No. 23A78

Supreme Court of the United States

EPIC GAMES, INC.,

Applicant,

v.

APPLE INC.,

Respondent.

RESPONSE TO EMERGENCY APPLICATION TO VACATE THE NINTH CIRCUIT'S STAY OF ITS OWN MANDATE

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Apple Inc. states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to this Court's Rule 21, Apple Inc. respectfully submits that Epic Games, Inc.'s application to vacate the Ninth Circuit's stay of its own mandate should be denied.

INTRODUCTION

Motions in the courts of appeals to stay the mandate pending a petition for a writ of certiorari are governed by Federal Rule of Appellate Procedure 41(d), which provides that the applicant "must show that the petition would present a substantial question and that there is good cause for the stay." In this case, the Ninth Circuit unanimously exercised its discretion to stay its own mandate pending Apple's forthcoming petition for a writ of certiorari "pursuant to Rule 41(d)." App. 2a. The Ninth Circuit's discretionary decision, applying the correct legal standard, does not warrant this Court's emergency intervention.

The Ninth Circuit cited *only* Rule 41(d) in granting the stay, yet Epic neither engages with nor even acknowledges the "substantial question" standard; nor does Epic dispute in its application that Apple's arguments meet that standard, as the Ninth Circuit found. Instead, Epic argues that the proper standard is the one used by *this* Court in deciding whether to stay a mandate in the first instance. That is wrong: By promulgating

Rule 41(d), this Court has directed the courts of appeals to use the substantial question standard in deciding whether to stay their own mandates pending certiorari. Epic also argues that a Ninth Circuit local rule establishes a more lenient standard, but that too is wrong: The local rule (correctly) explains that a stay motion "will be denied" if the forthcoming petition for certiorari "would be frivolous." 9th Cir. R. 41-1. It does not purport to change the Rule 41(d) standard for granting a stay of mandate in the court of appeals.

Because the Ninth Circuit applied the correct legal standard, Epic has no basis for seeking vacatur of the stay order. To obtain the requested relief, Epic must establish *both* that the order is "demonstrably wrong" *and* that Epic will be "seriously and irreparably injured" by a stay that merely preserves the status quo. Epic has made neither showing, nor could it. First, Apple's forthcoming petition will present substantial questions about whether the injunction at issue exceeds the Article III powers of the federal Judiciary. Second, by its terms, the injunction does not even apply to Epic, and thus Epic is not irreparably harmed by maintaining a stay that has already been in place for almost two years. Rather, Apple would be irreparably harmed by a decision to lift the stay, as compliance with the injunction would undermine Apple's efforts to protect users' privacy and security.

Epic's application should be denied.

STATEMENT

1. Apple's App Store is a two-sided transaction platform that allows third-party developers of apps built using Apple's proprietary software and technology to connect with consumers who use devices (such as iPhones) running Apple's iOS operating system. App. 80a. Developers who wish to license and use Apple's technology and tools to develop and distribute iOS apps must adhere to certain requirements. App. 80a–81a. As relevant here, all native iOS apps must be distributed through the App Store, and all in-app purchases of digital goods and services must use Apple's IAP mechanism. App. 81a. Apple charges a commission on downloads of paid apps and for transactions effected through IAP. *Ibid.*

Apple also has adopted certain "anti-steering" provisions, which help Apple enforce the IAP requirement. The rule at issue here prohibits developers from "includ[ing] buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than [IAP]" within iOS apps. C.A.9 Dkt. No. 42, at 698. This Court has upheld as procompetitive substantially similar anti-steering provisions. *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2287–90 (2018); *see also New York* v. *Meta Platforms, Inc.*, 66 F.4th 288, 303–04 (D.C. Cir. 2023) (rule prohibiting developers from linking out not anticompetitive).

2. Epic filed this lawsuit on its own behalf and did not seek to represent (or join) any other developers or even any of its own subsidiaries. C.A.9 Dkt. No. 94, at 895. Epic thereby bypassed pending class actions brought by app developers and consumers. *See Cameron* v. *Apple Inc.*, 19-cv-03074-YGR (N.D. Cal.); *In re Apple iPhone Antitrust Litig.*, 11-cv-06714-YGR (N.D. Cal.). Like the plaintiffs in those cases, Epic alleged that the App Store distribution and IAP requirements are anticompetitive and violate the antitrust laws. C.A.9 Dkt. No. 94, at 895–907.

Epic did not separately challenge the anti-steering provisions, instead identifying them in its Complaint as one way that Apple allegedly enforces the IAP requirement. C.A.9 Dkt. No. 94, at 902–03; D.C. Dkt. No. 1 ¶¶ 184–291. In addition to nine antitrust counts focused on the distribution and IAP requirements, Epic summarily alleged that "Apple's conduct, as described above, [also] violates California's Unfair Competition Law." D.C. Dkt. No. 1 ¶ 286. The detailed proposed injunctions that Epic submitted both before and after trial were entirely silent as to the anti-steering provisions. D.C. Dkt. No. 276-1; D.C. Dkt. No. 777.

3. After a bench trial, the district court found that Epic had failed to carry its burden of proof on any of its antitrust claims (D.C. Dkt. No. 812, at 150–59, 179), but concluded that Apple's anti-steering provisions are "unfair" under California's Unfair Competition Law ("UCL") (*id.* at 165–

66). Epic introduced scant evidence regarding these provisions at trial, *see id.* at 163 (noting the record on this issue was "less fulsome"), and no evidence whatsoever regarding the effect of the anti-steering provisions on Epic.

Epic has had no apps on the App Store since August 2020, when Apple terminated its developer program account after Epic unveiled secret code in its *Fortnite* app designed to circumvent Apple's IAP requirement. This intentional deception violated multiple provisions of the license agreement and developer guidelines, as the district court confirmed in ruling for Apple on its counterclaim for breach of contract. D.C. Dkt. No. 812, at 168. In addition to awarding money damages to Apple, the court entered a declaration that Apple has the contractual right to terminate the developer program accounts of Epic and any of its subsidiaries as a result of Epic's intentional misconduct. *See id.* at 178–79.

The district court did not hold a post-trial evidentiary hearing to determine the appropriate remedy for the UCL claim, but rather entered a permanent injunction *sua sponte* and without the benefit of adversary briefing. As relevant here, the court enjoined Apple from prohibiting developers from "including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to [IAP]." D.C. Dkt. No. 813. Although the case was

brought by a single plaintiff and involved no putative (much less certified) class, the court extended the injunction beyond Epic to *all* developers of U.S.-based iOS apps. *Ibid.*; *see also* D.C. Dkt. No. 812, at 167–68.

After entering the injunction, the district court denied Apple's motion for a stay pending appeal. In that order, the court ruled for the first time that Epic might suffer future injury from the anti-steering provisions because royalties on its Unreal Engine software were based on licensee sales net of commission. *See* D.C. Dkt. No. 830, at 2–3. The sole evidence on this point, however, shows that the royalties are assessed on gross sales (and thus Epic has no injury under this theory). *See* C.A.9 Dkt. No. 94, at 1079–80.

4. On December 8, 2021, the Ninth Circuit stayed the UCL injunction pending appeal, and its stay remains in place until the appellate mandate issues. App. 67a–68a.

In addition to challenging the UCL judgment on state-law grounds, Apple argued in its cross-appeal that the injunction was beyond the Article III powers of the federal Judiciary. Apple's first federal challenge was that Epic had not proven any injury to itself from the anti-steering provisions, and thus lacked Article III standing to obtain or enforce the injunction. C.A.9 Dkt. No. 93, at 102–04; C.A.9 Dkt. No. 183, at 1–8. Since Apple terminated Epic's developer program account in August 2020, Epic has

had no apps on the App Store and therefore is completely unaffected by the anti-steering provisions. Apple further argued that because Epic had not sought class certification, any injunctive relief must be limited as a matter of federal law only to Epic (the named plaintiff) and could not extend to non-parties. C.A.9 Dkt. No. 93, at 110–11; C.A.9 Dkt. No. 183, at 24–28. As Apple explained, the broader injunction entered by the district court "subverts Federal Rule of Civil Procedure 23(b)(2), which expressly addresses injunctive relief extending beyond the named plaintiff." C.A.9 Dkt. No. 93, at 111.

On April 24, 2023, the Ninth Circuit affirmed the UCL judgment and injunction (while rejecting Epic's antitrust arguments). App. 71a, 146a. With respect to Article III injury, the panel did not approve (or even mention) the district court's erroneous ruling regarding Unreal Engine royalties—which Epic had abandoned on appeal. Instead, the panel speculated that enjoining the anti-steering provisions could theoretically increase the earnings of Epic's subsidiaries and/or Epic's PC game store, which is not and has never been available on iOS. App. 147a. The panel adverted to this same theory as supporting the universal scope of the injunction. App. 154a. The panel cited no evidence that the anti-steering provisions have *actually* resulted in past injury or will result in future injury (much less the requisite irreparable harm) to Epic through its subsidiaries or the Epic

Games Store, and there is no such evidence in the trial record. On the contrary, this theory was advanced for the first time on appeal.

The panel denied Apple's and Epic's cross-petitions for rehearing on June 30, 2023. App. 162a–163a.

Apple promptly moved to stay the mandate pending the filing and disposition of a petition for a writ of certiorari to this Court, explaining that "[t]he petition will raise substantial questions of law and there is good cause for a stay. Fed. R. App. P. 41(d)(1)." App. 19a. In opposition, Epic argued that Apple's "arguments provide no basis for a stay because they raise no 'substantial question.' Fed. R. App. P. 41(d)(1)." App. 49a. On July 17, 2023, the panel unanimously granted Apple's motion and stayed its own mandate "[p]ursuant to Rule 41(d) of the Federal Rules of Appellate Procedure." App. 2a. Judge Smith specially concurred in the order. *See* App. 3a.

REASONS FOR DENYING THE APPLICATION

Epic cites no case—and Apple is aware of none—in which this Court or a Circuit Justice has vacated the stay of a mandate issued by a three-judge panel in a non-habeas civil case. *See* note 1, *infra*. Indeed, Apple has found just one case in which this Court has ever vacated an appellate court's stay of mandate outside of the habeas context: Six decades ago, a single Fifth Circuit judge issued a stay of the mandate in a

desegregation case over the express objections of the three-judge panel that had actually decided the appeal, and the Circuit Justice was required to intervene. *See Meredith* v. *Fair*, 83 S. Ct. 10, 10–11 (1962) (Black, J., in chambers). If anything, that exceptional case proves that this Court does not second-guess decisions of the courts of appeals staying their own mandates. As the advisory committee notes to Federal Rule of Appellate Procedure 41(d) have since reiterated, "[t]he granting of a stay . . . remain[s] within the discretion of the court of appeals."

Because the courts of appeals have ample discretion to stay their own mandates, such a stay can be vacated by this Court only where the applicant shows that it will be "seriously and irreparably injured by the stay, *and* the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc.* v. *Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (emphasis added) (citation omitted); *see also Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring) (similar). This discretion "should be exercised with the greatest of caution and should be reserved for exceptional circumstances." *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers).

Where, as here, the "panel carefully considered the issues presented and unanimously concluded that a stay was appropriate," that decision "is entitled to great weight." *Holtzman*, 414 U.S. at 1314; *see also Commodity Futures Trading Comm'n* v. *British Am. Commodity Options Corp.*, 434 U.S. 1316, 1319 (1977) (Marshall, J., in chambers) ("Since the Court of Appeals was quite familiar with this case, having rendered a thorough decision on the merits, its determination that stays were warranted is deserving of great weight, and should be overturned only if the court can be said to have abused its discretion"). The great solicitude afforded the appellate panel is due in part to "the intimate familiarity with the factual environment of th[e] litigation acquired by" the court of appeals. *Krause* v. *Rhodes*, 434 U.S. 1335, 1335 (Stewart, J., in chambers).

Epic cannot satisfy that daunting standard. Epic is simply incorrect in asserting that the Ninth Circuit applied the wrong legal standard in granting a stay of its own mandate pending the forthcoming petition for a writ of certiorari. (Part I, *infra*.) There is no basis for the extraordinary remedy Epic seeks from this Court because the Ninth Circuit's discretionary decision to stay its own mandate is not demonstrably wrong; and Epic has failed to demonstrate serious and irreparable harm from a stay that has been in place for more than two years and does not affect Epic's rights in any event. (Part II, *infra*.)

I. The Ninth Circuit Applied The Correct Standard

Federal Rule of Appellate Procedure 41(d) authorizes a court of appeals to stay its own mandate pending the filing and disposition of a petition for a writ of certiorari if the movant shows that the forthcoming petition "would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d). That is the standard under which both parties submitted extensive briefing in the court below. *See* App. 26a–39a (Apple's preview of its forthcoming petition under the heading "**Apple's Petition Will Present Substantial Questions Of Law**"); App. 52a–55a (Epic's response under the heading "**The Arguments Now Raised By Apple . . . Do Not Present Any Substantial Question**"). And that is the standard under which the Ninth Circuit panel decided to stay its own mandate after ruling against Apple on the injunction issue, to allow time for this Court's review.

Rule 41(d) is the *only* authority cited in the unanimous panel order granting the stay of the mandate. *See* App. 2a (granting stay "[p]ursuant to Rule 41(d)"). Yet, Epic never addresses the Rule 41(d) standard in its application to this Court. Indeed, the words "substantial question" and "good cause" appear nowhere in its submission, and Epic does not dispute in this Court that Apple's forthcoming petition will present substantial questions. Epic's failure to discuss, or even acknowledge, the controlling standard for staying the mandate—and the only standard the panel cited

in its decision—is reason alone to deny its application. And the arguments Epic does advance fare no better.

1. Rather than address whether the Ninth Circuit properly granted the stay under Rule 41(d), Epic observes that when *this* Court decides in the first instance whether to stay the mandate pending a petition for certiorari, it will consider whether there is a reasonable probability that four Justices will vote to grant certiorari along with a significant possibility of reversal. Appl. 6–7 (citing *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); *White* v. *Florida*, 458 U.S. 1301, 1302 (1982)). That is true as far as it goes, but irrelevant—Apple is not asking *this* Court for a stay of the mandate. It sought and obtained its stay from the Ninth Circuit pursuant to Rule 41(d), which governs such requests in the courts of appeals. Epic is now asking this Court to *reverse* that discretionary decision, yet offers no basis for doing so.[1]

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[1] Epic suggests that this Court applies the same standard for assessing lower court stays as it does in deciding whether to stay the mandate itself. *See* Appl. 6 (citing *Maggio* v. *Williams*, 464 U.S. 46, 49 (1983) (per curiam)). Its sole authority was a capital case on successive habeas review, where this Court had already *twice* denied certiorari and where every court to examine the issue had concluded the petitioner's claims were without merit. *Maggio*, 464 U.S. at 47–48. Habeas review of state-court judgments presents different questions of finality than direct appeals of federal judgments. *See*, *e.g.*, *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983) (reiterating that "[t]he role of federal habeas proceedings . . . is secondary and limited"). Epic's near-exclusive reliance on capital habeas cases (Appl.

Epic urges, though, that "[t]he [Advisory] Committee Notes explain that [Rule 41(d)] incorporates the standard articulated by this Court for granting such a stay." Appl. 6. That is wrong—they say no such thing:

> The amendment also states that the motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The amendment is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before *it* will stay a mandate. *See* Robert L. Stern et al., *Supreme Court Practice* §17.19 (6th ed. 1986).

Fed. R. App. P. 41 advisory committee's note to 1994 amendments (emphasis added). The Note acknowledges this Court's practice, but this Court in adopting Rule 41(d) did not require the courts of appeals to follow the same practice or apply the same standard. Rather, it adopted the "substantial question" standard—presumably because circuit judges are not in a position to predict how the Members of this Court are likely to vote in a particular case. *Cf. Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

2. Much of Epic's application is devoted to attacking a straw man: Citing the Ninth Circuit's local rule 41-1, Epic contends that "[t]he Ninth

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4, 6–7, 11) points up the absence of any relevant precedent supporting its extraordinary request.

Circuit awards a stay whenever the movant's legal argument is not 'frivolous.'" Appl. 1. That is not an accurate description of the decision below or the Ninth Circuit's local rule.

The order below did not cite local rule 41-1 or incorporate any of its guidance. *See* App. 2a. While Apple cited local rule 41-1 once in its stay motion (App. 19a), Epic did not cite local rule 41-1 in its response at all, nor did it argue that the Ninth Circuit had been applying the wrong standard for three decades—as it does now in its application.

Epic misrepresents local rule 41-1's import and operation. According to Epic, local rule 41-1 provides that "a stay . . . will *only* be denied when 'the Court determines that the petition for certiorari would be frivolous or filed merely for delay.'" Appl. 8 (emphasis added). Epic has added the word "only" to change the meaning of the local rule, which *actually* says that "a motion for stay of mandate pursuant to FRAP 41(d) . . . *will be denied* if the Court determines that the petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. 41-1 (emphasis added).

Thus, contrary to Epic's mischaracterization, local rule 41-1 correctly explains that a stay will be *denied* if the petition for certiorari would be frivolous. *See* 9th Cir. R. 41-1 advisory committee's note. The local rule does not lower the standard for when a stay will be *granted*—which is at all times governed by Rule 41(d)'s "substantial question" standard. The

local rule is therefore a permissible exercise of the Ninth Circuit's authority to promulgate such rules under Federal Rule of Appellate Procedure 47. *See also* Stephen M. Shapiro, et al., *Supreme Court Practice*, § 17.8 (10th ed. 2019) (some circuit courts "rely simply on the text of the rule and ask whether the question to be presented is 'substantial' and whether there is 'good cause' for a stay").

In his concurrence, Judge Smith observed that the Ninth Circuit will "often" stay its own mandate. App. 3a (citing *United States* v. *Pete*, 525 F.3d 844, 850 (9th Cir. 2008)). Seizing on this statement, Epic offers statistics about the frequency with which the courts of appeals purportedly issue stays of mandate pending a petition for a writ of certiorari, and argues that the Ninth Circuit "grants relief far too freely." Appl. 11. But there is no "correct" percentage of granted stay motions, and even the 50% grant rate Epic postulates does not indicate the Ninth Circuit grants such stays "as a matter of course"—the only outcome the advisory committee notes to Rule 41(d) say should be avoided. More importantly, Epic's *en grosse* statistics have no relevance to whether *this* stay was warranted in the particular circumstances of this case. It was, as explained below.

II. Epic Has Not Established The Prerequisites To Vacatur

Under the correct standard for granting a stay of mandate in the court of appeals (which Epic ignores), and the applicable standard for the vacatur of such a stay by this Court (which Epic also ignores), Epic's application plainly fails. As explained above, this Court will vacate a court of appeals' stay of its own mandate only where (A) the court of appeals demonstrably erred in applying accepted standards *and* (B) the applicant would be seriously and irreparably injured by the stay. Epic's application does not make either of the required showings.

A. The Ninth Circuit's Order Is Correct

Evaluated under the "substantial question" standard of Rule 41(d), Epic has come nowhere close to showing that the Ninth Circuit's stay of the mandate was demonstrably wrong. The three-judge panel that devoted months to this appeal unanimously decided in its discretion to stay the mandate pending Apple's petition for a writ of certiorari to this Court. While Judge Smith specially concurred, he agreed that the mandate should be stayed. His separate opinion goes to the merits of Apple's arguments, not the propriety of staying the mandate. Epic cannot show that the court of appeals' stay order was an abuse of discretion.

The basis for Apple's forthcoming petition for a writ of certiorari will be that the district court lacked Article III power to grant (and the Ninth Circuit erred as a matter of law in approving) nationwide injunctive relief

in a single-plaintiff action based on speculative theories of injury to non-parties that were neither advanced nor proven in the district court. A party "must set forth by affidavit or other evidence specific facts" to support a claim of standing (*Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 555 (1992) (citation omitted)), and the appellate court's speculation about potential sources of indirect injury cannot account for the absence of *evidence* by Epic or *findings* by the district court (*see Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 413 (2013)). And granting relief to all developers of U.S. iOS apps on the basis of the same unsupported speculation transgressed this Court's longstanding limitations on the scope of relief available in a single-plaintiff action. *See Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979).

Relying principally on Judge Smith's concurrence, Epic predicts that Apple's petition will do nothing more than raise a series of factual disputes. Appl. 12. Epic is wrong: Apple will be raising issues of federal law under Article III and Rule 23, and will show that the Ninth Circuit's decision conflicts with this Court's precedent as well as decisions of other courts of appeals. Apple previewed these arguments to the Ninth Circuit in support of its successful stay motion (*see* App. 19a–20a, 26a–39a), and they will be set forth more fully in Apple's forthcoming petition for a writ of certiorari.

Epic pretends that Apple presented "its current federal law arguments in its opening brief in only a single throwaway paragraph on page 111." Appl. 13. That is wrong several times over. Apple's *first* argument on its cross-appeal (which of course appeared at the back of its combined principal and response brief) was that "Epic cannot show injury or redressability" under Article III. C.A.9 Dkt. No. 93, at 102–03. Apple developed that argument over several pages, and pressed it on reply as well, citing many of the same cases it does now. *See id.* at 102–04; C.A.9 Dkt. No. 183, at 1–8. Apple also argued as a matter of federal law that in a non-class case, injunctive relief cannot extend beyond the named plaintiff, specifically citing Federal Rule of Civil Procedure 23(b)(2), this Court's decision in *Califano*, and multiple appellate decisions. *See* C.A.9 Dkt. No. 93, at 110–11; C.A.9 Dkt. No. 183, at 25–26.[2]

Contrary to Epic's assertion otherwise (Appl. 12), the district court did not find that Epic had standing "as a matter of fact" to sue in its own right, much less on behalf of all developers, on any of the bases relied on by the Ninth Circuit. The district court's sole ruling on Article III injury

[2] Epic tries to distinguish Apple's argument that Epic lacks standing for itself from an argument that Epic lacks standing on behalf of non-parties. Appl. 13–14. Epic conflates the absence of Article III standing with its inability to seek classwide relief—these are related, but distinct, issues that Apple preserved at all stages of the proceedings. D.C. Dkt. No. 779-1 ¶ 602; C.A.9 Dkt. No. 93, at 36, 102–104; C.A.9 Dkt. No. 247, at 18–21.

was not defended by Epic on appeal or accepted by the Ninth Circuit. Everything the panel said in rejecting Apple's Article III challenges—on both standing and the scope of the injunction—arose from attorney argument advanced for the first time on appeal, and that is precisely the problem. The complete absence of evidence supporting a federal judgment is a legal issue, not a factual one. *See Easley* v. *Cromartie*, 532 U.S. 234, 243 (2001).

Judge Smith's concurrence highlights, rather than resolves, the evidentiary deficiency that renders the injunction unconstitutional. For example, Judge Smith pointed to the fact that an Epic subsidiary "still has apps on the App Store that are subject to the anti-steering provision[s]" (App. 4a), but that does not establish whether and how the anti-steering provisions purportedly *harm* that subsidiary (and there is no evidence to that effect). And Epic similarly provided no evidence to establish that any purported harm to any non-party subsidiary will cause irreparable harm to Epic *itself*.

Judge Smith also asserted—and Epic repeats here—that "[a]s a games distributor, Epic is harmed because app developers cannot direct, with the promise of lower prices, their users to the Epic Games Store." App. 4a. But Epic never made nor offered proof on this argument in the district court, and for good reason. The anti-steering provisions address alternative mechanisms for making purchases within iOS apps. But the

Epic Games store is a platform for users to obtain and download software for *personal computers* (e.g., desktops, laptops), and is not an alternative source for *iOS* apps. The Epic Games Store is not even available on the App Store under rules that were upheld by both the district court and the panel (and unaffected by the injunction).

Epic ultimately retorts that "the Ninth Circuit said nothing of substance about any of the legal issues Apple intends to ask this Court to decide." Appl. 14. This is not a point in the court of appeals' favor. Apple preserved its federal challenges in the district court and presented them on appeal; that both lower courts failed to address them shows only that these important federal issues have not been given the careful and adequate consideration they deserve, particularly in light of the sweeping nature of the injunction. Apple's forthcoming petition will ask this Court to decide whether a federal court may, consistent with Article III, award nationwide injunctive relief affecting hundreds of thousands of developers and millions of consumers in a case brought by a single plaintiff that failed to prove any injury—past, present, or future—to itself from the enjoined provisions. That substantial question, should the Court choose to decide it, can only be answered "no."

B. The Stay Will Cause No Harm To Epic

Epic has not discharged its burden to show that it will be "seriously and irreparably injured" by the stay of the mandate. *W. Airlines*, 480 U.S. at 1305 (citation omitted). Although Epic vaguely states in its opening paragraph that "the result" of continuing the stay "will be to injure . . . Epic" (Appl. 1), it never returns to that point in its application. Epic identifies no *evidence* of irreparable harm from maintaining the stay pending Apple's petition for a writ of certiorari. That is because there is none, and that alone is reason to deny Epic's application.

Of all the arguments in Epic's application, the only one touching on the injury requirement is Epic's assertion that it has a "sweeping interest in the application of the anti-steering rules to *other* developers." Appl. 4 (emphasis added). But as set forth above, Epic is not an iOS app developer: Apple lawfully terminated Epic's developer program account following its willful breach of contract. Because of that, Epic is no longer subject to the anti-steering provision, has no apps on the App Store, and is thus not among the entities covered by the plain terms of the injunction. *See Arizonans for Off. English* v. *Arizona*, 520 U.S. 43, 67–69 (1997) (plaintiff must have standing at all stages of litigation).

The anti-steering provisions at issue solely concern alternative purchase mechanisms for digital goods and services within iOS apps, but Epic's game store is not an iOS app and is not available on the App Store.

Moreover, developers of iOS apps—the entities that *are* covered by the anti-steering provisions—already brought their own class action, which was settled with the deletion of a different anti-steering provision but no change to the rule at issue here; that settlement was approved by Judge Gonzalez Rogers, who also presided over Epic's case. *See* Order Granting Motion for Final Approval of Class Action Settlement, *Cameron* v. *Apple Inc.*, No. 19-CV-3074, Dkt. No. 491 (N.D. Cal. June 10, 2022). Yet Epic was granted far-reaching injunctive relief regarding anti-steering provisions that do not even apply to it.

Epic's bald assertion that the "anti-steering rules allow Apple to collect hundreds of millions of dollars in monopoly rents" is empty rhetoric. Appl. 14; *see also id.* at 2. The district court held unequivocally that Apple is not a "monopolist under either federal or state antitrust laws" (*see* D.C. Dkt. No. 812, at 1), and Epic never sought to quantify the economic consequence, if any, of the anti-steering provisions. As with everything else related to those provisions, Epic's *arguments* are divorced from the record *evidence*.

In contrast, Apple proved that it will suffer serious and irreparable harm if the stay of the mandate is lifted. *See* C.A.9 Dkt. No. 94, at 208–16. Once the mandate issues and the injunction goes into effect, Apple will be forced to change its business model and alter its guidelines applicable

to thousands of iOS app developers. These changes could hinder Apple's ability to maintain privacy and security within the iOS ecosystem, thus affecting millions of iPhone users around the country and potentially damaging Apple's reputation. Apple submitted evidence on this precise issue to both the district court and the Ninth Circuit (*see ibid.*), and Epic has never rebutted it.

Finally, Epic fails to explain what about its application constitutes an "emergency." It did not ask to enjoin the anti-steering provisions in the district court, it never sought to lift the stay pending appeal in the nearly two years it was in effect, and it identifies no particularized injury from the stay during that period (or now). The stay merely maintains the status quo that has been in place for years.

In short, Epic's entire application asks for extraordinary relief that is available only to alleviate serious and irreparable harm, yet Epic has not even tried to establish that the stay is causing it such harm. That is reason enough to deny the application.

CONCLUSION

The Court should deny Epic's application to vacate the Ninth Circuit's stay of its own mandate.

Respectfully submitted,

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