No. 25-1311

In the Supreme Court of the United States

APPLE INC.,
Petitioner,

v.

EPIC GAMES, INC.
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members live under injunctions of every description: antitrust and consumer-protection decrees, intellectual-property injunctions, environmental and employment orders, and the negotiated consent decrees through which most disputes with federal and state enforcers are resolved. The Chamber's members also frequently obtain injunctions. On either side of the "v.," they share one practical interest: knowing what a court order requires so that they can efficiently enforce it, comply with it, and plan around it. The Ninth Circuit's rule that a party may be held in contempt for violating the "spirit" of an injunction, even where the order's text does not address the conduct at issue, makes that knowledge unattainable. The Chamber submits this brief to explain, from the perspective of the businesses that must

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

implement injunctions, why a "spirit" standard cannot be operationalized and why the text-based standard applied by most circuits is the only workable one.

INTRODUCTION AND SUMMARY OF ARGUMENT

To a court, an injunction is a remedy. To the business that receives it, an injunction is a set of operating instructions. Within days of an order's entry, and often before the order takes effect, the enjoined company must translate the court's words into action. Such actions may involve changes in products, software, contracts, pricing, sales practices, training, and/or internal controls. This process goes beyond the work of one lawyer. It requires engineers, product managers, finance and procurement teams, compliance officers, auditors, and perhaps even the board of directors. Each of those people needs the same thing: a reliable answer to the question, "what are we allowed to do?" The only place that answer can be found in advance is the text of the order.

This Court's precedents reflect that reality. Rule 65(d) requires every injunction to "state its terms specifically" and to "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)–(C). The Rule exists "to prevent uncertainty and confusion on the part of those faced with injunctive orders, and 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) (per curiam). And because civil contempt is a "severe remedy," it "should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." *Taggart v. Lorenzen*, 587

U.S. 554, 561 (2019) (emphasis and citations omitted). Those principles are not "narrow literalism." They describe the minimum a business needs in order to comply.

The Ninth Circuit dispensed with that essential minimum. In its view, "parties may be held in contempt for violating the spirit of an injunction," Pet. App. 12a, even where, as the court acknowledged, "the text of the Injunction does not address" the conduct at issue "at all," *id.* at 34a n.9. Petitioner explains why that rule is irreconcilable with this Court's decisions and with Rule 65. Amicus writes to explain why it also fails in practical terms.

First, a "spirit" cannot be operationalized. Every injunction serves purposes that can be described at many levels of generality, and different descriptions yield different compliance obligations. This case is proof. The liability finding rested on an "informational harm." The Ninth Circuit itself recognized that "[t]he presence or absence of a commission does not alter consumers' access to information about purchase options." *Id.* Yet it affirmed a contempt finding for charging a commission on the theory that the order's "spirit" forbids "prohibitive" commissions, a category the court could not define and instead remanded to the district court to work out with expert testimony and perhaps a court-appointed "Technical Committee." *Id.* at 34a–36a. If two federal courts, after nine days of evidentiary hearings and a full appeal, cannot say what commission the order's "spirit" permits, no compliance team could have known that when the order took effect.

Second, a "spirit" standard converts compliance from a question about the order into a trial about the company's motives. Because the inquiry asks whether the company engaged in "action designed to defeat" the order, Pet. App. 23a (citation omitted), the natural evidence is the company's internal deliberations: the options it weighed, the financial projections it ran, and the advice its lawyers gave. That is precisely what happened here. The district court ordered production of "all Apple's documents relat[ed] to the decision-making process," *id.* at 7a, and the Ninth Circuit upheld the rejection of privilege over compliance presentations because they analyzed "how various compliance options would affect [the company's] revenue," *id.* at 19a. Under that approach, the act of analyzing the cost of alternative compliance paths, something every responsible business must do, becomes evidence of contempt. The predictable result is less candid analysis, less involvement of counsel, and worse compliance.

Third, the "spirit" standard treats ordinary business judgment as bad faith. Injunctions prohibit conduct; they do not command the enjoined party to select whichever lawful course most benefits its adversary. A company that chooses, among compliant alternatives, the one that best preserves its business has done nothing wrong. The decision below says otherwise: Apple was faulted because "at every step [it] chose to maintain its . . . revenue stream over compliance." Pet. App. 16a. A rule under which the pursuit of revenue is itself suspect or evidence of non-compliance cannot govern enterprises that owe fiduciary duties to their owners.

Fourth, the consequences of a contempt adjudication are too severe to rest on after-the-fact purposive reasoning. A contempt finding is a judicial declaration that a company defied a court. It brings sanctions, mandatory public disclosures, reputational harm, collateral consequences in later litigation, and, as this case shows, potential criminal referral of the company and its officers. Notice of what will trigger those consequences must come before the conduct, not after.

Finally, the text-based rule is workable, and the costs attributed to it are illusory. Reading an order to mean what it says is not literalism; it is interpretation, informed by context and resolved, in close cases, against contempt. Evasion through proxies and sham transfers is already addressed by Rule 65(d)(2). And when a plaintiff believes an order has proven too narrow, it has a ready remedy that gives everyone clear notice going forward: a motion to modify. The Ninth Circuit feared that such motions would "inundat[e]" the courts. Pet. App. 12a. The record refutes the fear. A motion to modify is a paper exercise. The contempt proceeding below consumed nine hearing days, twelve witnesses, sweeping document production, and privilege litigation, and it ended with a remand to determine what the injunction requires. Much of that could have been avoided by focusing on the text of the injunction in the first place.

ARGUMENT

I. An injunction is a set of operating instructions, and a business can operationalize only the text.

A. Courts write injunctions; businesses implement them. The implementation process is invisible in the case reports, but it is where the notice requirements of Rule 65 and this Court's contempt precedents do their work. It is worth describing.

The process begins with counsel, who parse the operative language clause by clause and translate it into a list of requirements: what must stop, what must start, by when, and for whom. That list then leaves the legal department. Product and engineering teams determine which systems, features, or manufacturing processes are affected and what must be rebuilt. Commercial teams identify the contracts, price lists, and marketing materials that must change. Finance models the cost of each compliant option. Human resources and compliance functions retrain the employees whose daily conduct the order governs, because an injunction binds not only the company but its "officers, agents, servants, employees, and attorneys," Fed. R. Civ. P. 65(d)(2)(A)–(B), each of whom faces personal exposure for a violation. Internal audit designs monitoring so that the company can verify its own compliance. Senior management and, for significant orders, the board of directors review and approve the plan. For a public company, securities laws add another layer of complexity with required disclosures of risk factors and legal proceedings. *See* 17 C.F.R. §§ 229.103, 229.105. Assessing loss contingencies also requires counsel to evaluate the likelihood that the company's conduct will be found noncompliant.

All of that must happen on the court's schedule, not the company's. Stays pending appeal end abruptly; an order that has been dormant for years can take effect overnight. Here, the injunction took effect the day after this Court denied certiorari in the prior appeal, and Apple's compliance program went live that same day. Pet. App. 7a. A company in that position must design and build its compliance program during the appeal without knowing whether it will be needed and must have it ready the moment the order takes effect.

Every participant in that process is working from the same document. Neither the engineer deciding what a feature may do, nor the finance analyst modeling a price change, nor the director asked to approve the plan can consult the injunction's "spirit." They can consult only the order. If the order says the company may not do *X*, they can build a program that does not do *X*, and they can verify, audit, and certify that it does not. If the governing standard is instead whatever purpose a court later attributes to the order, none of that is possible. A compliance checklist cannot be written for a broad purpose. An employee cannot be trained to strictly comply with a spirit. An auditor cannot test for it. And no general counsel can tell a board, with any confidence, that the company is in compliance.

B. An injunction rarely leaves an enjoined business with a single path forward. It forecloses some conduct and leaves the rest open. The business must then decide, among the courses the order permits, which one to take. That decision is ordinarily made on business grounds: cost, revenue, customer experience, and competitive position. Nothing in the law of injunctions requires the enjoined party to choose the option that most benefits its adversary or that most fully advances whatever policy the plaintiff hoped that the litigation would serve. The order defines the obligation; the business chooses within it.

This Court's precedents confirm as much. "In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms." *Terminal R.R. Ass'n of St. Louis v. United States*, 266 U.S. 17, 29 (1924); *see also Brown v. Plata*, 563 U.S. 493, 537–38 (2011) (noting that "the choice of how best to comply" with a court's order is best left to the enjoined party to "balance competing . . . concerns" over the "details of implementation").

Patent law affirmatively encourages an enjoined infringer to "design around" the patent, and it forbids the use of contempt to police a redesigned product unless the product is "not more than colorably different" from the one adjudged to infringe; otherwise, the patentee must bring a new action. *TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 882–83 (Fed. Cir. 2011) (en banc). The Federal Circuit grounded that rule in part in "the policy that legitimate design-around efforts should always be encouraged as a path to spur further innovation." *Id.* at 883 (citation omitted). No one would say that a company which redesigns its product to avoid an infringement injunction has violated the injunction's "spirit," even though avoiding the injunction is the entire point of the redesign.

This Court has taken a similar approach to the consent decrees under which many businesses operate, albeit for additional reasons. Those decrees are negotiated word by word. A decree "must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Its scope "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Id.* Indeed, "the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *Id.* at 681–82. A rule that enforces the "spirit" of such a decree hands one party, after the fact, terms that it failed to obtain at the table. The Ninth Circuit's rule draws no distinction between litigated and negotiated injunctions, and so it threatens the settled expectations of every business that has resolved a government investigation or private suit by agreeing to specific, bargained-for language.

C. One reason notice matters so much is that the consequences of a civil contempt adjudication extend far beyond the sanction imposed.

A contempt finding is first a judicial determination that the company disobeyed a court. That is why this Court has called it a "severe remedy," *Taggart*, 587 U.S. at 561 (citation omitted), and why the contempt power "uniquely is liable to abuse," *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994) (citation omitted). The finding carries a "stigma" independent of any fine. *Reich v. Sea Sprite Boat Co.*, 64 F.3d 332, 334 (7th Cir. 1995) (Easterbrook, J.). The desire to avoid that stigma "is a powerful (if not perfect) motivator, regardless of any material sanction," Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 Harv. L. Rev. 685, 777 (2018), and it is amplified when the finding is accompanied by "stigmatizing publicity," *id.* at 779–81. Contempt findings against well-known companies are national news, and they can move markets. *See, e.g.*, Barbara Ortutay, *Court Sides with Fortnite Maker Epic as Apple Sanctioned for Defying Order in App Store Case*, AP (May 1, 2025), https://tinyurl.com/ortutay; Tripp Mickle, *How Apple Created a Legal Mess When It Skirted a Judge's Ruling*, N.Y. Times (May 9, 2025), https://tinyurl.com/trippmickle; Michael Acton, *Apple Referred to Criminal Prosecutor for 'Thwarting' Order to Change App Store*, Fin. Times (Apr. 30, 2025), https://tinyurl.com/michaelacton; Julia Boorstin, *Court Ruling Could Mean Trouble for TiVo*, CNBC (July 2, 2009), https://tinyurl.com/julia-boorstin (reporting contempt order requiring satellite-television provider to disable roughly four million customers' digital video recorders, and the resulting swings in both companies' share prices); Eric Savitz, *TiVo Soars; Appeals Court Finds Dish in Contempt in DVR Case*, Forbes (Apr. 20, 2011), https://tinyurl.com/ericsavitz.

The finding also has concrete downstream effects. A public company must evaluate whether to disclose it. *See, e.g.*, EchoStar Corp., Annual Report (Form 10-K) (Mar. 1, 2010), https://tinyurl.com/echostar10k (disclosing June 2009 contempt order and approximately $200 million award, and warning investors of the potential consequences for the company's DVR business). Counterparties, lenders, and regulators may treat it as evidence of deficient controls. Courts in later proceedings may treat the company as a repeat offender when calibrating sanctions or assessing credibility. *See, e.g.*, *Jackson Hewitt Inc. v. Excellent Pro. Servs. LLC*, No. 08-CV-5237, 2010 WL 5665033, at *2 (E.D.N.Y. Nov. 8, 2010) (finding "the efficacy of lesser sanctions . . . doubtful given Defendants' history of contempt"), *report and recommendation adopted*, 2011 WL 317969 (E.D.N.Y. Jan. 31, 2011). And a contempt finding can even destroy individual careers and livelihoods. Here, the district court referred not only the company but "one of its officers" for criminal investigation. Pet. App. 9a; *see also* Rule 65(d)(2). This means that the individuals who implemented the compliance program bear that risk personally.

This is not an argument that contempt should be unavailable. It is an argument about sequence. Notice of the conduct that will trigger consequences of this magnitude must precede them. That is the premise of *Taggart*'s "fair ground of doubt" standard, of *Schmidt*'s "explicit notice" requirement, and of Rule 65(d). A standard that supplies the operative prohibition only in the contempt order itself inverts the sequence. It announces the rule and the violation in the same breath.

II. A "spirit" standard cannot be operationalized.

The Ninth Circuit described its rule as one of "practical sense." Pet. App. 12a. From the standpoint of the businesses that must comply with injunctions, it is the opposite. It cannot be applied in advance, it turns compliance into an inquest into motive, it treats ordinary business judgment as culpable, and it distorts the remedial process it is meant to serve.

A. The first problem is definitional. An injunction does not have a single "spirit." It has a text, and behind that text lie purposes that can be described at various levels of generality. The plaintiff had purposes in seeking the order. The court had purposes in framing it as it did rather than more broadly (or more narrowly). The underlying cause of action has purposes of its own—from Congress or a state legislature, for example. And each of those can be characterized narrowly or broadly. A contempt standard keyed to "spirit" leaves the enjoined party to guess which characterization a court will adopt after the fact. *See Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 378 (1997) (noting that where it is "difficult" for the enjoined party "to know how to remain in compliance with the injunction . . . [t]his lack of certainty leads to a substantial risk that much more [conduct] will be burdened than the injunction by its terms prohibits").

This case illustrates with unusual clarity the problem with a "spirit" based approach. The injunction's operative sentence barred 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 In-App Purchasing." Pet. App. 166a. What was its "spirit"? At least five candidates appear in the opinions below:

1. The liability finding rested on an *informational* harm: Apple's anti-steering rules "prevent[ed] informed choice among users of the iOS platform." Pet. App. 3a (citation omitted). On that view, the order's purpose was to let developers tell users about other ways to buy. That purpose is satisfied when developers may display links and communicate with customers, which no one disputes Apple now allows.

2. The order's text suggests a *transactional* purpose: enabling users to follow a link from an app to an external purchasing mechanism. On that view, the order might also speak to the design and placement of links, though it says nothing about either.

3. The district court adopted an *economic* purpose: making linked-out purchases commercially attractive to developers, so that Apple could not "nullif[y] the revenue impact of the Injunction." Pet. App. 16a. On that view, the order regulates Apple's commission rate, though the text "does not address commissions at all." *Id.* at 34a n.9.

4. Respondent has pressed a *competitive* purpose: generating "competitive pressure" on Apple's in-app commission. Pet. Reply Br. 10 (quoting Br. in Opp. 32–33). On that view, the order is a tool for price regulation across Apple's platform.

5. And behind all of these lies an ultimate consumer-welfare purpose that animates any competition case: lower prices for users.

Each of those purposes implies a different set of compliance obligations. Under the first, Apple complied. Under the third, whether Apple complied depends on the "threshold upon which commissions become 'prohibitive.'" Pet. App. 34a n.9. But that threshold appears nowhere in the order, and the Ninth Circuit itself declined to specify what the threshold was. Under the fourth and fifth, the order has no fixed content at all; compliance would be measured by market outcomes rather than by conduct.

The courts below chose the second and third purposes. But nothing in the order's text, or in the liability opinion it implemented, told a compliance team in January 2024 that the "spirit" of a steering injunction premised on an informational harm would be read to cap commissions. Respondent itself conceded as much. The motion that launched the contempt proceeding acknowledged that the district court "did not explicitly prohibit" Apple from "introducing a new fee on purchases made outside [an] app." JA549; *see* Pet. Br. 13, 33. If the party that sought the order and moved to enforce it could not point to text prohibiting the commission, the enjoined party's compliance team could hardly have been expected to find it. And the Ninth Circuit acknowledged that "[t]he presence or absence of a commission does not alter consumers' access to information about purchase options." Pet. App. 34a n.9. The court thus affirmed a contempt finding for conduct that, by its own account, did not implicate the harm that the injunction was entered to remedy.

The point is not that the Ninth Circuit chose the wrong purpose. Rather, it is that a standard which requires the enjoined party to predict which purpose a court will later seek to enforce is not a standard at all.

This Court has recognized the problem in an analogous setting. "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158–59 (2012). The "spirit" standard demands exactly that kind of divination, and it attaches to the failure a severe sanction—contempt—that is far more serious than back pay.

Two further features of the decision below confirm that the standard cannot be applied in advance. First, the Ninth Circuit sorted Apple's conduct into conduct that violated the order's "strict letter" and conduct that it assumed did not but nonetheless violated the order's "implicit command to refrain from action designed to defeat it." Pet. App. 22a–23a (quoting *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 413 (1960) (Frankfurter, J., concurring)). Three categories of conduct, and the commission, fell on the "spirit" side of that line. *Id.* at 22a–25a, 34a n.9. A company should not be expected to comply with an "implicit command"; it should be required to comply only with an explicit one. Second, having held Apple in contempt for a "prohibitive" commission, the court could not say what a non-prohibitive commission would be. It remanded with a list of factors, a suggestion that the district court take expert testimony, and the possibility of a court-appointed "Technical Committee" to determine the permissible rate. Pet. App. 34a–36a. The content of the obligation, in other words, is *still being written* more than two years after the company was required to comply with it. That is the defining characteristic of a rule that cannot be operationalized.

B. The second problem follows from the first. Because a "spirit" standard cannot be applied by comparing conduct to text, courts applying it look elsewhere: to whether the enjoined party's conduct was "designed to evade the injunction's goals." Pet. App. 12a (citation omitted). The inquiry becomes one about the company's state of mind, and the evidence of state of mind is the company's own compliance deliberations.

The proceedings below show what that means in practice. Two months after the injunction took effect, Respondent moved to enforce it. The district court held a six-day evidentiary hearing with seven witnesses. Pet. App. 7a. It then "ordered the production of all Apple's documents relat[ed] to the decision-making process leading to the link entitlement program and associated commission rates." *Id.* Apple asserted privilege over many of those documents, "but most of its privilege claims were eventually withdrawn or rejected." *Id.* at 8a. A second hearing followed, with three more days of testimony from five more witnesses. *Id.* The resulting contempt order rested heavily on internal presentations in which Apple's business personnel evaluated "how the company could offer linked-out purchases without losing revenue." *Id.* at 18a. The Ninth Circuit held those presentations unprivileged because their "primary purpose" was business rather than legal, notwithstanding that they were prepared in response to the injunction and opened with slides reproducing or summarizing its terms. *Id.* at 18a–19a. "The fact that the Injunction prompted, or caused, these communications," the court said, "is not enough." *Id.*

Amicus takes no position on the privilege rulings as applied to particular documents—the point is structural. A "spirit" standard makes the compliance process itself the subject of the contempt proceeding. Every option the company considered and rejected, every projection of what compliance would cost, and every candid exchange between business leaders and counsel about where the line lies becomes evidence of whether the company "chose . . . revenue . . . over compliance." Pet. App. 16a. And because the standard treats the pursuit of the company's interests as a marker of bad faith, the more carefully a company analyzes its options, the more evidence it generates against itself.

That dynamic is corrosive. This Court has long recognized that "corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law,'" and that the privilege exists to encourage exactly that. *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (citation omitted). Compliance with an injunction is the paradigm case. The process described in Part I.A depends on businesspeople telling lawyers what they want to do and lawyers telling businesspeople what the order permits. If that exchange is presumptively discoverable in a later contempt proceeding and the business considerations reflected in it are presumptively incriminating, companies will respond rationally: fewer options analyzed in writing, fewer projections run, less legal involvement in operational decisions.

That is the opposite of what a court entering an injunction should want.

The "spirit" standard also aggravates a structural concern this Court identified in *Bagwell*. Civil contempt proceedings "leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." 512 U.S. at 831. When the question is whether the defendant violated the order's text, that concentration of authority is disciplined by the document: the judge, the parties, and the reviewing court are all bound by the same words. When the question is whether the defendant violated the order's "spirit," the discipline disappears. The judge who wrote the order is asked what he or she meant by it, and the answer is unfalsifiable.

Indeed, the answer is unfalsifiable even to the judge who issued the injunction. The judge may have had no specific intent with respect to the new facts and circumstances that prompted the contempt proceedings. The judge is then faced with the problem of deciding—on a post hoc basis—what he or she would have thought the injunction's spirit was as applied to present circumstances. Conversely, a contempt standard based on the text, rather than the spirit, avoids this post hoc inquiry.

C. The third problem with the decision below is that it treats the pursuit of the company's commercial interests, within the space the order leaves open, as evidence that the company violated the order.

Consider how the courts below characterized Apple's conduct. The district court found that Apple "considered whether its actions would comply, and at every step Apple chose to maintain its anticompetitive revenue stream over compliance." Pet. App. 16a (citation omitted). It found that Apple's compliance plan was "the most anticompetitive option" among those Apple considered. *Id.* And the Ninth Circuit held that even if Apple's reading of the injunction had been "reasonable," "evidence of Apple's bad faith negates a good-faith defense." *Id.* at 15a.

Set aside the record-specific findings, on which amicus takes no position, and focus on the rule those statements announce. It is that a company which (1) identifies several ways to comply with an injunction, (2) evaluates their financial consequences, and (3) selects the one that best preserves its revenue has thereby exhibited bad faith, and that its bad faith defeats an otherwise reasonable interpretation of the order. That rule cannot govern commercial enterprises. Every business subject to an injunction will consider the financial consequences of its compliance options; a management team that did not would be derelict. Every business will prefer the compliant option that costs it least; that preference is what fiduciary duty requires. And every business "wants" the reading of an order under which its preferred option is compliant. If wanting that reading is bad faith, then bad faith is universal, and the "good faith and reasonable interpretation" exception the Ninth Circuit recognized, *id.* at 14a–15a, is empty.

This Court's cases point the other way. *Taggart* holds that the contempt standard is "generally an *objective* one," under which "a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable." 587 U.S. at 561. The corollary is equally important: A party whose reading of the order is objectively reasonable is not in contempt, and its reasons for preferring that reading are beside the point. *Taggart* noted that subjective intent may bear on the appropriate sanction and that "civil contempt sanctions may be warranted when a party acts in bad faith," *id.* at 561–62, but it nowhere suggests that intent can supply a violation the text does not. The Fifth Circuit makes the point directly: Even crediting the finding that the enjoined party "was intent on" achieving the very result the injunction had blocked, "[n]either harboring that intent nor" acting on it "was a violation of the court order." *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 794 (5th Cir. 2013).

The Ninth Circuit's contrary approach rests on a misreading of this Court's decision in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), which it read to place "the burden of any uncertainty in the decree" on the enjoined party. Pet. App. 25a n.5 (quoting 336 U.S. at 193). That reading cannot be squared with *Taggart*, which places the burden of uncertainty the other way: contempt "should not be resorted to where there is [a] fair ground of doubt." 587 U.S. at 561 (citation omitted). *McComb* involved respondents who had violated the terms of a decree that "[b]y its terms enjoined any practices which were violations of" specific statutory commands, 336 U.S. at 192, and who had been found to be "not unwitting victims of the law," *id.* at 193. It does not hold that a party whose conduct falls outside a decree's terms bears the risk that the court will later read the decree more broadly. For a business, the difference between those two rules is the difference between a compliance program and a gamble.

D. The Ninth Circuit justified its rule as protection for the parties in whose favor injunctions run. Pet. App. 12a. But the protection it supplies is of a kind that equity has never recognized: relief the plaintiff never proved it was entitled to, imposed without the safeguards that attend the entry or modification of an injunction. And the rule imposes real costs on courts and on every party, plaintiff or defendant, that relies on the words of a decree.

Begin with the way injunctions are drafted. Under a text-based rule, the plaintiff who proposes an injunction has every reason to ask for what it actually wants, in language specific enough to be enforced, and the court has every reason to insist on it. Rule 65(d) and this Court's tailoring requirements do their work at the front end, where the enjoined party can be heard on the feasibility and scope of each obligation before it is bound. A "spirit" standard removes those incentives. A plaintiff that obtains a narrow order loses nothing by its narrowness, because it can later enforce the order's purposes (whatever they may be) through contempt; and a plaintiff that could not have justified a broader remedy at the front end can obtain the same result at the back end without ever justifying it. The result is leverage that the plaintiff never earned. This case shows how it works. The Ninth Circuit recognized that the informational harm found at trial "does not require that all commissions and all fees be prohibited." Pet. App. 34a n.9 (emphasis omitted). Yet the Ninth Circuit directed the district court to amend the contempt order to set Apple's commission rate, an outcome Respondent never sought through a motion to modify and never had to show was necessary to remedy the harm found at trial. Equity does not award relief that way. It requires the party seeking a remedy to establish its entitlement, with the other side heard, before the remedy binds.

The rule also disserves the parties who rely on negotiated decrees, and here the cost falls on plaintiffs as much as on defendants. Many injunctions binding businesses are consent decrees with agencies or private plaintiffs. Those instruments are attractive to both sides because they trade the uncertainty of litigation for the certainty of agreed terms. A "spirit" standard removes the certainty. If a decree's text can be supplemented in a contempt proceeding by whatever purposes a court later attributes to it, the defendant has agreed to an obligation of unknown scope, and the value of settling falls accordingly; fewer cases will settle, and those that do will settle on terms that are longer, more defensive, and more heavily litigated. Nor does the plaintiff know what it obtained. The district court here read the injunction's "spirit" to forbid any commission at all; the Ninth Circuit read the same "spirit" to forbid only "prohibitive" commissions and set the zero-commission order aside. Pet. App. 30a–34a. Respondent's victory shrank on appeal for the same reason Apple's compliance program failed: No one could say what the order meant. A motion to modify, filed when Respondent first objected to the commission, would in all likelihood have produced a definite rule within months. The contempt route has produced more than two years of litigation and, as yet, no number.

Finally, consider the burden on courts. The Ninth Circuit reasoned that a text-based rule would leave plaintiffs "inundating courts with requests for modification in an effort to plug the loopholes." Pet. App. 12a (quoting *Schering Corp. v. Ill. Antibiotics Co.*, 62 F.3d 903, 906 (7th Cir. 1995)). The comparison cuts the other way. A motion to modify is resolved on the papers or after a focused hearing, and its product is a new sentence in an order that everyone can read. A "spirit" contempt proceeding is, as this case shows, a full trial on the defendant's motives: here, nine hearing days, twelve witnesses, production of an entire decision-making file, a privilege fight, a lengthy contempt order, an appeal, and a remand to determine, with expert assistance, what the injunction requires. Pet. App. 7a–9a, 34a–36a. If the concern is judicial economy, the text-based rule wins easily.

III. The text-based standard is workable, and existing tools address genuine evasion.

The text-based standard applied by the First, Second, Third, and Fifth Circuits does not leave plaintiffs or courts helpless against the enjoined party who complies with an order's words while defeating its purported "spirit." Three features of existing law address that concern without sacrificing the notice on which compliance depends.

A. The text-based rule does not require courts to read injunctions in a vacuum or to indulge strained constructions. Injunctions, like other legal texts, are read as a whole and in context, "in the light of the issues and the purpose for which the suit was brought." *Terminal R.R.*, 266 U.S. at 29. What the rule forbids is expanding a decree "by implication or intendment beyond the meaning of its terms." *Id.* The question is always what the words, fairly read, prohibit; context informs that reading but cannot replace it.

Schering, the very case on which the Ninth Circuit relied, applied exactly that approach. The decree there barred the sale of a named chemical in "solution" form; the defendant sold the same chemical as a powder with instructions to add water. 62 F.3d at 905–06. Judge Posner held that "a literal change in form, as from liquid to solid," did not take the sale outside a decree that named the chemical, and he found support for that reading in ordinary principles of interpretation. *Id.* at 906–07. But he was careful to affirm the underlying rule: "We have no quarrel with the general rule that injunctions should be construed narrowly in order to make sure that the persons subject to an injunction have clear notice of what they are prohibited from doing," and "close questions of interpretation are resolved in the defendant's favor in order to prevent unfair surprise." *Id.* at 906. "[I]t would not do," he added, "to render general an injunction that was specific by free-wheeling interpretation of its terms." *Id. Schering* is thus a case about what a decree's words mean; it was resolved in the plaintiff's favor because the words, fairly read, covered the conduct. It provides no support for holding a party in contempt for conduct that an order, in the Ninth Circuit's own words, "does not address . . . at all."

That is the line the text-based rule draws, and it is a line that businesses can apply. When a proposed course of conduct falls within the fair meaning of the order's terms, the company knows it is prohibited. When the conduct falls outside the order's terms, the company knows it is permitted unless and until the order is modified. Each of those answers can be given in advance, and each can be implemented by the enterprise-wide process described above.

B. The Ninth Circuit's "spirit" rule originated in a case about evasion by proxy. In *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 774 F.3d 935 (9th Cir. 2014), the enjoined parties transferred assets and operations to nominally separate entities that then engaged in the very conduct the injunction forbade. *Id.* at 941–44. That is a genuine problem, but it is one the Federal Rules already solve.

An injunction binds not only the parties but "other persons who are in active concert or participation with" them and receive notice of the injunction. Fed. R. Civ. P. 65(d)(2)(C). This Court has also long held that a defendant "may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding," *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). *Sea Shepherd* could, and should, have been decided on that ground alone. The Ninth Circuit's error below was to detach the "spirit" language from that context and to apply it to a party's own conduct that the order did not address. Pet. App. 12a. Nothing in the text-based rule prevents courts from reaching sham transfers, straw parties, or concerted evasion; Rule 65(d)(2) can address that problem.

C. Finally, when an injunction turns out not to reach conduct the plaintiff believes it should reach, the law supplies a remedy that is prospective, transparent, and fair to everyone: modification.

The power is well established. "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). "[A] sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961). Rule 60(b)(5) codifies the authority, and this Court has read it flexibly. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383–84 (1992). The enjoined party's adoption of a compliance approach the plaintiff did not anticipate is a paradigmatic new circumstance. And the remedy is available to both sides: "[i]f defendants enter upon transactions which raise doubts as to the applicability of the injunction, they may petition the court granting it for a modification or construction of the order." *Regal Knitwear*, 324 U.S. at 15. As this Court has explained, courts "would not be apt to withhold a clarification in the light of a concrete situation that left parties . . . in the dark as to their duty toward the court," because "courts no less than parties desire to avoid unwitting contempts as well as to punish deliberate ones." *Id.*

Of course, modification is not a license to write anything into a decree after the fact. Any modification must be tailored to the underlying violation and adjudicated harm. *See Armour*, 402 U.S. at 681. Otherwise, modification could be used to enjoin or mandate all manner of conduct without having first adjudicated an underlying violation of law that warrants the entry of such extraordinary relief.

When proper, modification has three practical virtues that contempt lacks. It operates prospectively, so the enjoined party receives notice before it is bound. It is adversarial in the right way: The plaintiff proposes language, the defendant is heard on feasibility and scope, and the court tailors the result to the violation, as Rule 65(d) and this Court's remedial precedents require. And it produces a text, which the enjoined party can then implement through the process described in Part I.A. Contempt for violating an order's "spirit" has none of those virtues. It operates retroactively; it is adjudicated by the judge whose purposes are at issue; and it produces, at most, a finding that the defendant should have known better.

The Ninth Circuit operated under the erroneous assumption that requiring plaintiffs to seek modification would reward gamesmanship. But the assumption proves too much. Every injunction leaves some conduct unaddressed. Every enjoined party will, and may, conduct its business in the space the order leaves open. If that is gamesmanship, then the only injunction that is not "gamed" is one that prohibits everything the plaintiff dislikes, and Rule 65(d) forbids injunctions of that kind. The text-based rule does not immunize evasion. It allocates the burden of imprecision to the party best positioned to cure it: the plaintiff who proposed the order, who knows what it wanted, and who can ask the court—in a proceeding with notice to everyone—to say so.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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