No. 25-1311

In the Supreme Court of the United States

APPLE INC.,
Petitioner,

v.

EPIC GAMES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Epic's response confirms the need for review.

On the first question, Epic's attempt to rewrite the question effectively concedes that the contempt issue is cert-worthy. Epic accepts that "the Injunction did not expressly address the precise manner of petitioner's violation" of the district court's order. Epic's Brief in Opposition (BIO) i. But in the First Circuit, a party may not be held in civil contempt for violating a court order unless the order "clearly and unambiguously" proscribes, within its "'four corners,'" "*the precise conduct on which the contempt allegation is based*." *United States v. Saccoccia*, 433 F.3d 19, 28 (1st Cir. 2005). Epic does not even cite *Saccoccia*, let alone acknowledge its contrary rule. And by stating outright that the injunction did not address "the precise manner" of Apple's supposed violation, Epic all but concedes that the First Circuit would have resolved this case differently. That conflict is reason enough to grant certiorari. The contempt standard should not vary from Boston to San Francisco.

Epic's claim that the Ninth Circuit actually relied on the injunction's "text" to affirm the district court's contempt finding fails. BIO2-3. Epic rewrites the injunction to say that it "enjoined *all* actions that 'prohibit' steering, without limitation." *Id.* at 15 (emphasis in original); *see id.* at 1 (claiming injunction generally "enjoined Apple from 'prohibiting developers' from steering" (citation omitted)); *id.* at 19 ("The Injunction forbade Apple in general terms from 'prohibit[ing]' steering."). But in fact, the injunction specifically barred Apple from "prohibiting developers from (i) *including in their apps and their metadata buttons, external links, or other calls to action that*

direct customers to purchasing mechanisms[.]" Pet. App. 166a (emphasis added). In other words, it barred specific and defined conduct. As the Ninth Circuit itself recognized: "[T]he text of the Injunction does not address commissions at all." *Id.* at 34a n.9.

This explains why the Ninth Circuit *had* to invoke the injunction's "spirit" to conclude that Apple could be held in contempt for charging a commission. *Id.* Epic now runs away from the Ninth Circuit's "spirit" rule, but the court emphatically declared that its prior precedent "means what it says: parties may be held in contempt for violating the spirit of an injunction." *Id.* at 12a. That rule directly conflicts with the text-based standard applied in other circuits. And it is untethered from the equitable principles underlying civil contempt, this Court's precedents, and Federal Rule of Civil Procedure 65, which require clear notice of the specific conduct prohibited by an order. Epic argues the district court could have *modified* the injunction on a going-forward basis to address commissions. But that just underscores the need for review. Civil contempt is a serious sanction with serious consequences. Having fought for years to hold Apple in contempt for charging a commission, Epic cannot shield that ruling from review by claiming that it makes "no difference." BIO14.

On the second question, Epic again tries to avoid the issue, this time by denying that "the Ninth Circuit created an 'antitrust exception' to this Court's decision in [*Trump v. CASA*, *Inc.*, 606 U.S. 831 (2025)]." BIO3. But the court was clear: doubling down on prior precedent, it held that *CASA* "has no bearing" on antitrust cases. Pet. App. 47a (citation omitted). That exception is meritless and guts *CASA* in a critical category of cases. Again trying to sidestep

review, Epic claims that Apple forfeited its *CASA* challenge. But Apple's *CASA* arguments were both pressed and passed on below. On the merits, Epic devotes just one, unconvincing paragraph to trying to justify an injunction granting relief to millions of nonparty developers in a case brought by Epic alone. Even then, Epic does not defend the Ninth Circuit's reasoning in originally upholding the injunction and instead advances an entirely new theory. None of this comes close to justifying the universal injunction entered in this case under *CASA*'s limits.

The petition should be granted.

ARGUMENT

I. THE FIRST QUESTION PRESENTED MERITS REVIEW

A. The Ninth Circuit Grounded Its Contempt Decision On Its "Spirit" Rule

Tellingly, Epic begins by trying to sidestep the contempt question altogether. It argues this case does not present the first question because the Ninth Circuit "found that the commission violated the express terms of the district court's order." BIO14. This attempt to recast the decision fails.

The district court's original injunction is a sentence providing that Apple and its agents:

> are hereby permanently restrained and enjoined from prohibiting developers from (i) including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to In-App Purchasing . . . .

Pet. App. 166a. Far from finding that Apple's commission "violated the express terms" of the

injunction, the Ninth Circuit recognized that "the text of the Injunction does not address commissions at all," much less prohibit Apple from charging one. *Id.* at 34a n.9. That ends any real textual analysis.

Epic's contrary position is based on sleight-of-hand. First, Epic rewrites the injunction to say that it "enjoined *all* actions that 'prohibit' steering, without limitation." BIO15. But as the text above shows, the injunction did not enjoin "*all* actions that 'prohibit' steering, without limitation"; it imposed a *specific* prohibition addressed to *specific* conduct—using "buttons, external links, or other calls to action." Pet. App. 166a. Second, Epic says (at 14-15) the Ninth Circuit *did* rely on the text of the injunction because the court pointed to the injunction's use of one word—"'prohibit[].'" Pet. App. 19a. But the Ninth Circuit plucked that word from context and ignored *what* was "prohibited"—the specific conduct quoted above, which, in turn, tracked Section 3.1.1 of Apple's developer guidelines. Pet. 10.

Instead of enforcing the specific terms of the injunction, the Ninth Circuit vastly expanded it to bar anything with "prohibitive effect." Pet. App. 20a. Thus, it explained that "the spirit of the Injunction" covers "*prohibitive* commissions," even though "the text of the Injunction does not address commissions at all." *Id.* at 34a n.9. The court began its decision with an extended discussion of "**The Injunction's Spirit**," *id.* at 11a-12a, and it expressly reasoned that it did not matter that "the Injunction says nothing about commissions," *id.* at 20a-22a. The court's decision is a "spirit" analysis from start to finish.

Pointing to a single word ("prohibit[]") does not transform a "spirit" analysis into a "textual" one. In other circuits, civil contempt is unavailable unless the

order "clearly and unambiguously" proscribes, within its "'four corners,'" "*the precise conduct on which the contempt allegation is based*." *Saccoccia*, 433 F.3d at 28. Epic itself has conceded that "the Injunction did not expressly address the precise manner of petitioner's violation." BIO i. As Professor Bray explained below, Apple's commission did not violate any express prohibition in the injunction. CA9 Amici Br. of Prof. Bray *et al*. 10-11, ECF 80 (Bray). That explains why the Ninth Circuit's decision relies so heavily on the "spirit" of the injunction to justify finding contempt based on conduct—Apple charging a commission—that the court acknowledged was not mentioned in the injunction. Pet. App. 34a n.9.[1]

Finally, the Ninth Circuit's remand instructions confirm that its decision is not based on a textual analysis. The court stated that the district court could bar "a prohibitive commission by *modifying* the Injunction." *Id.* at 34a (emphasis added). If the injunction's text *already* forbade this conduct, there would be no need for any such modification. But it plainly did not, which explains why the Ninth Circuit had to invoke the injunction's *spirit*.

In short, the first question is squarely presented.

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[1] Epic points (at 16) to the contempt finding on the design restrictions. That finding is also flawed. Pet. 24. And if Apple prevails on the proper text-based standard, a remand is necessary to reconsider that finding. In any event, the key issue is the contempt finding as to Apple's commission—no violation of the injunction's design restrictions can justify policing Apple's commission rate using the civil contempt power.

B. The Circuits Are Deeply Divided

Epic's attempt to deny (at 21-25) the circuit split fares no better. Epic cannot undo the clear—and stark—disagreement on the civil contempt standard.

The conflict over the proper standard is undeniable. In the First Circuit, for example: "The question is not whether the order is clearly worded as a general matter; instead, the 'clear and unambiguous' prong requires that the words of the court's order have clearly and unambiguously forbidden *the precise conduct on which the contempt allegation is based*." *Saccoccia*, 433 F.3d at 28. That exacting rule is consonant with other circuits. *See, e.g.*, *Drywall Tapers & Pointers of Greater N.Y. v. Local 530 of Operative Plasterers & Cement Masons Int'l Ass'n*, 889 F.2d 389, 395 (2d Cir. 1989) ("[T]he party enjoined must be able to ascertain from the four corners of the order *precisely what acts are forbidden*." (emphasis added)), *cert. denied*, 494 U.S. 1030 (1990); Pet. 16-18 (citing additional cases).

Epic does not acknowledge *Saccoccia* or *Drywall*. Yet it concedes in reframing the first question presented that the injunction here "did not expressly address the precise manner of petitioner's violation." BIO i. That seals the conflict: Under Epic's own framing, the First and Second Circuits would not have upheld a contempt finding on commissions. The same goes for the Third and Fifth Circuits. Pet. 16-18.

Epic tries to distinguish this case based on the district court's findings of bad faith. BIO1, 6. But in *Hornbeck Offshore Services, L.L.C. v. Salazar*, the Fifth Circuit confronted similar findings, where the district court found that the Department of the Interior tried to "avoid the effect of [an] injunction" by

"ignoring" its "purpose" and implementing an "end-run" around its prohibitions. 713 F.3d 787, 795 (5th Cir.), *cert. denied*, 571 U.S. 1110 (2013). Yet, applying a text-based rule, the Fifth Circuit reversed the district court's civil contempt finding because the Department's "actions did not violate the injunction as drafted and reasonably interpreted." *Id.* at 795. That conclusion follows *a fortiori* here. The injunction here does not even *mention* commissions.

The denial of certiorari as to *Sea Shepherd Conservation Society v. Institute of Cetacean Research*, 774 F.3d 935 (9th Cir. 2014), also proves nothing. *Contra* BIO14. That petition focused on an "Alien Tort Statute" question. Pet. i, *Sea Shepherd Conservation Society v. Institute of Cetacean Research*, 576 U.S. 1005 (2015) (No. 14-1300). The contempt issue was an afterthought, not discussed until page 34 of a 40-page petition. And because *Sea Shepherd* was an aiding-and-abetting case, it did not employ the "spirit" rule in the extreme manner that the Ninth Circuit activated here (Pet. App. 12a).

C. The Decision Below Is Wrong

The Ninth Circuit's "spirit" rule cannot be squared with this Court's precedents, the equitable principles underlying civil contempt, or Rule 65. Because contempt "uniquely is 'liable to abuse,'" *International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994) (citation omitted), this Court has held that parties must "'receive explicit notice'" of what they may not do "before being held in civil contempt," *Taggart v. Lorenzen*, 587 U.S. 554, 561 (2019) (citation omitted). And Rule 65(d)(1)(B)'s requirement that injunctions "state [their] terms specifically" is designed to "avoid the possible

founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). As Professor Bray explained, these principles require that, when contempt is based on a court order, the order's terms must clearly and unambiguously proscribe the particular conduct on which the contempt finding is based. Bray 9-11.

Epic points to *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). BIO18-19. In *McComb*, however, the injunction "[b]y its *terms* enjoined any practices which were violations" of the Fair Labor Standards Act. 336 U.S. at 192 (emphasis added). Epic concedes as much but says the injunction's terms in *McComb* were "no more 'specific' than the injunction" at issue here. BIO19 n.5. Yet that argument relies on Epic's attempt to rewrite the injunction into a "general" prohibition, *id.* at 19, when in fact the injunction was specific and targeted in preventing Apple from barring "buttons, external links, or other calls to action," *supra* at 3-4. That specificity readily distinguishes *McComb*.

"Equity's concern with circumvention is not a reason to skip over the essential requirement that contempt be imposed only when an injunction actually prohibits what the defendant did." Bray 12. Instead, the way to address new problems is by *modifying* the injunction, not by imposing the severe sanction of civil contempt based on a *post hoc* divination of the "spirit" of an injunction.

II. THE SECOND QUESTION PRESENTED MERITS REVIEW

The Ninth Circuit's refusal to seriously grapple with *CASA* in upholding the universal injunction in this case also warrants this Court's review.

Epic labels as "inexplicable" "Apple's contention that the Ninth Circuit created an exception to *CASA*." BIO28. But the Ninth Circuit stated that "*CASA*'s holding about district courts' authority under the Judiciary Act of 1789 has *no bearing* on whether [a] district court . . . exceed[s] its equitable powers under Section 16 of the Clayton Act." Pet. App. 47a (emphasis added) (quoting *Epic Games, Inc. v. Google LLC (In re Google Play Store Antitrust Litig.)*, 147 F.4th 917, 958 (9th Cir. 2025), *cert. dismissed*, 146 S. Ct. 1051 (2026)). And here the Ninth Circuit vastly expanded its antitrust exception by extending it to "incipient" violations under *state* competition law—in a case in which Epic *lost* all of its antitrust claims. *Id.*

Epic does not even cite *Google*, much less attempt to grapple with its holding that *CASA* has "no bearing" on fashioning equitable remedies in this context. Nor does Epic have any response to the fact that this Court has held that the traditional equitable limits *do* govern antitrust claims. Pet. 30.

Epic notes that this Court "declined to review two years ago" the scope of the injunctive relief authorized by the district court, as if nothing has changed. BIO30. But Epic glosses over the fact that last June this Court decided *CASA,* which clarified and accentuated the limits on how courts can fashion equitable remedies. Moreover, the Ninth Circuit has since carved out an antitrust exception to *CASA*. That this Court previously denied certiorari before it decided *CASA* is therefore irrelevant.

On the merits, Epic lacks any coherent explanation of how the universal injunction could be justified under *CASA*. In response to Apple's argument that "the Injunction should at least be limited to developers wishing to steer users to the

Epic Games Store," Epic cries waiver. BIO31-32. But both parties briefed *CASA* below, and the Ninth Circuit squarely rejected Apple's *CASA* argument. Pet. App. 47a. The issue was, in short, both "pressed" and "passed on" below, making it ripe for review. *Illinois v. Gates*, 462 U.S. 213, 221-24 (1983).

Devoting just one paragraph to attempting to explain how extending the injunction to millions of other developers is justified, Epic contends that "the Ninth Circuit correctly rejected" Apple's challenge to the scope of the injunction because "[t]he only way to redress Epic's injury as an app *developer* . . . is to allow all developers . . . to steer to lower-priced out-of-app payment methods," which Epic says will create "competitive pressure" on Apple's *in*-app commission rate. BIO32-33 (emphasis added). But Epic has never offered any support for this circuitous argument, and the Ninth Circuit simply stated: "We agree with Epic on this question." Pet. App. 46a. That cannot satisfy *CASA*'s stringent standard.

Epic does not even attempt to defend the only rationale the Ninth Circuit has ever offered for the universal injunction—that the injunction must run to nonparties to provide Epic relief as an app *distributor* via the Epic Games Store. *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1003 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 681 (2024). Even accepting it, that rationale can support extending the injunction only to developers that wish to steer users to Epic's own alternative purchasing mechanism in the Epic Games Store; it cannot justify an injunction that enjoins Apple's conduct with respect to millions of nonparty developers with no connection to Epic at all.

This Court's review is warranted to ensure that *CASA* is given effect in the Nation's largest circuit.

III. THIS CASE IS AN IDEAL VEHICLE

The case presents a clean vehicle to decide both recurring and important questions presented. The issues were squarely argued by the parties and resolved by the Ninth Circuit in a published opinion with "sweeping" implications. Computer & Communications Industry Ass'n, *et al.*, Amici Br. 4.

Having sought and vigorously defended the contempt ruling, Epic now suggests none of this matters because the district court could have *modified* the injunction to address commissions. BIO25-26. But Epic glosses over the fundamental difference between forward-looking modifications and backward-looking contempt sanctions. *See FTC v. Trudeau*, 579 F.3d 754, 778 (7th Cir. 2009) (distinguishing the two); Bray 14 ("power to modify is distinct from the power to impose contempt"). Epic also fails to grapple with the "stigma" contempt threatens, *Reich v. Sea Sprite Boat Co.*, 64 F.3d 332, 334 (7th Cir. 1995) (Easterbrook, J.)—which Epic has repeatedly tried to leverage in this case. And Epic ignores that absent any contempt finding, there is no justification for the district court to take *any* action on remand as to Apple's commission rate.

The *CASA* issue is also squarely presented. No matter what happens on remand as to commissions, the scope of the injunction remains critical. Epic claims "antitrust injunctions are vanishingly rare." BIO34. But this issue has already arisen *twice* in the Ninth Circuit since *CASA*. Pet. 30. And Epic itself has stressed "the unique importance of this particular case," claiming that it concerns "hundreds of thousands of developers and one billion consumers," in a market that "produces $100 billion in revenue,

every year." Pet. 27, *Epic Games, Inc. v. Apple Inc.*, 144 S. Ct. 682 (2024) (No. 23-337).

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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