2d 201 (3d Cir. 1991) 6

United States v. Colgate & Co.,
250 U.S. 300 (1919) 3

TABLE OF AUTHORITIES
(*continued*)

Page(s)

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001) 3, 7, 8

Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004) 2, 3, 5, 6, 8, 9, 11

Zenith Radio Corp. v. Hazeltine Rsch., Inc.,
395 U.S. 100 (1969) 5, 6

Miscellaneous:

Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (rev. ed. 1996) 7

Dan R. Dobbs, *Law of Remedies: Damages–Equity–Restitution* § 2.9 (2d ed. 1993)................ 5

Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972 (1986) 11

Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439 (2008) 10

Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984) 11

Michael Porter, *Competitive Strategy* (1980) 10

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus curiae in important antitrust cases. *See, e.g.*, *Apple v. Pepper*, 587 U.S. 273 (2019); *FTC v. Actavis*, 570 U.S. 136 (2013); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

The central aim of antitrust law is to ensure free-market competition, providing consumers with better goods and services at lower prices. The Ninth Circuit's decision—and the district court's far-reaching injunction—undermine that laudable goal. WLF is concerned that the decision below, if left in place, will erode the procompetitive aims of antitrust law and invite rent-seeking lawsuits by rivals.

SUMMARY OF ARGUMENT

In our free-market system, a business—even an alleged monopolist—may choose with whom it will transact. Antitrust law places only one limit on this discretion: a monopolist that ends an established and profitable course of dealing must have a rational business reason for doing so. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608–11

---

* No party's counsel authored any part of this brief. No one, other than Washington Legal Foundation and its counsel, helped pay for the brief's preparation or submission. Filed more than ten days before the response deadline, this brief provides timely notice to all parties of WLF's intent to file.

(1985). This is not a high bar. The monopolist need not maximize competition—and it certainly need not go out of its way to assist competitors. It must merely act sensibly from a competitive business vantage.

Above all, antitrust law does not grant competitors the right to free ride on a rival's success. On the contrary, this Court has long protected a firm's right to refuse to deal with its competitors, recognizing that forced cooperation risks stifling the innovation and investment that foster economic growth. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08 (2004). In *Trinko*, this Court cabined *Aspen Skiing*'s "duty to deal" to its rarefied facts and warned that any further expansion could deter procompetitive conduct and burden courts with tasks ill-suited to their competence. *Id.* at 408–09.

Faced with that daunting precedent, Epic expressly disavowed any refusal-to-deal claim here, and the district court granted Google summary judgment on that question. Yet as a "remedy" for unrelated violations, the court imposed sweeping duties to deal on Google anyway, forcing it to share its proprietary app catalog with rivals and to distribute competing stores, at "reasonable fees," through Google Play.

The Ninth Circuit affirmed, adopting a loose causation standard that permits remedies to target competitive advantages untethered from actual antitrust violations. This approach decouples remedy from liability, flouting this Court's directive that the same antitrust considerations should govern both the liability and remedies phases. *Nat'l Collegiate*

Athletic Ass'n v. Alston, 594 U.S. 69, 102 (2021). In doing so, the decision below not only circumvents *Trinko*'s careful limits, but it directly conflicts with the D.C. Circuit's rigorous causation requirement for antitrust remedies in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

All this turns federal antitrust law on its head. Antitrust is about unleashing the forces of competition, not throttling them. The Ninth Circuit's view—that rivals may use the courts to eliminate competitive advantages that do not flow from an antitrust violation—will have just the opposite effect. It will invite struggling firms to use antitrust law as a sword rather than a shield. It will deter innovation in highly competitive markets. And it will permit competitors to seek treble damages for pro-competitive "harms" that antitrust law does not reach. Allowed to stand, the decision below will injure competition and consumers alike.

This Court should grant review and ensure that antitrust remedies target the fruits of unlawful conduct, not the rewards of legitimate innovation.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NEEDED TO CLARIFY THE EQUITABLE LIMITS OF INJUNCTIVE RELIEF IN ANTITRUST CASES.

This Court has long cherished the right to refuse to deal, viewing it as essential to free enterprise. *Trinko*, 540 U.S. at 407 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). Duties to deal are disfavored because they "lessen the incentive

for the monopolist, the rival, or both to invest in . . . economically beneficial facilities." *Id.* at 407–08. Such obligations risk "false condemnations" that chill procompetitive behavior and burden courts with supervising terms of trade—tasks for which judges are "ill suited." *Id.* at 414, 408. That is why the Court has confined *Aspen Skiing*'s exception to its unusual facts, warning against expansion of an antitrust duty to deal. *Id.* at 408–09. Liability for refusing to deal thus attaches only in narrow confines: a unilateral termination of a prior profitable relationship motivated solely by anticompetitive intent. *Aspen Skiing*, 472 U.S. at 608–11.

Here the lower courts acknowledged these limits at the liability stage. In fact, Epic disclaimed any refusal-to-deal theory of liability, resulting in summary judgment for Google on that question. No *Aspen Skiing* factors were found: no profit sacrifice, no termination of prior dealings. Yet the injunction imposes extraordinary forced-sharing duties as a remedy—compelling Google to grant rivals access to its app catalog and to carry third-party stores at regulated rates.

This defies logic: if a duty to deal cannot support antitrust liability, it cannot be smuggled in as mandatory relief. *Alston*, 594 U.S. at 102 ("[S]imilar considerations apply to the remedy."). Without a prior course of dealing, there is no evidence that the district court's preferred course will be profitable, no reason to infer that Google's otherwise lawful refusal was unjustified, and nothing to guide the court in determining what terms to impose on Google's forced sharing arrangement. Yet under the Ninth Circuit's rule, not only have the courts become "central

planners"—something antitrust law seeks to avoid, *see Trinko*, 540 U.S. at 408—but worse, here they are centrally planning on a blank slate. Nothing in the law justifies exceeding *Aspen Skiing*'s "outer boundary" in this way. *Id*. at 409.

While a district court's discretion to craft an equitable remedy is broad, it is not unlimited. Decrees that prohibit specified conduct are generally preferable to those that impose affirmative duties. *See* 1 Dan R. Dobbs, *Law of Remedies: Damages–Equity–Restitution* § 2.9, at 224–25 (2d ed. 1993). They are easier to obey (and enforce) than those that command the defendant to do something, which enmeshes the federal courts in administration.

Most importantly, equitable remedies must hew closely to the proven basis for the defendant's liability. Remedies should narrowly target conduct "of the same type or class" as the proven violation. *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 132 (1969). They cannot serve as vehicles for addressing broader issues unrelated to the violation. That is, the "remedy must be tailored to the violation, rather than the violation's being a pretext for the remedy." *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997) (Posner, J.). Equity cannot transform antitrust law into judicial fiat. *See Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 453 (2009) (refusing to "police" market prices).

Every one of these equitable limits was violated in this case. The Ninth Circuit flatly rejected the notion that an injunction should "only touch the consequences of a defendant's conduct." Pet. App. 48a. This overreach is particularly stark given Google's

two-sided platform, where developers and users interact through curated, secure ecosystems. Forced sharing of the app catalog—built on Google's substantial investments in app vetting and maintenance—expropriates that value while ignoring the platform's mutual dependencies. Epic's claims targeted Google's exclusive deals, not Google's refusal to share its assets. Yet the remedy here assumes harms disclaimed by the plaintiff, rejected at summary judgment, and never proven at trial. Indeed, neither the jury nor the district court found any facts showing a causal connection between the district court's far-reaching duty-to-deal remedies and Google's alleged anticompetitive conduct.

In other words, the injunction's "dosage" of forced sharing "exceed[s] that necessary to effect the cure." *Temple Univ. v. White*, 941 F.2d 201, 216 (3d Cir. 1991). By affirming the district court's overbroad remedy, the Ninth Circuit invites courts to impose duties to deal as routine relief, contrary to *Trinko*'s mandate that such duties be avoided in most cases. *Trinko*, 540 U.S. at 415.

The district court erred further by dismissing *Trinko* as confined to liability, ignoring this Court's insistence that antitrust remedies may not stray from the proven basis for liability. *Alston*, 594 U.S. at 102; *Zenith*, 395 U.S. at 132. And the Ninth Circuit compounded that error by adopting a lax causation standard that permits injunctions to undo competitive advantages predating the violative conduct, even if lawfully earned. Equity abhors a windfall. But the Ninth Circuit's approved remedy does more than just recoup any ill-gotten gains. It

deprives Google of the fruits of its legitimate labors and investments. That's not equity; it's punishment.

Google's liability here arose from exclusive deals, not refusals to deal—yet the Ninth Circuit blesses a remedy that mandates the very dealings by rivals that this Court has called the "supreme evil of antitrust." *Trink*, 540 U.S. at 408. The Court should grant review.

II. REVIEW IS NEEDED TO RESOLVE THE NINTH CIRCUIT'S SPLIT WITH THE D.C. CIRCUIT ON THE QUESTION PRESENTED.

The Ninth Circuit's lax causation requirement for injunctive relief creates a circuit split with the D.C. Circuit's rigorous framework in *United States v. Microsoft*. There, the en banc court vacated an injunction after narrowing liability, requiring the district court to ensure "a sufficient causal connection between Microsoft's anticompetitive conduct" and the "remedial goal" of diminishing market position. *United States v. Microsoft Corp.*, 253 F.3d 34, 105-06 (D.C. Cir. 2001) (en banc).

Quoting the leading treatise, *Microsoft* stressed that the "[m]ere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition." *Id.* at 106 (quoting 3 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 650a, at 67 (1996)). On remand, the court rejected all remedies lacking this link, refusing to compel disclosures that would allow rivals to "clone" Windows, which would have denied returns on innovation unrelated to any violation. *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199,

1218–20 (D.C. Cir. 2004). It also rejected forced code alterations that would ease rivals' paths to customers, noting the advantages of "positive network effects" derived from Microsoft's lawful conduct. *Id.* at 1210–12. Remedies, the D.C. Circuit insisted, must address "consequences of the illegal conduct," not pave roads for competitors beyond liability determinations. *Id.* at 1215–16. "The fruits of a violation must be identified before they may be denied." *Id.* at 1232.

Microsoft stands athwart the Ninth Circuit's holding, which rejects any suggestion that an injunction should "only touch the consequences of a defendant's conduct." Pet. App. 48a. This novel approach endorses remedies targeting lawfully acquired advantages, so long as they bear some relation to the defendant's conduct. Here, the injunction aims to erode Google's network effects—more developers attract more users, and vice versa—assuming they resulted from violations. But the jury found only Sherman Act breaches; Google's network effects far predated any violative conduct. The Ninth Circuit's rule permits expropriating such advantages without proof of causation, denying "returns from . . . investment in innovation." *Massachusetts*, 373 F.3d at 1219.

This split warrants review. The D.C. Circuit's approach faithfully applies this Court's directive that remedies should target the proven "consequences of the illegal conduct." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 698 (1978). It guards against overreach, ensuring that injunctions do not "lessen . . . incentive[s]" for innovation. *Trinko*, 540 U.S. at 407–08. In contrast, the Ninth Circuit's lax approach invites end-runs around this Court's duty-

to-deal limits, allowing courts to stand forced-sharing injunctions on unrelated findings (or no findings at all). The contrast between the two circuits' approaches to antitrust relief is stark and irreconcilable.

No precedent supports imposing such sweeping obligations in a single-competitor suit. As scholars have warned, such leniency not only erodes incentives for innovation but also circumvents this Court's duty-to-deal precedents by allowing forced sharing to be imposed indirectly, even when no prior course of dealing or profit sacrifice has been shown. Certiorari is imperative to align the circuits and preserve antitrust's pro-innovation aims.

III. WITHOUT THIS COURT'S INTERVENTION, THE DECISION BELOW WILL IMPERIL INNOVATION AND ECONOMIC GROWTH.

By allowing rivals to free ride on Google's efforts, the decision below diminishes their incentives to innovate while giving Google good reason to hesitate before investing in new features that may be commandeered by its competitors by court order. This Court's intervention is vital to prevent this precedent from chilling investment in innovation across the technology sector, where platforms thrive on voluntary cooperation rather than court-ordered alliances.

Imposing unwarranted duties to deal threatens American innovation. It deters investment in beneficial facilities, as firms will fear compelled sharing with free-riders. *Trinko*, 540 U.S. at 407–08. Why curate a secure app catalog if courts can

mandate its distribution to your competition? The injunction's forced duties—sharing Play's catalog and hosting competitors at regulated prices—are untethered to proven harms. In two-sided platforms, aiding rival developers harms consumers by diluting network effects. The decision below ignores real-world consequences like eroded security and diminished user trust.

Allowed to stand, the Ninth Circuit's decision threatens to transform antitrust law into a tool for strategic litigation abuse. It would permit rent-seeking rivals to subject pro-competitive firms to the formidable threat of antitrust liability, "chill[ing] the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). And it would create "irrational dislocations in the market." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

Outside the easiest cases, a court cannot distinguish competition from exclusion. "*Every* indicator of exclusion also is present with efficient competition. Both predators and efficient producers undercut rivals and gain market share." Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439, 443 (2008). This threat of over-deterrence is not merely ironic; it is corrosive to the vital workings of our economy. It risks returning antitrust law to a time when leading business-school textbooks promoted antitrust litigation as a strategic device to halt competitors' growth and chill pro-competitive behavior. *See, e.g.*, Michael Porter, *Competitive Strategy* 85–86 (1980).

Antitrust litigation is uniquely expensive and wildly unpredictable. Once it survives a motion to dismiss, a plaintiff's antitrust suit can easily amass a steep but irresistible settlement value. *Twombly*, 550 U.S. at 558 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive."). As this case shows, the debate over whether a particular practice is exclusionary can take many years and a lot of money to resolve. Rather than face the high costs and long odds of an appeal (never mind a certiorari petition), most antitrust defendants opt to settle.

This case, which has the advantages of a fully developed record and superb counsel on both sides, offers the Court an ideal vehicle to clarify the outer limits of antitrust law and the federal courts' equitable powers. Left in place, the Ninth Circuit's enforced-sharing remedy will erode competition and distort market incentives. The Court should grant review and end this failed experiment in central planning—"a role for which [federal courts] are ill suited." *Trinko*, 540 U.S. at 408.

"Judicial errors that tolerate baleful practices are self-correcting," Judge Easterbrook has observed, but "erroneous condemnations are not." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 3 (1984). The chief "sin" of forced sharing, therefore, is "putting on defendants a burden they often cannot carry." Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 980 (1986). For Google, that unfair burden will continue unless this Court intervenes.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
candrews@wlf.org

November 3, 2025