No. _____

IN THE
Supreme Court of the United States

EPIC GAMES, INC.,

Applicant,

v.

APPLE INC.,

Respondent.

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT ON APPLICATION TO VACATE NINTH CIRCUIT'S STAY OF ITS MANDATE AND STAY OF PERMANENT INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

EMERGENCY APPLICATION TO VACATE THE NINTH CIRCUIT'S STAY OF ITS MANDATE OR STAY PENDING APPEAL

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IDENTITY OF PARTIES AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Applicant is Epic Games, Inc. ("Epic"), which was plaintiff in the district court and appellant and cross-appellee in the court of appeals.

Respondent is Apple Inc. ("Apple"), which was defendant in the district court and appellee and cross-appellant in the court of appeals.

This case was designated under Northern District of California rules as related to the following cases:

- *Cameron v. Apple Inc.*, No. 19-cv-03074-YGR-TSH;
- *In re Apple iPhone Antitrust Litigation*, No. 11-cv-06714-YGR-TSH; and
- *SaurikIT, LLC v. Apple Inc.*, No. 20-cv-08733-YGR-TSH.

RULE 29.6 STATEMENT

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

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

Applicant Epic respectfully requests that this Court vacate the stay of the appellate mandate issued by the Ninth Circuit in this case or, in the alternative, vacate the court's stay pending appeal. This Court has repeatedly held that such a stay is appropriate only when the movant demonstrates, *inter alia*, a reasonable probability that this Court will grant certiorari and reverse. But the Ninth Circuit does not follow that precedent. Instead, it grants a stay much more freely—and without regard to whether this Court would review and overturn the ruling. The Ninth Circuit awards a stay whenever the movant's legal argument is not "frivolous." 9th Cir. R. 41-1. Because the Ninth Circuit in this case granted a stay only by applying its erroneously lax legal standard, *see generally* Appendix A at 3a-11a (concurring opinion of M. Smith, J.), and because the result will be to injure not only Epic but innumerable consumers and other app developers for a significant period of time, this Court should vacate the Ninth Circuit's stay.

STATEMENT

The detailed Background and Procedural History of this case are set forth in the parties' Ninth Circuit briefs on Apple's Motion to Stay the Mandate. *See* Appendix B at 21a-26a; Appendix C at 51a-52a. As relevant here, Epic won at trial its claim that various "anti-steering" rules imposed by Apple on mobile application (app) developers violate California's Unfair Competition Law. Those rules prohibit developers from directing iPhone users to less-expensive ways to pay for digital goods

they use in apps. The rules' principal effects are thus to deprive consumers of accurate information that would save them money and, concomitantly, to generate for Apple hundreds of millions of dollars annually in supracompetitive profits. The district court enjoined Apple from enforcing these anticompetitive rules against developers, such as Epic and others.

Apple appealed to the Ninth Circuit, overwhelmingly relying on state law grounds. Based on those state law arguments, Apple sought a stay of the district court's injunction pending appeal. A motions panel granted the stay, finding that Apple had identified, among other things, "serious questions on the merits" regarding the proper interpretation of California law. *See* Appendix D at 67a-68a. The court's order provided that the stay pending appeal would be lifted upon the eventual issuance of the Ninth Circuit's mandate after a decision on the merits. *Id.* at 68a.

A unanimous merits panel subsequently rejected Apple's defense of the anti-steering rules—including Apple's California law arguments underlying the stay pending appeal—in a detailed opinion. *See* Appendix E at 146a-154a. The full court then denied Apple's petition for rehearing en banc without any judge calling for a response or a vote. *See* Appendix F at 162a-163a.

The Ninth Circuit's denial of rehearing ordinarily would cause the mandate to issue in seven days. *See* Fed. R. App. P. 41(b). That would automatically terminate the Ninth Circuit's stay pending appeal of the injunction. *See* Appendix D at 68a. But Apple sought a stay of the mandate pending its forthcoming filing of a petition for a

writ of certiorari in this Court, seeking to prevent the injunction from taking effect for several months. *See* Fed. R. App. P. 41(d).

In seeking a stay of the mandate, Apple notably abandoned the California law arguments that dominated its prior briefing, and that had been the entire legal basis for the stay pending appeal, *see* Appendix D at 67a-68a, no doubt because questions of state law are effectively excluded from review in this Court. And Apple sought this new stay under a *much* laxer legal standard: "The [Ninth Circuit's] standard for granting such a stay is lenient. The Court 'often' stays the mandate pending certiorari, as parties 'need not demonstrate that exceptional circumstances justify a stay.'" Appendix B at 26a (quoting *United States v. Pete*, 525 F.3d 844, 850 & n.9 (9th Cir. 2008)). Apple argued that a stay was appropriate under the standard articulated in the Ninth Circuit Local Rule implementing Federal Rule of Appellate Procedure 41—*i.e.*, that its certiorari "petition will not be frivolous." *Id.* at 19a (citing 9th Cir. R. 41-1).

Apple invoked several federal law arguments that it had made only glancingly or not at all in its opening brief on appeal, and which the panel in turn had discussed only briefly or not at all. *See id.* at 27a-36a. The factual premise of Apple's federal arguments was that Epic had secured the injunction based on injury it had suffered only in its capacity as an individual app developer. *See id.* at 23a-26a, 29a-30a. On that basis, Apple argued that its petition for certiorari would present a substantial argument that the district court's injunction violates Article III, the federal court's equitable power Fed. R. Civ. P. 23, and the Due Process Clause.

In response, Epic urged the Ninth Circuit to apply the rigorous standard repeatedly announced by this Court for granting a stay of the mandate—including particularly the requirements that the movant prove a reasonable probability that this Court will grant certiorari and reverse. Appendix C at 49a-50a (citing *Netherland v. Tuggle*, 515 U.S. 951, 952 (1995); *Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983); *S. Park Indep. Sch. Dist. v. United States*, 453 U.S. 1301, 1303 (1981)). Epic explained that the motion should be denied because the panel had rejected the factual premises underlying all of Apple's argument, without applying any legal rule that even Apple contested. The panel had thus upheld the injunction on the basis that Epic is not merely an app developer, but a games store operator that seeks to compete with Apple's App Store. Appendix E at 147a. In its capacity as store operator, Epic has a sweeping interest in the application of the anti-steering rules to other developers. *See id.* at 147a, 154a. Furthermore, Apple had not made its Article III, Rule 23, and due process arguments in any detail, and the panel had said nothing of substance about any of those issues in its merits decision that might be reviewed in this Court. Apple notably had not cited any decision of any court of appeals that applied a different rule than the Ninth Circuit on any question.

The Ninth Circuit nonetheless granted the stay. *See* Appendix A at 2a. Judge Milan Smith issued a published concurring opinion. The stay was appropriate, Judge Smith explained, only because of the Ninth Circuit's "general practice of granting a motion for a stay if the arguments presented therein are not frivolous." *Id.* at 3a (citing *Pete*, *supra*). It was thus sufficient that "the arguments in Apple's motion may

not be technically frivolous," but Judge Smith then took pains to explain in detail that, "[w]hen our reasoning and the district court's findings are considered, Apple's arguments *cannot withstand even the slightest scrutiny*." *Id.* (emphasis added).

Judge Smith documented how, although Apple's legal arguments were arguably non-frivolous and thus enough to secure a stay of the mandate in the Ninth Circuit, they "ignore key aspects of the panel's reasoning and key factual findings by the district court," so that they "simply masquerade [Apple's] disagreement with the district court's findings and objection to state-law liability as contentions of legal error." *Id.* at 3a. Apple's "conclusory statement" that the lower courts' rulings are supported by no substantial evidence "is simply false." *Id.* at 5a. The record and district court's findings also refute Apple's assertion that its anti-steering rules protect consumers. *Id.* "The injunction against the anti-steering provision simply allows developers to let users know that certain content (which Apple has already chosen to allow access to) can be purchased at a lower price elsewhere." *Id.* at 7a n.2. In sum, Apple's arguments "challenge an imagined panel opinion on an imagined record." *Id.* at 11a.

No member of the panel disagreed with Judge Smith's articulation of the Ninth Circuit's legal standard or his explanation of how Apple had (only barely) satisfied it.

ARGUMENT

A. The Ninth Circuit's Legal Standard for Granting a Stay of the Mandate Pending Certiorari Cannot Be Reconciled with this Court's Precedents.

Federal Rule of Appellate Procedure 41(d) authorizes a court of appeals to issue a stay of its mandate pending the filing and disposition of a petition for a writ of certiorari. The Committee Notes explain that the Rule incorporates the standard articulated by this Court for granting such a stay. Fed. R. App. P. 41 advisory committee's note to 1994 amendment. This Court, in turn, has made clear that there is "no reason to apply a different standard" when the question is whether this Court should grant a stay itself or whether it should grant a stay "pending disposition of a petition for certiorari to this Court should continue in effect." *Maggio v. Williams*, 464 U.S. 46, 49 (1983) (per curiam); *accord United States v. Warner*, 507 F.3d 508, 511 (7th Cir. 2007) ("This standard is similar to the one that the Justices themselves use, when they are ruling on applications in chambers in their capacity as Circuit Justices.").

This Court's precedents require the movant to make multiple "well-settled" showings:

> There must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

White v. Florida, 458 U.S. 1301, 1302 (1982) (cleaned up) (collecting cases). This Court has consistently adhered to that standard, as have individual Justices in numerous in-chambers opinions. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *Indiana State Police Pension Tr. v. Chrysler*, 556 U.S. 960, 960-61 (2009) (per curiam); *Bell v. Thompson*, 545 U.S. 794, 806 (2005); *see also, e.g.*, *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); *Corsetti v. Massachusetts*, 458 U.S. 1306, 1306-07 (1982) (Brennan, J., in chambers).

The governing standard thus does not merely ask whether the application presents a significant legal question, much less whether the movant presents a "non-frivolous" argument. Courts of appeals constantly decide interesting and difficult issues; that is no reason to block the effectiveness of their decisions. Instead, the governing rule is that even in difficult cases the court of appeals' mandate will issue seven days after the panel ruling or denial of rehearing. *See* Fed. R. App. P. 41. This Court's precedents articulating the legal standard for a stay of the mandate at bottom ask whether it is appropriate to put the court of appeals' ruling on hold because there is a realistic prospect that it will be overturned—*i.e.*, that it is one of the small number of federal appellate rulings that this Court will both grant review and reverse—and because the movant will be irreparably injured before that happens.

A stay is thus a limited and rare exception to the rule that the mandate issues as a matter of course. A stay imposes significant costs on the party denied the rightful benefit of the appellate ruling in its favor. A petitioner has 90 days by default to seek certiorari—a period that is often extended to 150 days. With a single extension of the

time to respond, the case will not be ripe for disposition for another 90 days. That time may be lengthened somewhat by the Court's summer recess, or substantially by an order calling for the views of the Solicitor General. In all, stays of the mandate will regularly block the effectiveness of the appellate court's judgment for seven months or more.

The Ninth Circuit's stay in this case should be vacated because that court's standard for granting a stay of the mandate is much less stringent than required by this Court's precedents. That court has issued a rule (41-1) providing that although a stay "will not be granted as a matter of course," it will only be denied when "the Court determines that the petition for certiorari would be frivolous or filed merely for delay." The Ninth Circuit cited that rule in the case relied on by Apple and Judge Smith, *United States v. Pete*, 525 F.3d 844 (9th Cir. 2008), which explained that the court "often" stays the mandate pending certiorari, as under its standard parties "need not demonstrate that exceptional circumstances justify a stay." *Id.* at 851 & n.9. Judge Smith, who has the benefit of 17 years of experience on that court, explained that it will grant a stay of the mandate so long as the arguments in support are "not frivolous." Appendix A at 3a.

The Ninth Circuit's legal standard has no basis in law or logic. There is no context in which a court's judgment is put on hold for a substantial period merely because the losing party has a non-frivolous argument. Frivolity is the standard for avoiding sanctions under Federal Rule of Civil Procedure 11 or Federal Rule of

Appellate Procedure 38, not for securing a stay delaying the effectiveness of a fully-adjudicated outcome.

Of note, as far as can be determined, the Ninth Circuit has never even attempted to explain the legal basis for its standard. No Ninth Circuit opinion, for example, addresses any of the precedent of this Court governing stays of the mandate or explains why it is appropriate to so freely interrupt the ordinary judicial process of allowing the court of appeals' ruling to take effect. Rather, as Judge Smith explained, over time a "general practice" has taken hold, which is now reflected in its Circuit Rule 41-1.

Besides the Ninth Circuit, only the Sixth Circuit applies a standard that is less rigorous than this Court's precedents require. The Sixth Circuit holds that a stay is appropriate "when it presents a close question or one that could go either way." *United States v. Kincaid*, 805 F. App'x 394, 395 (6th Cir. 2020) (quoting *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985)) (cleaned up).

In stark contrast, five other circuits—the Second, Third, Seventh, Eighth, and Federal—have expressly adopted the rigorous inquiry mandated by this Court's precedents. *See In re A.F. Moore & Assocs., Inc.*, 974 F.3d 836, 840 (7th Cir. 2020); *United States v. Silver*, 954 F.3d 455, 458 (2d Cir. 2020); *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 977 F.3d 1379 (Fed. Cir. 2020); *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007); *John Doe I v. Miller*, 418 F.3d 950, 951 (8th Cir. 2005). Those courts have stressed that the bar to receiving a stay "is high," *Silver*, 954 F.3d at 458, and requires an "exceptional" showing, *Nara*, 494 F.3d at 1133. (For a particularly

clear discussion of the requirements of this Court's precedents and the meaning of the Advisory Committee Note to Rule 41, see the opinion of Judge Dyk—who has considerable personal experience with practice before this Court—in *American Axle & Manufacturing*, *supra*).

The Ninth Circuit's radically more forgiving legal standard is not merely rhetorical. Since July 1, 2022, the Ninth Circuit has granted 51% of motions to stay the mandate (41 of 81). The overwhelming majority of the stays that were denied were presented by transparently frivolous applications—generally submitted *pro se*, and frequently incomprehensible.[1] Only the Sixth Circuit, which as noted applies a similarly lax standard, is so generous—granting 62% since July 2022, although on a much smaller sample size (13 of 21).

To ensure that the data regarding the past year was not an outlier, we expanded our review of the Ninth Circuit to encompass all motions to stay the mandate since July 1, 2020. In that roughly three-year period, that court granted 132 stays of the mandate—representing 46% of those motions (132 of 288).

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[1] For illustrative examples, *see, e.g.*, *Chamberlin v. Hartog, Baer & Hand, APC*, No. 22-16409, Dkt. 27 at 4 (9th Cir. 2022) (*pro se* application asserting that his counsel "threw the case"); *Flarity v. Roberts*, No. 21-35661, Dkt. 41 at 3-4 (9th Cir. 2021) (*pro se* application asserting that Ninth Circuit's treatment of *pro se* litigants is unconstitutional); *Kraft v. Gainey Ranch Comm. Ass'n*, No. 21-16403, Dkt. 41 at 1 (9th Cir. 2021) (*pro se* application asserting court "just made up" facts); *Chadbourne v. Wilmington Trust*, No. 20-60054, Dkt. 47 (9th. Cir. 2020) (unintelligible *pro se* application); *Lloyd v. Commissioner*, No. 20-73387, Dkt. 41 at 2-3 (9th Cir. 2020) (*pro se* application asserting 11 grounds that federal taxes are unenforceable); *United States v. Mendez*, No. 20-30007, Dkt. 82 at 1-5 (9th. Cir. 2020) (*pro se* application asserting numerous unintelligible errors); *Peasley v. Rippberger*, No. 20-16695, Dkt. 51 at 1-2 (9th Cir. 2020) (handwritten *pro se* application asserting that he has no access to legal materials to proceed); *United States v. Cantizano*, No. 19-10373, Dkt. 98 at 1 (9th Cir. 2019) (one-page, handwritten, *pro se* application).

The practice in other courts of appeals is very different. Since July 1, 2022, the other circuits granted only 11% of such motions—roughly one-fifth as frequently as the Ninth Circuit, on a large sample size (15 of 140). Adhering faithfully to the strict requirements of this Court's decisions, the Fourth, Seventh, Eighth, and Tenth Circuits denied every single stay motion; the D.C. and Third Circuits each granted only one.

That the Ninth Circuit grants relief far too freely is also plain from a review of the 132 cases in which it issued a stay since July 1, 2020. Of those, this Court granted certiorari in only 14% (17 of 123; nine have not yet been resolved). In a large proportion of cases in which a stay was granted, the only purpose and effect of the stay was delay. In almost one-third (39), the moving party *did not even file* a petition for certiorari. In a little more than a third of the cases where a petition was filed and certiorari was denied (27 of 73), this Court did not even call for a response.

B. Apple's Stay Application Cannot Satisfy the Standard Set by this Court's Precedents.

This Court previously has summarily reversed the entry of a stay where "[n]othing indicates that the Court of Appeals even attempted to undertake the three-part inquiry required by our decision[s]," including determining whether four Justices "would consider the underlying issue sufficiently meritorious for the grant of certiorari" or that "a significant possibility of reversal" existed. *Netherland v. Toggle*, 515 U.S. 951, 952 (1995) (per curiam) (cleaned up).

The Court should do the same here, taking this unique opportunity to make clear that the Ninth Circuit's standard for granting a stay of the mandate is far too lenient. The Ninth Circuit almost always grants stays by summary orders. It almost never explains the basis for granting such a motion, not even by citing the standard it is applying. Here, by contrast, Judge Smith's opinion makes clear both the lax standard the court applied and that the standard is dispositive of Apple's motion. Apple received a stay notwithstanding that its arguments, while not "technically frivolous", "cannot withstand even the slightest scrutiny." Appendix A at 3a.

As Judge Smith explained, all of Apple's arguments rest on the premise that Epic is entitled to relief only as an individual app developer. But both the district court and the court of appeals found otherwise, as a matter of fact. So, Apple's legal arguments "simply masquerade its disagreement" with those factual conclusions. *Id.* It is long-settled that this Court will not grant certiorari to resolve that factual dispute. *See United States v. Johnston*, 268 U.S. 220, 227 (1925). And even if it did grant review, it would not reverse on that basis. *See Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious exceptional showing of error.") (citation omitted).

For present purposes, the better view is that Apple's arguments are in fact frivolous. But all that matters here is that there is no prospect that this Court would grant certiorari to review the supposedly legal questions raised by Apple's motion,

much less reverse on that basis. Apple did not cite any legal holding actually set forth in the panel opinion that would be subject to review. Nor did it cite any decision of any other court of appeals that conflicted with a rule announced by the Ninth Circuit.

As discussed, Apple's argument against the injunction on appeal—and the entire basis for the stay pending appeal—relied principally on state law. It has now abandoned all those points. Apple did argue back on page 110 of its opening brief that as a matter of federal remedies law "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff[]." Apple Opening Br. 110 (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)). But the panel then adopted that exact rule, quoting that exact language, from that exact precedent. *See* Appendix E at 152a-53a.

Beyond that, Apple presented its current federal law arguments in its opening brief in only a single throwaway paragraph on page 111—which does not even mention the Article III argument Apple advanced in its motion to stay. Apple argued:

> Any injury to Epic from the anti-steering provisions would be remedied by an injunction prohibiting Apple from applying those provisions to *Epic*. Conversely, an injunction applicable to other developers provides no benefit to Epic. Such an injunction, however, subverts Federal Rule of Civil Procedure 23(b)(2), which expressly addresses injunctive relief extending beyond the named plaintiff. Allowing what is essentially classwide relief without certifying a class action creates an inequitable asymmetry whereby non-parties can claim the benefit of a single favorable ruling without being bound by it. Among other problems, this kind of one-way preclusion violates Apple's due process rights. *See Hansberry v. Lee*, 311 U.S. 32 (1940).

Apple Opening Br. 111; *compare id.* 103-04 (making only the distinct Article III argument that Epic and its subsidiaries had suffered no injury in fact, without either raising any Article III objection that Epic was asserting the interests of third parties or discussing the scope of the injunction).

In response, the Ninth Circuit said nothing of substance about any of the legal issues Apple intends to ask this Court to decide. The opinion thus does not even mention Rule 23 or due process, and does not discuss the Article III theory that Apple invoked for the first time in its stay motion. The Ninth Circuit instead merely rejected Apple's factual premise—nothing more:

> Second, the district court did not abuse its discretion when setting the scope of the injunctive relief because the scope is tied to Epic's injuries. The district court found that the anti-steering provision harmed Epic by (1) increasing the costs of Epic's subsidiaries' apps that are still on the App Store, and (2) preventing other apps' users from becoming would-be Epic Games Store consumers. Because Epic benefits in this second way from consumers of other developers' apps making purchases through the Epic Games Store, an injunction limited to Epic's subsidiaries would fail to address the full harm caused by the anti-steering provision. Appendix D at 154a.

Finally, to the extent relevant, the equities weigh strongly against a stay of the mandate. The district court found and the court of appeals agreed that Apple's anti-steering rules harm consumers by preventing developers such as Epic from directing consumers to ways to purchase digital goods less expensively. In turn, the rules allow Apple to collect hundreds of millions of dollars in monopoly rents. Apple's contrary arguments that the rules protect consumers from fraud, Judge Smith correctly

explained, ignore the record and those findings. There is no justification for imposing those significant costs for months until Apple's certiorari petition is inevitably denied.

The posture of this case is the least appropriate context in which to freely grant a stay of the mandate. This stay has the effect of extending the appellate motions panel's earlier stay of the district court's injunction pending appeal. That is entirely inappropriate, because it is clear that the standard for a stay pending appeal is not met. That earlier stay was granted on a much more substantial showing by Apple that its state law arguments were meritorious. But the merits panel then unanimously rejected those arguments, and Apple has abandoned them entirely.

At the very least, therefore, this Court should vacate the stay of the injunction. It is now clear as a matter of law that Apple is not entitled to that stay, which nonetheless remains in effect only because the Ninth Circuit provided that it would remain in place until the appellate mandate issued.[2]

[2] As a formal matter, an order vacating the stay of the mandate would return jurisdiction over the entire case to the district court, whereas vacating the stay pending appeal would give the district court jurisdiction only over administration of the injunction.

CONCLUSION

This Court should vacate the Ninth Circuit's stay of the appellate mandate or, in the alternative, vacate the Ninth Circuit's stay pending appeal.

Respectfully submitted,

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