

No. 25-1311

In the Supreme Court of the United States

APPLE INC., *Petitioner*,

v.

EPIC GAMES, INC.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

**BRIEF OF *AMICUS CURIAE*
PROTECT THE FIRST FOUNDATION
SUPPORTING PETITIONER**

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*¹

This case asks whether a court may force a private compiler—Apple, which curates a storefront of other people’s apps—to carry third-party speech it would otherwise limit or exclude. The injunction bars Apple from declining apps and metadata that include “buttons, external links, or other calls to action” that steer customers to rival purchasing mechanisms. App.166a. Those items are someone else’s speech, and requiring Apple to host them overrides Apple’s editorial judgment and, in so doing, violates the First Amendment.

The courts below nevertheless held Apple in contempt, not only for violating that speech-restrictive order’s terms, but also for violating its unwritten “spirit,” thus letting a district court dictate speech style, language, formatting, and placement on Apple’s curated store. The injunction and its opaque application thus implicate the First Amendment and trigger strict scrutiny, which is impossible to satisfy on these facts.

The First Amendment analysis is straightforward. As this Court recognizes, “[a]n entity exercising editorial discretion in the selection and presentation of content is engaged in speech activity.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024) (cleaned up). “[T]hat is as true when the content comes

¹ This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel or members made a monetary contribution toward the brief’s preparation or submission.

from third parties as when it does not.” *Ibid.* And an injunction that restricts that editorial discretion “confronts the First Amendment.” *Id.* at 732. Thus, when an injunction targets, compels, or restricts speech, its terms must be interpreted—at the very least—“no broader than necessary to achieve its desired goals.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). And when *interpreting* such an injunction, courts must “couch[]” it “in the narrowest terms that will accomplish [its] pin-pointed objective.” *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968). Plus, if the injunction is content based, the injunction is subject to strict scrutiny. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

But an injunction’s unarticulated “spirit” has no terms to construe. Using it as the measure of contempt thus leaves the speaker to guess which choices remain lawful or to constantly seek guidance and permission from whatever judge communes with that spirit before engaging in First Amendment activity. Many who are “worr[ie]d that the legal system will err, and count speech that is permissible as instead not,” may reasonably respond to the threat of civil contempt with “self-censorship of speech that could not be proscribed—a cautious and restrictive exercise of First Amendment freedoms.” *Counterman v. Colorado*, 600 U.S. 66, 75 (2023) (cleaned up).

This case thus presents significant First Amendment concerns. And it is particularly important to Protect the First Foundation—a nonprofit, nonpartisan organization that advocates for First Amendment rights. To be sure, *Amicus* agrees with

Apple that, for reasons of basic fairness and under Federal Rule of Civil Procedure 65, an injunction's spirit cannot support a contempt finding. Pet.Br. at 21-26.

But *Amicus* writes separately to make three other points. First, the injunction as written requires Apple to carry others' speech. It forces Apple to host developers' "calls to action," links, and buttons steering customers off the Store, App.166a—language Apple would otherwise condition or exclude. Apple writes the Review Guidelines, rejects submissions by the millions, and features some titles while largely ignoring others. Choosing what third-party speech to include, on what terms, and in what form is "speech activity." *Moody*, 603 U.S. at 731. A judicial decree that "order[s] the excluded to be included" "confronts the First Amendment," *id.* at 731-732, and is subject to strict scrutiny. But the Ninth Circuit wrongly held that the First Amendment was not even implicated by the letter or the spirit of the injunction. App.40a-41a.

Second, when, as here, an injunction regulates speech, it must be read no broader than its express terms. A speaker who cannot tell what a decree forbids will "steer far wider of the unlawful zone" than necessary to comply. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). And "[i]njunctions *** carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen*, 512 U.S. at 764. An unarticulated "spirit" has no "pin-pointed objective" and no terms a speaker can parse. *Carroll*, 393 U.S. at 183. Subjecting an injunction that compels speech to a "spirit" construction thus compounds already severe First Amendment

problems. And since the injunction requires Apple to allow a specific message, it is content based and subject to strict scrutiny. Moreover, what is true for the written injunction is just as true for the supposed and blithe “spirit” of that injunction. Whether it is the original injunction or the “spirit” of the injunction that the district court later applied, the First Amendment compulsion problem is the same: Style, language, format, and placement of speech are protected editorial speech activity.

Third, heightened constitutional scrutiny should have applied even though the speech may relate to commercial transactions because the more forgiving review this Court applied in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), does not apply to the injunction here. That case governs only compelled disclosure of purely factual, uncontroversial information that form and clarify the metes and bounds of the terms of the speaker’s own proposed commercial transactions. *Id.* at 651. The decisions below require Apple to host Epic’s pitch for purchases outside the Store—and to do so in Epic’s style, language, format, and placement. That is not a compelled disclosure of factual information about the scope of Apple’s own transaction terms. It is an order requiring Apple to publish someone else’s speech that Apple would otherwise have declined to host at all.

In short, the injunction requires Apple to carry speech it would not otherwise host, so it must be read no more broadly than its terms and subjected to heightened First Amendment scrutiny. Because the decisions below instead treated the First Amendment as unimplicated and then enforced an unarticulated

and amorphous supposed “spirit” of the injunction, this Court should reverse.

STATEMENT

Apple operates the iOS App Store, a curated marketplace through which developers distribute apps to iPhone and iPad users. App.2a. Apple required developers to use Apple’s In-App Purchase system for digital goods sold inside iOS apps and banned certain forms of third-party advertising such as “buttons, external links, or other calls to action” directing customers to external purchasing mechanisms. App.2a-3a.

For its part, Epic Games develops video games, most notably *Fortnite*, and runs its own storefront for distributing apps. App.2a. Frustrated with the limits Apple places on in-app purchases and Apple’s decision not to allow Epic’s promotional efforts to steer customers away from Apple’s payment processing system, Epic sued Apple. App.3a. It alleged violations of the Sherman Act, California’s Cartwright Act, and California’s Unfair Competition Law. *Ibid*.

After a bench trial, the district court rejected Epic’s federal antitrust claims. App.3a. But it held that Apple’s “anti-steering” rules—restrictions on “buttons, external links, or other calls to action” directing and encouraging users to use purchasing mechanisms other than Apple’s In-App Purchase system—violated California’s Unfair Competition Law. App.3a-4a. The court then entered a one-page permanent injunction: It “permanently restrained and enjoined” 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, in addition to In-App Purchasing and (ii) communicating with customers through points of contact obtained voluntarily from customers through account registration within the app.” App.166a. The Ninth Circuit affirmed the injunction. App.4a.

As the injunction required, Apple permitted external links. App.4a, 7a. But it enforced editorial rules regarding “what [those] links could say, what they could look like, and where they could be located.” App.4a-6a. And it charged a commission on “linked-out purchases.” App.4a-5a. In response, Epic moved to enforce the injunction, App.7a, and the district court held Apple in contempt for violating the injunction’s “spirit.” App.131a-133a.

The Ninth Circuit affirmed the contempt findings. App.2a. Courts, it held, may “find a breach of the decree in a violation of the spirit of the injunction, even though its strict letter may not have been disregarded.” App.12a. “In short,” the court held, “parties may be held in contempt for violating the spirit of an injunction.” *Ibid.*

In affirming the contempt findings, the Ninth Circuit rejected Apple’s showing that the injunction and resulting findings implicated the First Amendment and should have been subject to heightened scrutiny. Despite the editorial discretion Apple exercises in deciding what apps with what content to allow, the court explained that the resulting contempt order “has not interfered with Apple’s own expressive activity” because limits on “developers’

style, language, formatting, or quantity of links” describe “the developers’ expressive activity, not Apple’s.” App.40a-41a.

ARGUMENT

I. Apple’s Curation of the App Store Is Protected Speech.

The written terms of the injunction require Apple to carry others’ speech. They bar Apple from applying its editorial standards to decline to convey via the app store apps whose content and metadata contain “buttons, external links, or other calls to action” that encourage and steer customers to rival purchasing mechanisms. App.166a. Those calls to action are someone else’s language and promotional expression. Requiring Apple to host them is compelled speech, and it triggers the First Amendment.

The Ninth Circuit waved that away. It held that the injunction regulates “the developers’ expressive activity, not Apple’s,” and that Apple is unlike the compilers protected in *Moody*. App.40a-41a (citing *Moody*, 603 U.S. at 738). It was wrong on both counts. This Court’s decisions recognize that compiling, arranging, and excluding the speech of others—including the conditions on which inclusion will be granted and how the compilation will be presented—is the compiler’s own speech. *Moody* did not change that. Even if the underlying words originate with a third party, Apple has a First Amendment right to decide whether and how to give them space.

A. A compiler’s choices about what third-party speech to include or exclude and how to present included speech are the compiler’s own protected speech.

This Court’s precedents make clear that a curator’s choices about what to include, exclude, and how to present it are the curator’s own speech. So too are the conditions, both substantive and stylistic, on which inclusion will be granted. Indeed, “the presentation of an edited compilation of speech generated by other persons *** fall[s] squarely within the core of First Amendment security.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569-570 (1995). This means that forcing a curator to host a third party’s words is compelled speech.

1. That principle has protected the editorial discretion of publishers for decades. In *Miami Herald Publishing Co. v. Tornillo*, for example, the Court held that a Florida law that purported to give a political candidate “a right to equal space to reply to criticism and attacks on his record by a newspaper” violated the First Amendment. 418 U.S. 241, 243, 258 (1974). To get there, the Court reviewed its precedents from “as early as its decision in *Associated Press v. United States*[, 326 U.S. 1 (1945)],” the “clear implication” of which was “that any *** compulsion to publish that which reason tells *** should not be published” would be unconstitutional. *Tornillo*, 418 U.S. at 254-256. Because the Florida law at issue “operate[d] as a command in the same sense as a statute or regulation forbidding” a newspaper to publish unfavorable speech, it violated the First Amendment “[e]ven if a

newspaper would face no additional costs to comply.” *Id.* at 256-258.

The Court thus realized that the harm from forced publication was not necessarily pecuniary—although it could be. Rather, the harm was the “intrusion into the function of editors.” *Id.* at 258. A paper’s “choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper,” are “the exercise of editorial control and judgment” that the State may not commandeer. *Ibid.* And because the “newspaper is more than a passive receptacle or conduit for news, comment, and advertising,” Florida could not force the *Miami Herald* to publish the speech of others. *Ibid.* As Justice White explained, the Florida law flouted “the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor.” *Id.* at 261 (White, J., concurring). The First Amendment does not allow the government “to dictate to the press the contents of its news columns or the slant of its editorials.” *Ibid.*

2. *Tornillo*’s rule protects more than the traditional press. The Court later applied the same principle to protect the speech rights of a privately owned utility in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) (“*PG&E*”) (plurality op.). There, the Commission ordered PG&E—a utility that had long included in its billing envelopes a publication called *Progress*—to also carry a third-party newsletter in the “space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices.” *Id.* at 5-6. This too

flouted the First Amendment. The plurality explained that the State may not require a speaker “to carry speech with which it disagreed,” *id.* at 11 n.7, or even force it “to associate with speech with which [it] *may* disagree,” *id.* at 15 (emphasis added). And while the Court recognized that, in some respects, the Commission’s order was unlike the statute in *Tornillo*, it mirrored that statute in one key aspect. “Like the Miami Herald,” PG&E was “still required to carry speech with which it disagreed, and might well feel compelled to reply or limit its own speech in response to” any speech it was forced to allow. *Id.* at 11 n.7.

In *Hurley*, the Court applied the same rule to a parade. The case arose after Massachusetts, applying its public-accommodations law, ordered the organization that, for decades, had organized the St. Patrick’s Day Parade to admit an LGBT group with its own marching unit and banner. 515 U.S. at 572. The Court held that the First Amendment prevented the Massachusetts law from requiring the LGBT group’s inclusion in a form and manner contrary to the editorial choices of the organizers—because parades are expressive and “every participating unit affects the message conveyed by the private organizers.” *Id.* at 572-573. Thus, to require the parade’s organizers “to include among the marchers a group imparting a message the organizers do not wish to convey” would be to “alter the expressive content” of the parade. *Id.* at 559, 572-573.

In so holding, the Court did not ask whether the parade had a “narrow, succinctly articulable message.” *Id.* at 569. It explained that a private speaker “does not forfeit constitutional protection

simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.” *Id.* at 569-570. Nor did it matter that the parade’s organizers did not “generate, as an original matter, each item featured in the communication.” *Id.* at 570. It was enough that the organization “decided to exclude a message it did not like from the communication it chose to make.” *Id.* at 574. “[W]hatever the reason” for “that choice,” the Court held, it “is presumed to lie beyond the government’s power to control.” *Id.* at 575.

Each case establishes that an order that a private compiler of expressive content carry someone else’s speech over the compiler’s editorial objections implicates the First Amendment and is subject to heightened scrutiny.

B. *Moody* reaffirmed that rule for commercial platforms that host the speech of others.

Moody v. NetChoice, LLC, 603 U.S. 707 (2024), reaffirmed this Court’s rule that curation decisions are themselves protected speech. The case concerned 2021 Florida and Texas statutes regulating large social-media platforms. Both laws limited the platforms’ “capacity to engage in content moderation—to filter, prioritize, and label” third-party posts—and required a platform to give a user an “individualized explanation” if it removed or altered her content. *Id.* at 717. Texas’s central provision went further: It barred covered platforms from “censor[ing]” a “user’s expression”—defined “broadly” to include “pretty much anything that might be posted”—based on the

“viewpoint” it contained. *Id.* at 736 (quoting Tex. Civ. Prac. & Rem. Code Ann. §143A.002(a)(2) and citing *id.* §143A.001(2)).

After surveying its precedents, including *Tornillo*, *PG&E*, and *Hurley*, the Court drew “three general points.” *Moody*, 603 U.S. at 730-731. First, the First Amendment applies “when an entity engaging in expressive activity, including compiling and curating others’ speech, is directed to accommodate messages it would prefer to exclude.” *Id.* at 731. “Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own.” *Ibid.* Thus, when the government “order[s] the excluded to be included,” it “interferes with such editorial choices,” “alters the content of the compilation” and “confronts the First Amendment.” *Id.* at 731-732.

Second, “none of that changes just because a compiler includes most items and excludes just a few.” *Id.* at 732. The Court explained that the St. Patrick’s Day Parade in *Hurley* was itself “eclectic,” with “patriotic, commercial, political,” and other themes. *Ibid.* (quoting *Hurley*, 515 U.S. at 562). “No matter.” *Ibid.* To the Court, it “‘is enough’ for a compiler to exclude the handful of messages it most ‘disfavor[s].’” *Ibid.* (quoting *Hurley*, 515 U.S. at 574). This is so because a “narrow, succinctly articulable message is not a condition of constitutional protection.” *Ibid.* (citation omitted).

Third, the government cannot override editorial choices “by asserting an interest in improving, or

better balancing, the marketplace of ideas.” *Id.* at 732-733. The Court explained that the challenged laws in *Tornillo*, *PG&E*, and *Hurley* were all defended as promoting a “greater diversity of expression.” *Ibid.* But “[i]t made no difference” because, however “imperfect the private marketplace of ideas,” it was “a worse proposal” to allow the government to decide “when speech was imbalanced” and then to “coerc[e] speakers to provide more of some views or less of others.” *Id.* at 733.

Applying these principles, the *Moody* Court found that Facebook’s “News Feed or YouTube’s homepage,” each of which “delivers a personalized collection of [uploaded] stories” to their users, *id.* at 734, was protected speech even though each business will “happily convey the lion’s share of posts submitted to them,” *id.* at 738. It explained that “‘the basic principles’ of the First Amendment ‘do not vary’” with the medium. *Id.* at 733 (quoting *Brown v. Entertainment Merchs. Ass’n*, 564 U.S. 786, 790 (2011)). And it clarified that the principle “that laws curtailing *** editorial choices must meet the First Amendment’s requirements” “does not change because the curated compilation has gone from the physical to the virtual world.” *Id.* at 717.

With that clarification in place, the Court had no problem applying everything that flowed from it: “The government may not, in supposed pursuit of better expressive balance, alter a private speaker’s own editorial choices about the mix of speech it wants to convey.” *Id.* at 734. And because Texas’ version of the social-media law—if not Florida’s too—would have done just that, the Court concluded it would “interfere

with protected speech.” *Id.* at 738. That is the same rule *Tornillo*, *PG&E*, and *Hurley* applied to compelled carriage in other contexts—the government may not force a private compiler to host third-party speech, or to present included speech in a form the compiler would reject, without satisfying heightened or strict scrutiny.

C. The App Store is Apple’s curated collection of apps and is entitled to First Amendment protection.

Under the principles established in *Tornillo*, *PG&E*, and *Hurley* and reaffirmed in *Moody*, the App Store is compiled expression that Apple has curated to its own ends, and its editorial decisions are protected by the First Amendment.

1. Apple describes the App Store as “a safe and trusted place to discover and download apps.”² Apple has built the App Store to its “highest standards” to ensure “privacy, security, and content,” and the App Store is “[c]urated by experts” to that end.³ Those experts do not merely accept every app that is submitted. In 2024 alone, Apple rejected more than 1.9 million app submissions for privacy violations, fraud, and other guideline failures.⁴

But Apple’s editorial role does not end once an app has been approved. Even after an app is in the store, “Apple moderators regularly review worldwide App

² *App Store*, Apple, <https://www.apple.com/app-store/> (last visited Sep. 20, 2026).

³ *Ibid.*

⁴ *Ibid.*

Store charts for inappropriate content.”⁵ Nor does this review limit itself to the content in apps themselves. The same year that Apple rejected 1.9 million apps, it removed more than 1.9 million user reviews that it viewed as spam.⁶

2. The decision to allow an app or a review is not arbitrary or ad hoc. Apple’s Review Guidelines promise “a highly curated App Store where every app is reviewed by experts” and “an editorial team” that “helps users discover new apps” by highlighting apps that Apple believes will be of interest or value.⁷

The first chapter is Safety. Guideline 1.1 refuses apps with content that is “offensive, insensitive, upsetting, intended to disgust, in exceptionally poor taste, or just plain creepy.”⁸ Guideline 1.1.1 bars defamatory or mean-spirited attacks on religion, race, sexual orientation, gender, or national origin, with a carve-out for professional political satirists.⁹ Guideline 1.1.2 rejects realistic depictions of killing or torture and forbids game “enemies” aimed at real races, cultures, governments, or corporations.¹⁰ Guideline 1.1.3 forbids apps that “encourage illegal or reckless use of weapons and dangerous objects” as well as those that “facilitate the purchase of firearms or

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *App Review Guidelines*, Apple (June 8, 2026), <https://developer.apple.com/app-store/review/guidelines/>.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

ammunition.”¹¹ Guideline 1.1.4 excludes overtly sexual and pornographic material, hookup apps, and trafficking.¹² Guideline 1.1.5 forbids “[i]nflammatory religious commentary or inaccurate or misleading quotations of religious texts.”¹³ Guideline 1.1.6 rejects fake-function apps and anonymous prank-calling tools, even for “entertainment” purposes.¹⁴ And Guideline 1.1.7 forbids apps that would “capitalize or seek to profit on recent or current events, such as violent conflicts, terrorist attacks, and epidemics.”¹⁵

The list goes on. Guideline 1.2 requires apps “with user-generated content” to offer methods for filtering, reporting, and blocking.¹⁶ It also authorizes removal without notice of apps used mainly for pornography, anonymous chat, or bullying. Guideline 1.3 walls off the Kids Category and only allows apps “focus[ed] on creating a great experience *** for younger users.”¹⁷ And Guideline 1.4 allows Apple to reject apps that “risk[] physical harm” such as by offering medical advice, encouraging drug use, or urging users to engage in potentially dangerous challenges.¹⁸

These guidelines establish Apple’s view of which direct and indirect expressive content belongs in its

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

compiled App Store and which does not. And they show that even the inner workings of an app—what an app does or says—are subject to Apple’s editorial discretion.

3. But the decision about what to include and what to reject is far from Apple’s only expressive choice. It also cares deeply about how apps on the App Store are presented.

Apple tells developers, for example, that a “worldwide team of editors curates selections on the App Store for each Apple platform.”¹⁹ These editors highlight new releases, major updates, in-app events, and “unique stories” such as an app that “changed an industry” or “helped a user solve an uncommon problem.”²⁰

One way Apple curates this content is through a service called the Today tab. It provides Apple’s choice of the App of the Day, the Game of the Day, interviews, how-to pieces, and “Apple’s unique perspective on apps and games,” told with artwork and sometimes video.²¹ The consumer-facing storefront advertises “[o]ver 120 expert editors worldwide,” “[o]ver 40K stories and counting,” and collections “[h]andpicked for you,” updated daily.²² Ranking and taxonomy do the same work in a quieter register: Search results turn on text relevance and customer behavior. And by organizing

¹⁹ *Discovery on the App Store and Mac App Store*, Apple, <https://developer.apple.com/app-store/discoverability/> (last visited Sep. 20, 2026).

²⁰ *Ibid.*

²¹ *Ibid.*

²² *App Store*, *supra* note 2.

each app into categories such as Entertainment, Shopping, or Social Networking, Apple decides where an app lives and which tab it can reach. Putting one title on the main page and another on a screen that requires multiple clicks to reach is editorial arrangement.

And it remains Apple’s editorial arrangement even if Apple has a commercial motive. Indeed, even if Apple’s compliance choices were made in bad faith, they are protected. While such considerations may be relevant when reviewing the mens rea necessary for potential contempt, they say nothing about whether the App Store is Apple’s expressive compilation. The platforms in *Moody* were commercial enterprises. See 603 U.S. at 717, 734. But their decisions were still protected. *Id.* at 731. Other forms of expression—“books, newspapers, and magazines”—are regularly “published and sold for profit” without losing First Amendment protections. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

So too for the App Store. Just as a bookstore may give priority to books by friends, by the owners themselves, or books with a higher profit margin, Apple may allow self-interest to influence its editorial choices without diminishing those choices’ First Amendment protection.

4. This Court’s precedents thus make clear that decisions about what apps to include, where to include them, and when to promote them belong to Apple alone and are themselves protected “speech activity.” *Moody*, 603 U.S. at 731 (quoting *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674

(1998)). “And that is as true when”—as in the App Store—“the content comes from third parties.” *Id.* at 731. Nor does it matter that Apple has been “rather lenient” in admitting apps and reviews. *Id.* at 732 (quoting *Hurley*, 515 U.S. at 569). It is enough that Apple decided “to exclude the handful of messages” with which it disagreed most by establishing the review guidelines. *Id.* at 732 (citing *Hurley*, 515 U.S. at 574). Those conditions are how Apple decides both what third-party speech enters the compilation and in what form. “[T]hat kind of focused editorial choice packs a peculiarly powerful expressive punch.” *Id.* at 732.

Nor must the written injunction compel a rewrite of a Today story to alter Apple’s protected judgments. The First Amendment protects decisions about “organizing and presenting the included items” as well. *Id.* at 731. Thus, the decision about how apps may promote, encourage, or advertise competing channels or even speak about payment—including at the point of sale—is part of how Apple presents them in its compilation, which is “expressive activity of its own.” *Ibid.*

Yet the written injunction requires Apple to host developers’ “buttons, external links, or other calls to action” directing and encouraging customers to rival compilers and sellers of expressive content. App.166a. The decisions below then forced Apple to add the developers’ style, language, format, and placement to the developer’s preferred promotional content. An order that Apple must carry a competitor’s pitch, on a competitor’s terms, alters the inclusion conditions

Apple set and requires “the excluded to be included” in the very sense that *Moody* forbids. See 603 U.S. at 732.

5. In holding that the injunction does not even *implicate* First Amendment rights, the Ninth Circuit misapplied *Moody*. True, the panel recognized that “ordering a party to provide a forum for someone else’s views implicates the First Amendment” if “the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt.” App.40a (quoting *Moody*, 603 U.S. at 728). But its application missed the mark when it asserted that the order “has not interfered with Apple’s own expressive activity” because limits on “developers’ style, language, formatting, or quantity of links” describe “the developers’ expressive activity, not Apple’s.” App.40a-41a. The apps selected to appear in the App Store, and the style, language, and formatting favored by Apple in making such selections, are Apple’s own editorial choices—Apple’s own “speech.” *Moody*, 603 U.S. at 731). A developer remains free to prefer contrary expressive choices, but it cannot force Apple to host those contrary choices.

The panel also held that Apple had not shown it is “in the business *** of combining ‘multifarious voices’ to create a distinctive expressive offering.” App.40a-41a (quoting *Moody*, 603 U.S. at 738). But *Moody* does not require a separate showing of that kind once the compiler is selecting, conditioning, and presenting third-party items. See 603 U.S. at 731-732, 738. The combined curated results of the Guidelines, the exclusions, and the Today tab are, by definition, that offering.

In short, *Moody* reaffirms a long line of cases holding that compiling and presenting third-party items is the compiler's speech. *Id.* at 731. Ordering Apple to carry links, language, and formatting it would condition or exclude is "ordering the excluded to be included" and "confronts the First Amendment." *Id.* at 732.

6. The Ninth Circuit's error seems to be grounded in its concern with the consequences of crediting Apple's First Amendment right to decide what to include or exclude from its store. "If Apple is correct," the Ninth Circuit worried, "a regulated party's expressive activity is implicated whenever it cannot restrict someone else's speech on a forum it runs." App.41a. But *Moody* already drew the appropriate line. It rejected the claim that such a protection would swallow every hosting forum, explaining that there may be cases where "compelled access did *not* affect the complaining party's own expression." 603 U.S. at 730-731 (discussing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) and *Rumsfeld v. Forum for Acad. & Inst'l Rts., Inc.*, 547 U.S. 47 (2006)).

But Apple's editorial decisions about what to include show that forced inclusion *would* alter Apple's chosen expression. Apple writes the Review Guidelines, rejects apps by the millions, features some titles and buries others, and signs the stories on the Today tab. That is combining "multifarious voices" into "a distinctive expressive offering," a choice the First Amendment protects. *Id.* at 738 (quoting *Hurley*, 515 U.S. at 569).

By interfering with that choice, the lower courts subjected Apple’s editorial choices to a speech restraint that requires heightened scrutiny. There is no question that developers speak in their own apps. But Apple also speaks when it chooses which of those apps enter the Store, on what terms, and in what light.

II. Injunctions that Implicate First Amendment Rights Should Be Interpreted Narrowly to Avoid Chilling Speech.

Because the injunction as written interferes with Apple’s speech, it must be interpreted narrowly and subject to strict—or at least heightened—scrutiny like all other injunctions that restrict, chill, or compel speech. That approach is required by the narrow tailoring component of First Amendment scrutiny and by basic principles of constitutional avoidance.

A. Vague injunctions can chill protected expression.

Judicial overreach can harm speech directly through prior restraint or outright restrictions or compulsion. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-419 (1971). But similar harms can also flow from vague judicial orders that chill protected expression.

1. This Court has recognized that vague laws “offend several important values.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). They deprive a person of an “opportunity to know what is prohibited, so that he may act accordingly.” *Ibid.* They also fail to “provide explicit standards for those who apply them,” thereby “delegat[ing] basic policy matters to *** judges.” *Id.* at 108-109.

These offenses are even more acute when a law “abut(s) upon sensitive areas of basic First Amendment freedoms.” *Id.* at 109 & n.6 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). Such laws “operate[] to inhibit the exercise of (those) freedoms,” *id.* at 109 & n.7 (quoting *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961)), and “inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked,” *id.* at 109 & n.8 (cleaned up) (quoting *Baggett*, 377 U.S. at 372).

2. What is true of statutes is true of decrees. “Injunctions *** carry greater risks of censorship and discriminatory application than do general ordinances.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 764 (1994). And with the greater risk comes the need for “a somewhat more stringent application of general First Amendment principles.” *Id.* at 765. An order that does not tell the speaker what is forbidden produces the same risk of chill that *Grayned* described. It increases the likelihood that would-be speakers subject to an injunction will “steer far wider of the unlawful zone”—perhaps by avoiding addressing viewpoints that the reviewing judge may not like—than they would if the injunction’s contours were defined. *Grayned*, 408 U.S. at 109 (quoting *Baggett*, 377 U.S. at 372).

That is why this Court has held unconstitutional laws allowing injunctions that may sweep up too much protected expression. In *Vance v. Universal Amusement Co.*, for example, the Court held unconstitutional a nuisance statute that would have allowed judges to restrain the future exhibition of

unnamed films “that have not been finally adjudicated to be obscene” and that may not ever be so adjudicated. 445 U.S. 308, 311, 316-317 (1980) (per curiam).

That is also why the Court has vacated injunctions themselves. In *Madsen*, for example, the Court considered the validity of an amended decree restricting protests that had been entered after abortion clinics claimed that an initial injunction did not go far enough. 512 U.S. at 758. That original injunction barred protesters from blocking clinic access. *Ibid.* The expanded injunction added a 36-foot buffer, a ban on any “images observable” from inside the clinic, a 300-foot no-approach zone, and a 300-foot bubble around the homes of clinic employees. *Id.* at 759-760. The Court, finding that the revised injunction was content-neutral, affirmed only the public-street buffer and invalidated the rest under a single test: a content-neutral speech-sensitive injunction may “burden no more speech than necessary to serve a significant government interest.” *Id.* at 765, 768-775.

The injunction here violates that same principle.

B. To avoid those harms, injunctions that target speech should be narrowly interpreted and must survive (at least) heightened scrutiny.

Because of the risk that an injunction regulating speech will chill protected expression, this Court has enforced strict guardrails around such injunctions. One such guardrail is that a content-neutral decree that targets protected speech must be interpreted “no broader than necessary to achieve its desired goals.”

Madsen, 512 U.S. at 765. It must be “couched in the narrowest terms that will accomplish the pin-pointed objective.” *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968). And if an injunction is content based, strict scrutiny applies. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

For these principles to have teeth, injunctions must be specific so that the parties and courts know how to interpret them. The relevant question must not be what a later court *wishes* the injunction order had said. It must be what the order actually said. And, if there is ambiguity in the injunction’s express terms, they must be narrowly construed. This is so both because of basic lenity principles and because of the constitutional concerns of allowing judges to suppress or punish any speech that falls within the ambiguity.

While clarity is required to adequately protect First Amendment freedoms, the need to delineate an injunction’s terms is also important for notice. The Court has explained in other contexts that “[b]asic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.” *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). To that end, Federal Rule of Civil Procedure 65(d)(1) provides that every injunction must “state its terms specifically” and “describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.”

Applying those principles to speech, an enjoined party cannot conform its speech to a decree it cannot parse with certainty. And a reviewing court cannot

apply either the fit that *Madsen* requires for content-neutral injunctions, or the strict scrutiny required for content-based injunctions that target speech, based on an amorphous standard like the “spirit” of the underlying injunction. For both reasons, a compelled speaker like Apple can only be held to the order’s express terms, and only if those terms survive the relevant level of scrutiny.

C. The injunction unconstitutionally compels speech—both as written and in the “spirit” construction.

Because the written injunction requires Apple to host third-party “calls to action” that “direct customers to purchasing mechanisms” other than Apple’s, App.166a, it targets speech because of the message expressed and is thus content based. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-164 (2015). It is therefore subject to strict scrutiny. *Madsen*, 512 U.S. at 762-764 (citing *Perry Educ. Ass’n*, 460 U.S. at 45). But even if the Court considered the injunction and its “spirit” content neutral, *Madsen* and *Carroll* still require that it be read no broader than those terms and that it burden no more speech than necessary. *Madsen*, 512 U.S. at 765 (collecting cases); *Carroll*, 393 U.S. at 183. The additional “spirit” construction did the opposite.

The injunction 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, in addition to In-App Purchasing and (ii) communicating with customers through points of contact obtained voluntarily from customers through

account registration within the app.” App.166a. These stated requirements are the injunction’s “pin-pointed objective[s].” *Carroll*, 393 U.S. at 183.

By those terms, Apple may not ban the link itself, a button that hyperlinks to it, a call to action, or any follow-on communication between Epic and its customers. But the order does not mention font, color, placement, or word count. Nor did it deputize the district court to police the “style, language, formatting, or quantity of” the links required by the order. App.40a-41a.

Despite the written order’s compelling Apple to allow speech with which it disagreed, Apple nevertheless permitted the links the injunction required. App.4a. Yet the contempt finding compounded those harms and somehow rested on how those links looked, what they could say, where they sat, and the fact that Apple charged a commission for link-out purchases, concluding that this mix violated the injunction’s “spirit.” App.4a, 131a-133a. That further compels Apple to speak according to the court’s post-hoc editorial choices imposed whenever and however the “spirit” moves it. Thus, no less than the original written injunction, the district court’s “spirit” construction should have been subject to strict scrutiny.

And the harm of not doing so here was severe—it resulted in a contempt order. But this Court’s cases make clear that, since Apple was a speaker, it had the right to know, ex ante and with clarity, which of its editorial choices remain lawful. It was deprived of that

right and left instead to guess—and, as it turned out, to guess wrongly.

In subjecting Apple to that game, the courts below flouted this Court’s guidance in *Madsen* and *Carroll* to protect speakers. Those decisions require “precision of regulation,” *Madsen*, 512 U.S. at 765-766 (discussing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982)), a standard that no “spirit” can ever communicate from beyond the veil of the injunction’s embodied text. Yet the decision below failed to apply heightened or strict scrutiny to the written injunction and its “spirit” construction when it found that Apple’s speech rights were not even implicated. That decision should be reversed.

III. *Zauderer* Does Not Save the Injunction.

Given the serious First Amendment implications of the content-based injunction and contempt order, the courts below should have applied strict scrutiny. That is true even if the injunction were recast as a commercial-disclosure order. This Court’s decision in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which applied lesser scrutiny to commercial speech in narrow circumstances, does not apply here. While the courts below did not rest on *Zauderer*, some courts of appeals have treated it as a general get-out-of-the-First-Amendment-free card on compelled commercial speech. It is not.

A. *Zauderer* governs only compelled disclosures of the terms of a seller’s own commercial transactions.

Zauderer arose after an Ohio lawyer ran a newspaper advertisement offering to represent women

injured by the Dalkon Shield on a contingent-fee basis. 471 U.S. at 630-631. The advertisement stated that “[i]f there is no recovery, no legal fees are owed by our clients.” *Id.* at 631. Ohio reprimanded the lawyer for omitting that clients might still be liable for *costs* even if they lost. *Id.* at 633, 652. In other words, its description of the commercial terms engaging the firm failed to disclose a material financial term of the engagement that rendered the promotional advertisement misleading. This Court upheld that disclosure requirement, holding—as Justice Thomas put it—“that laws requiring the disclosure of factual information in commercial advertising may satisfy the First Amendment if the disclosures are ‘reasonably related’ to the Government’s interest in preventing consumer deception.” *Moody*, 603 U.S. at 751 (Thomas, J., concurring in the judgment) (discussing *Zauderer*, 471 U.S. at 651).

But *Zauderer* did not purport to set a new standard of First Amendment protection for anything that might be broadly considered commercial speech. It clarified that it was *not* suggesting “that disclosure requirements do not implicate the advertiser’s First Amendment rights at all.” *Zauderer*, 471 U.S. at 651. It simply held that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.” *Ibid.*

By its terms, that standard applies only when the government requires a vendor to provide “purely factual and uncontroversial information about the terms under which [the speaker’s] services will be available.” *Ibid.* And there, the disclosure concerned

the lawyer’s own contingent-fee terms. The Court reasoned that the State’s interest in preventing deception about those terms justified a limited disclosure requirement, so long as the requirement was not “unjustified or unduly burdensome.” *Ibid.* That narrow rule gave the Court a way to distinguish a particular kind of commercial disclosure from *Tornillo*, the case that would otherwise control. *Ibid.* *Zauderer* thus applied only to disclosures that meet each of three independent factors: (1) the disclosure must be purely factual and uncontroversial; (2) it must concern the terms under which the speaker’s own services will be available; and (3) it must not be unjustified or unduly burdensome. *Ibid.*

This Court recognized as much in *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) (“*NIFLA*”). There, the Court explained that *Zauderer* “has no application” to a forced notice about state-sponsored services the speaker does not itself provide—particularly when the services were controversial. *Id.* at 768-769. *Hurley* said the same thing in different words: *Zauderer* does not apply outside the circumstances of a factual, uncontroversial disclosure of the speaker’s own goods or services in “commercial advertising.” *Hurley*, 515 U.S. at 573 (discussing *Zauderer*).

B. *Zauderer* does not apply because the injunction requires Apple to carry another’s promotional speech.

Applying those limitations here, *Zauderer* cannot be used as a shield against Apple’s First Amendment rights. Neither the injunction as written nor the

injunction’s “spirit” merely requires Apple to disclose the terms of its own In-App Purchase system. They instead require Apple to host a pitch for a competitor’s purchasing system (Epic’s) outside the Store. And, through the expanded “spirit” reading, the injunction also requires that pitch to appear in the developer’s style, language, format, and placement, *inside* Apple’s curated storefront. App.4a, 40a-41a. That is compelled carriage of someone *else’s* commercial speech at the point of sale, not a disclosure of the facts or terms of sale for the services or goods Apple itself offers or provides.

Accordingly, *Zauderer* does not protect the injunction’s commands. That decision never contemplated forcing Zauderer to carry a rival’s advertisement, still less to dictate use of the rival’s font, wording, and placement within Zauderer’s advertisements. And since *Zauderer* “has no application” to a notice about services the speaker does not itself provide, *NIFLA*, 585 U.S. at 768-769, it cannot apply to require Apple to host Epic’s speech. A competitor’s external-purchase offer is not a term of Apple’s own service, but an offer to leave Apple’s curated storefront to purchase goods or services elsewhere. It is thus no different from requiring Barnes & Noble to include a notice on its front window or in the checkout aisle telling shoppers of a sale happening at the independent bookstore down the street.

The point-of-sale setting makes the mismatch even clearer. In *PG&E*, the Commission ordered a utility to carry a third-party newsletter in the leftover space of its billing envelope. 475 U.S. at 5-6. That was

unconstitutional even though the utility was already speaking to customers about a commercial relationship. *Id.* at 20-21. Forcing Apple to carry a rival purchasing pitch inside its own app, in the rival's chosen form, is a similar compelled carriage and is likewise subject to strict scrutiny.

But the harm goes further still. After all, *PG&E* dealt with the envelope for electricity already purchased. See *id.* at 5-6. A cleaner analogue to what the district court required here would be to require a company that sends only an *offer* of service to include with that offer a competing offer as well.

C. Even if *Zauderer* applied, the injunction would fail it.

Even if *Zauderer* applied to compelled speech about a competitor's goods or services, both the letter and "spirit" of the injunction here would fail *Zauderer*'s other two limits.

First, the compelled speech is not "purely factual and uncontroversial." *Zauderer*, 471 U.S. at 651. A "call to action" that directs a customer to buy somewhere else is a sales pitch. App.166a. Style, language, formatting, quantity, and placement are not facts about *Apple*'s terms. They are editorial choices about how a competing offer will look and where it will sit. *NIFLA* refused to apply *Zauderer* when the notice addressed a controversial topic like abortion. 585 U.S. at 768-769. If the Court reaches *Apple*'s speech, it should do the same here: A court-ordered advertisement for a rival purchasing channel, in the rival's style, language, format, and placement, is

controversial and thus fails *Zauderer*'s "uncontroversial" requirement.

Second, the requirement here is also "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651. A *Zauderer* disclosure must remedy a harm that is "potentially real, not purely hypothetical," *Ibanez v. Florida Dep't of Bus. & Pro. Regul.*, 512 U.S. 136, 146 (1994), and may extend "no broader than reasonably necessary," *In re R.M.J.*, 455 U.S. 191, 203 (1982).

Here the original injunction already required Apple to allow the link, the button, and the call to action. App.166a. What the decisions below added is a roving power to police how those words look and where they go, measured against an injunction's undefined "spirit." App.4a, 131a-133a. That sweeps much broader than the one-line disclaimer about a seller's own fee that this Court accepted in *Zauderer*. It is closer to an order that "dictate[s] to the press the contents of its news columns" like the one invalidated in *Tornillo*, 418 U.S. at 261 (White, J., concurring). And since a speaker like Apple cannot conform its editorial judgment to an injunction's undefined "spirit," the resulting burden is one that *Zauderer* itself said may "offend the First Amendment by chilling protected commercial speech," 471 U.S. at 651, or functionally imposing a classic prior restraint.

CONCLUSION

The Court should reverse the contempt judgment because a "spirit" construction of an already constitutionally suspect written injunction supplies no terms a speaker can parse and cannot survive any level of heightened scrutiny.

Respectfully submitted,

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