No. 24-6256, 24-6274

In the United States Court of Appeals for the Ninth Circuit

EPIC GAMES, INC.,
Plaintiff-Appellee,

v.

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

On Appeal from the United States District Court for the Northern District of California
Nos. 3:20-cv-05671-JD; 3:21-md-02981-JD
Hon. James Donato

BRIEF OF AMICUS CURIAE THE COMMITTEE FOR JUSTICE IN SUPPORT OF APPELLANTS' MOTION FOR A STAY OF PERMANENT INJUNCTION PENDING PETITION FOR REHEARING

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

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

CFJ has a critical interest in the outcome of this litigation. This Court's opinion affirms a radical form of liability and a radical remedy upon Google that penalizes it for rising to the top of the market in the area of selling smartphone apps using innovation and business acumen by forcing it to open its Play Store to its competitors, something the Supreme Court has repeatedly admonished against in the antitrust

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person—besides *amicus curiae* and its counsel—contributed money that was intended to fund preparing or submitting this brief.

context. The opinion creates a watershed change in antitrust law, warping it from a law that fosters competition for the benefit of consumers into a law that mandates businesses deal with their rivals, to consumers' detriment. A stay of such a dramatic holding pending disposition of Google's rehearing petition is appropriate.

Given the word limitations, CFJ's amicus brief limits itself to discussing two of the four factors for granting a stay: that (1) Google is likely to succeed on the merits; and (2) absent a stay, Google will suffer irreparable harm.

ARGUMENT

I. Google is likely to succeed on the merits

A. Antitrust law exists to promote competition, not individual competitors

The panel opinion is quite striking in what it orders Google to do. It mandates that Google open up its app store—something that it created through its own ingenuity and business acumen—to its competitors for no cost. It also orders Google to distribute its entire Play Store catalogue to its competitors so that they may sell such apps via their own stores. And it even requires Google to make available, in its own app store, app stores developed by other rivals. In other words, the

panel opinion mandates that Google deal with its competitors. This is directly repugnant to the Supreme Court precedent that, absent the most extenuating of circumstances, a company has no duty to deal with its competitors. *See Verizon v. Trinko*, 540 U.S. 398 (2004). It is also directly repugnant to this Court's own precedent in *FTC v. Qualcomm Inc.*, 935 F.3d 752 (9th Cir. 2019) ("*Qualcomm I*"); *FTCv. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) ("*Qualcomm II*"); and to the Tenth Circuit's holding in *Novell v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013) (Gorsuch, J.).

Trinko articulates an important clarification from the Supreme Court as to the ultimate purpose of antitrust law—its purpose is not to do away with monopoly power as such, but rather to ensure that firms only acquire or use that power in a manner that does not harm consumers. There, a Verizon phone customer brought suit against the company alleging that, by failing to open its service area to its competitors as part of a new mandate under the Telecommunications Act, it had attempted to gain an unlawful monopoly in the telecommunications market. *Trinko*, 540 U.S. at 401-05. The Court would have none of it. A monopoly alone is insufficient to create

antitrust liability. It "requires, in addition to the possession of monopoly power in the relevant market, the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* at 407 (cleaned up).

In other words, "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, it not only not unlawful; it is an important element of the free-market system." *Id.* And "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Id.* In language that seems tailor-made for Google's app store, the Court emphasized that "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." *Id.* That is exactly what Google did here by conditioning the use of its app store on the payment of a fee. It did nothing wrong in doing so, because "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive

for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id.*

B. Absent extraordinary circumstances, courts cannot order businesses to deal with their competitors.

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

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

This Court itself has recognized, in the context of granting a stay pending appeal, the importance of not weaponizing the Sherman Act to force businesses to deal with their competitors. *See Qualcomm I*, 935 F.3d at 755-56. Qualcomm refused to license its essential patents to rival chip suppliers, and also refused to sell its modem chips to any manufacturers who lacked patent licensing agreements with it. *Id.* at 755. The district court entered an injunction forcing Qualcomm to do so, and this Court granted a stay pending appeal. *Id.* This Court agreed

that Qualcomm had shown a likelihood of success on the ground that the district court's injunction likely compelled them—wrongly—to deal with their competitors. *Id.* at 756.

This Court later reversed the injunction on the merits. *See Qualcomm II*, 969 F.3d at 1005. In reversing, this Court emphasized that "the antitrust laws, including the Sherman Act, were enacted for the protection of competition, not competitors." *Id.* at 993 (cleaned up). Thus, "[c]ompetitors are not required to engage in a lovefest." *Id.* It concluded that the district court had ignored the Supreme Court's warning in *Trinko* that imposing a duty to deal should only applied in rare circumstances. *Qualcomm II*, 969 F.3d at 994. Indeed, it found that Qualcomm's conduct was for the purpose of "greater profits in both the short and long term . . . ." *Id.*

The Tenth Circuit came to a similar conclusion in *Novell*. There, the future Justice Gorsuch noted that "[i]f the law were to make a habit of forcing monopolists to help competitors by . . . sharing their property . . . courts would paradoxically risk encouraging collusion between rivals and dampened price competition—themselves paradigmatic antitrust wrongs—injuries to consumers, and the competitive process alike."

Novell, 731 F.3d at 1073. Nor is that all. "If forced sharing were the order of the day, courts would have to pick and choose the applicable terms and conditions." *Id.* This would require courts "to become 'central planners,' a role for which we judges lack many comparative advantages and a role in which we haven't always excelled in the past." *Id*.

In short, the panel opinion mandates that Google deal with its competitors under circumstances far beyond the outer limits of *Aspen Skiing*. This failure to adhere to Supreme Court precedent, as well as its conflict with both this Court's own caselaw and the caselaw of other circuits, provides Google a substantial likelihood of success.

II. Absent a stay, Google Will Suffer irreparable harm

A. This injunction will cause Google irreparable reputational harm.

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

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

Even isolated breaches would irreparably tarnish Google's reputation as a trusted steward of Android security. Courts have repeatedly held that the loss of consumer trust and goodwill constitutes irreparable harm. *Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 1991) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."). Once consumers, developers, and regulators perceive Google as unable to protect user data, no damages award could restore that confidence.

This reputational injury extends to Google's relationships with developers and device manufacturers, many of whom partner with

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

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

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

The injunction also imposes irreparable competitive harm by compelling Google to share the fruits of its innovation with rivals under terms devised by judicial fiat. As noted above, the Supreme Court has warned that "[e]nforced sharing … requires antitrust courts to act as central planners, a role for which they are ill suited." *Trinko*, 540 U.S. at 408. Forced access is "at or near the outer boundary" of Sherman Act liability, permissible only in "extraordinary" circumstances such as *Aspen Skiing*. *Trinko*, 540 U.S. at 409. Those circumstances are absent

here, where Google has never voluntarily distributed its app catalog to competitors.

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

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

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

Such distortions to the competitive process are the very definition of irreparable harm. Again, this Court has emphasized that the Sherman Act protects "competition, not competitors." *Qualcomm II*, 969 F.3d at 993 (cleaned up). By forcing Google to deal with rivals in ways that undermine its ability to compete long-term through reduced innovation, the injunction subverts that principle of the Sherman Act and causes harm that cannot be remedied after the fact.

CONCLUSION

This Court should stay the injunction pending panel or en banc review.

Respectfully submitted,

/s/ John M. Reeves

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

CERTIFICATE OF SERVICE

I hereby certify that on **August 15, 2025**, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ John M. Reeves

CERTIFICATE OF COMPLIANCE

I certify that this brief contains **2,326** words, excluding those parts exempted by Fed. R. App. P. 32(f).

I further that certify this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as it is written in proportionally-spaced, 14-point Century font using Microsoft Office Word 2016.

/s/ John M. Reeves