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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: *Epic Games Inc. v. Google LLC et al.*, Case No. 3:20-cv-05671-JD	Case No. 3:21-md-02981-JD ***AMICUS CURIAE* BRIEF OF THE FEDERAL TRADE COMMISSION** Judge: Honorable James Donato

TABLE OF AUTHORITIES

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fashion relief based on the record evidence regarding the defendant's conduct and the competitive dynamics of the industry at issue.[3]

The Federal Trade Commission (FTC or Commission) respectfully submits this *amicus curiae* brief to aid the Court's consideration of the remedy for Google's antitrust violations. The FTC takes no position on Epic's specific remedy proposals, or the evidence cited by the parties in support or opposing them.

Interest of the Federal Trade Commission

The FTC's mission is preventing unfair methods of competition and unfair or deceptive practices in the marketplace.[4] Through over 100 years of experience enforcing the U.S. antitrust laws, the FTC has developed expertise investigating and litigating cases involving anticompetitive mergers and conduct. In its adjudicative capacity,[5] the FTC crafts orders to remedy antitrust violations and vindicate the public interest.[6] The FTC's enforcement authority covers a wide range of industries, including technology and digital platforms. The agency has significant legal and technical expertise dedicated to addressing competition and consumer protection issues in technology sectors.[7]

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[3] *Zenith Radio Corp.*, 395 U.S. at 133 ("We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by § 16, should not respond to the 'salutary

Not only has the FTC investigated and litigated matters concerning many areas of technology, but it has also conducted studies

Regardless of the particular theory of antitrust harm, adequate relief should serve these remedial goals and "put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct and break up or render impotent the monopoly power found to be in violation of the Act."[13] The Ninth Circuit has specifically recognized that these remedial goals apply in monopolization cases like this one: "If the jury finds that monopolization or attempted monopolization has occurred, the available injunctive relief is broad, including 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."[14]

A. District Courts Have Broad Power to Craft Injunctive Relief to Remedy Antitrust Violations

District courts enjoy "broad power" to fit the decree to the special needs of the individual case.[15] There are four important facets to a district court's remedial power in antitrust actions.

First, a court can go further than "a simple proscription against the precise conduct previously pursued."[16] Courts have wide leeway not only to enjoin specific practices found to have violated the antitrust laws, but also "to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past."[17] For example, the Supreme Court in *Zenith* reinstated a far-reaching injunction that did not merely prohibit the conduct adjudged to be illegal. Instead the injunction prevented defendants from conspiring in a patent pool in Canada and *all other foreign pools*, even though the violation and

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competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.").

[13] *Grinnell Corp.*, 384 U.S. at 566 (citing *Schine Chain Theatres v. United States*, 334 U.S. 110, 128-129 (1948)).

[14] *Optronics Techs. Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 486 (9th Cir. 2021).

[15] *Zenith Radio Corp.*, 395 U.S. at 132 (citing *NLRB*, 312 U.S. at 435 and *United States v. Nat'l Lead Co.*, 332 U.S. 319, 328-35, 328 n.4 (1947)); *see also Ford Motor Co.*, 405 U.S. at 573 (quoting *Int'l Salt Co.*, 332 U.S. at 401).

[16] *Nat'l Soc. of Pro. Engineers v. United States*, 435 U.S. 679, 698 (1978).

[17] *Zenith Radio Corp.*, 395 U.S. at 132.

harm were established only in relation to a patent pool in Canada.[18] Recognizing courts' power to order fencing-in relief, the Court noted that "when the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed."[19]

Second, injunctive relief is not limited to proscribing specific types of anticompetitive conduct. Instead, a district c

Third, injunctive relief should restore lost competition in a forward-looking way. The Supreme Court has said that when considering remedial provisions that are "designed to restore future freedom of trade, courts should give weight to [a jury finding and] the circumstances under which the illegal acts occur."[24] In other words, the goal is to "effectively pry open to competition a market that has been closed by defendants' illegal restraints," and not merely to end the specific illegal practices.[25] Therefore, fashioning an effective equitable remedy in an antitrust case requires courts "to see to it that effective competition shall be established . . . not only for the present but for the foreseeable future as well."[26]

Fourth and finally, "adequate relief in a monopolization case should . . . deprive the defendants of any of the benefits of the illegal conduct."[27] If antitrust violators ultimately reap the advantages secured through unlawful conduct, that will only serve to incentivize similar behavior by other market participants. In developing an appropriate remedy, a district court should therefore strive to ensure the monopolist is not continuing to reap the

conduct.[28] Even outside the specific context of private antitrust suits, courts can exercise similarly broad remedial power in other types of private cases that involve the public interest.[29]

Here, the remedy in Epic's case against Google implicates the public interest. Like in *Zenith Radio*, Epic's request for injunctive relief seeks to create "an open, competitive Android ecosystem for all users and industry participants."[30] In fact, Epic is not seeking monetary damages in this action or preferential treatment for itself to the exclusion of other developers.[31] As detailed in its complaint, "Epic seeks to end Google's unfair, monopolistic and anticompetitive actions in each of [the markets alleged], which harm device makers, app developers, app distributors, payment processors, and consumers."[32] To that end, the remedial "goal" of Epic's injunctive relief proposal is to "open up to competition the two markets found by the jury" for the benefit of developers and users.[33] The public interest in restoring lost competition

equitable remedies in this private suit to restore competition for the benefit of the public and not merely the plaintiff.[34]

II. Crafting Effective Antitrust Remedies in Digital Markets Requires Accounting for Network Effects, Data Feedback Loops, and Other Key Features of Digital Markets

operating systems,[36] app stores,[37] and payment platforms like credit cards.[38] In either case, network effects mean that demand for the platform grows exponentially as more users join the platform.

Network effects can confer a powerful incumbency advantage to dominant digital platforms, creating barriers to entry and to competition.[39] Users are often less likely to switch to competing platforms given the presence of large numbers of developers on the incumbent platform, and developers who may otherwise offer their products on a competing platform are often less likely to do so because the competing platform lacks a viable customer base. The incumbent platform operator—which had been motivated to attract both users and developers by offering innovative, low-cost services before establishing dominance—may become less incentivized to compete after it achieves market power and builds a moat insulating itself from competition. Once users and other stakeholders are locked in, the dominant operator is often less incentivized to invest in the platform by adding features or lowering the costs of using the platform for paying participants like developers. As the D.C. Circuit explained in *United States v. Microsoft*, such network effects create a "chicken-and-egg situation" in which dominant digital platforms become difficult to dislodge.[40]

In addition to network effects, dominant digital platforms can also insulate their market positions through data feedback loops. When consumers use digital platforms to interact with other users or stakeholders, the platform operator typically retains important data about users and

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[36] *See generally United States v. Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001).

[37] *In re Google Play Store Antitrust Litig.*, No. 20-CV-05761-JD, 2022 WL 17252587, at *5 (N.D. Cal. Nov. 28, 2022) ("Dr. Singer posits, without objection by Google, that the Android App Distribution Market is a two-sided market in that it 'matches buyers (in this case consumers) and sellers (in this case app developers). Two-sided platforms benefit from 'indirect network effects,' meaning that each additional buyer makes the platform more appealing to sellers.").

[38] *See generally Ohio v. Am. Express Co.*, 585 U.S. 529 (2018).

[39] *See United States v. Google LLC*, No. 20-cv-3010 (APM), 2024 U.S. Dist. LEXIS 138798, at *372-73 (D.D.C. Aug. 5, 2024).

[40] *Microsoft Corp.*, 253 F.3d at 55 ("[D]espite the limited success of its rivals, Microsoft benefits from the applications barrier to entry.").

In particular, a remedy may need to ensure that potential competitors can overcome the lock-in advantages of network effects and data incumbency. This could include remedies that ensure that a dominant platform is sufficiently interoperable with competitor platforms to give the rivals a meaningful chance to attract a sufficient network of users, developers, and other stakeholders to compete effectively in the market. Further, to reduce the barriers associated with data feedback loops, a remedy may include provisions ensuring data interoperability, so that users are less "locked in" and can more freely take their data to a competing platform. To address unlawfully acquired scale or unlawfully erected entry barriers, in the context of a single product or across lines of business, a remedy may involve structural relief. Forward-looking provisions like these are necessary to dislodge barriers a monopolist has accrued from network effects and data feedback loops. Failure to overcome a platform monopolist's network and data-driven market power and open the market to competition risks prolonging a market where defendants continue to enjoy the "fruits of monopolistic practices or restraints of trade."[48]

III. The Foregoing Remedial Principles Apply to Google's Objections and Proffer

Applying the principles described above, the FTC offers the following views about certain aspects of Google's Proffer Concerning Epic's Proposed Remedies[49] ("Proffer") and

of any requirement that Google provide access to its Application Programming Interfaces (API) to non-customers for free.[52] But courts have wide latitude to impose these sorts of requirements on monopolists when crafting remedies to restore competition. In Massachusetts v. Microsoft, the D.C. Circuit recognized a court's authority to award this type of relief when it affirmed an injunction requiring Microsoft to share its proprietary APIs with competitors to "facilitate[e] the[ir] entry . . . into a market from which Microsoft's unlawful conduct previously excluded them." 373 F.3d 1199, 1215-18 (D.C. Cir. 2004).

In its objections, Google relies heavily on Pacific Bell Telephone Co., dba AT&T California, et al. v. linkLine Communications, Inc., et al., 555 U.S. 438 (2009) and Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) to support its positions concerning the administrability of Epic's proposed remedy. Here, unlike Trinko and linkLine, a jury has already found that Google violated the antitrust laws.[53] Neither case

remedies for Google's antitrust violations.

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Respectfully submitted,

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