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 FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Whether a court may hold a party in civil contempt based on a violation of an injunction's "spirit" where the injunction is silent as to the conduct upon which contempt is based.

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INTEREST OF THE UNITED STATES

This case presents a question concerning the standard for imposing civil contempt based on a violation of an injunction. The United States and its agencies and personnel are often subject to injunctions as defendants in civil actions. The federal government also routinely obtains injunctions as the plaintiff in enforcement actions. The United States thus has a substantial interest in the resolution of the question presented.

INTRODUCTION

Seven years ago, this Court reiterated that a party may be held in civil contempt for violating an injunction only "if there is *no fair ground of doubt* as to whether the order barred the [party's] conduct." *Taggart* v. *Lorenzen*, 587 U.S. 554, 557 (2019). That demanding standard, which this Court has applied for more than 140 years, reflects that "basic fairness requir[es] that those enjoined receive explicit notice of what conduct is outlawed before being held in civil contempt," which is a "severe remedy." *Id.* at 561 (quotation marks omitted); see *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609, 618 (1885).

Civil contempt is therefore appropriate only if the defendant's conduct is clearly covered by the injunction's express terms. Of course, like all legal provisions, an injunction's text should be construed reasonably and in context. The injunction thus need not always explicitly identify the specific conduct alleged to be contemptuous; in appropriate circumstances, an injunction's prohibitions may be framed in more general terms and context may supply the requisite clarity that they apply to the conduct at issue. But if the application of the injunction's terms to the defendant's challenged conduct remains ambiguous even after being reasonably construed in context, then civil contempt is not available. Instead, the plaintiff must pursue either clarification or modification of the injunction, or a new action. That traditional rule for civil contempt strikes the balance between protecting the power of courts to ensure their orders are followed and protecting the right of parties to receive fair notice before being sanctioned.

In this case, however, the Ninth Circuit held that petitioner could be found in civil contempt simply for having violated "the spirit of the injunction," even if petitioner's conduct did not violate the injunction's express terms—let alone violate those terms clearly. The Ninth Circuit did not even cite the "fair ground of doubt" standard, much less apply it. That was plain reversible error. Indeed, respondent's certiorari-stage brief did not defend the "spirit of the injunction" standard.

But this Court should not simply reaffirm (again) the correct standard and remand. As with other legal standards whose content is best understood through application, this Court's application of the "fair ground of doubt" standard to some of the allegedly contemptuous conduct in this case would provide useful guidance to lower courts.

For example, the courts below erroneously held petitioner in contempt for charging a 27% commission on certain transactions that were "steered" from petitioner's software platform to respondent's website. They reasoned that the injunction had barred petitioner from prohibiting such steering, and petitioner's imposition of a 27% commission had the intent and effect of making the steering cost-prohibitive. But a fair ground of doubt exists whether the injunction's text, read in context, barred the 27% commission: the anti-steering ban neither mentions nor covers commissions; and charging the 27% commission on the steered transactions raised very different legal issues than prohibiting the steering altogether, even if petitioner hoped the two would yield the same results. In contrast, the courts below correctly held petitioner in contempt for certain design limitations. The injunction required petitioner to allow respondent to include "buttons" and "links" to enable steering, but the only "buttons" petitioner allowed were so-called "plain buttons," which the courts found were indistinguishable from links, and not "buttons" within that term's ordinary meaning. That raises no fair ground of doubt: the "plain buttons"-only restriction clearly violates the injunction's express terms. This Court should remand for the lower courts to apply the proper standard to the remaining contempt charges.

STATEMENT

1. a. Petitioner develops mobile electronic devices such as the iPhone and iPad; an operating system (iOS) for those devices; and the App Store, where users may purchase and download software applications (apps) to run on the devices. Pet. App. 2a. Petitioner licenses its intellectual property so developers can create iOS apps and distribute them to petitioner's users through the App Store. *Ibid.* In addition to selling the apps themselves, developers can sell goods and services to users through the apps using petitioner's In-App Purchase system (IAP), which processes payments through the App Store. *Ibid.* Petitioner generally charges a 30% commission on in-app purchases of digital goods and services. *Id.* at 2a-3a. At the time this case was filed, petitioner prevented developers from including buttons, external links, or other calls to action in their apps that would direct customers to purchasing mechanisms other than in-app purchases (such as the developers' own websites), thereby ensuring that all app-driven purchases would generate the 30% commission. *Id.* at 3a. Petitioner also prevented developers from allowing users to make purchases within iOS apps using alternatives to petitioner's in-app purchase system. *Ibid.*

Respondent develops video games, including the popular game *Fortnite*, which it distributes to iOS users through the App Store. Pet. App. 2a. Invoking federal and state antitrust and competition law, respondent challenged, as relevant here, petitioner's ban on developers' directing users to off-app purchasing sites. *Id.* at 3a.

b. Following a bench trial, the district court held that the ban violated state competition law because its "'anti-steering' provisions" prevented "informed choice" among iOS users. Pet. App. 3a. The court entered a permanent injunction that enjoined petitioner, as relevant here, "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." *Id.* at 166a.

Both parties appealed to the Ninth Circuit, which stayed the injunction pending appeal. After argument, the court of appeals affirmed in part, reversed in part, and remanded. 67 F.4th 946. The court affirmed the finding of liability against the anti-steering provision under state competition law. *Id.* at 999-1002. The court also affirmed the permanent injunction without modification. *Id.* at 1002-1003. This Court denied certiorari. 144 S. Ct. 681 (No. 23-344); 144 S. Ct. 682 (No. 23-337).

c. After the Ninth Circuit affirmed the injunction, petitioner considered two internal proposals for compliance with the injunction. Under the first, petitioner would restrict the design and placement of buttons, links, and other calls to action that steer users to make off-app purchases, but would not charge any commission on such purchases. Pet. App. 4a, 72a-73a. Under the second, petitioner would lift most of those restrictions and instead charge a 27% commission on most steered off-app purchases. *Ibid.* Petitioner ultimately chose to impose both the restrictions from the first proposal and the commission from the second proposal. *Id.* at 4a, 74a-75a. Those changes went into effect the day this Court denied petitioner's certiorari petition, and the injunction took effect the next day. *Id.* at 7a.

Petitioner arrived at the 27% commission by taking the 30% commission for in-app purchases and then applying "a 'cost of payments discount' of 3%," Pet. App. 5a, reflecting the fact that it did not process the payment for off-app purchases but still had supplied the platform and user base that led to the purchase, *id.* at 78a-79a. Petitioner also imposed several restrictions on buttons, links, and other calls to action that would direct users to external purchasing mechanisms. *Id.* at 5a-6a. Most relevant here, any buttons had to be what petitioner called "plain buttons": the buttons could not be enclosed in a visible shape, and the background surrounding the text of the button had to match the background of the app's page. *Id.* at 5a-6a, 23a, 96a.

Believing that the restrictions violated the injunction, respondent moved the district court to hold petitioner in civil contempt, to direct petitioner to bring its policies into compliance, and to require petitioner to remove all anti-steering provisions. Pet. App. 53a n.2.

2. The district court found that petitioner's conduct violated both the "spirit" and "the literal text" of the injunction, and thus warranted civil contempt. Pet. App. 131a-132a; see *id.* at 50a-165a. The court found that petitioner "opted to construct a program that nullified the revenue impact of the [i]njunction by prohibiting any viable alternative." *Id.* at 134a. The court observed that of the approximately 136,000 total developers on the App Store, only 34 had applied to use links to external purchases within four months after the rollout of petitioner's new policy. *Id.* at 114a.

With respect to the 27% commission, the district court asserted that it "cannot conceive of how any reasonable mind interpreting [its] and the Ninth Circuit's orders would find that structure permissible, because it *forecloses competitive alternatives*," which "appears to have been the point." Pet. App. 136a. In particular, the court found that petitioner knew that developers would almost always incur additional costs for off-app purchases exceeding 3%. *Id.* at 136a & n.64. With respect to the restriction on buttons, the court noted that "[t]he *only* button [petitioner] permits under its guidelines is what it refers to as the 'Plain Button style,' which 'may not be enclosed in a shape that uses a contrasting background fill.'" *Id.* at 96a. The court found that "[n]othing about" such a plain button "appears to be a 'button,' by the ordinary usage and understanding of the word." *Ibid.* The court thus found the plain-button limitation was "explicitly at odds with" the injunction's prohibition on banning buttons. *Id.* at 139a-140a. The court further found that petitioner's other restrictions on the design and placement of buttons, links, and other calls to action also warranted civil contempt. *Id.* at 138a-141a.

As a sanction, the district court entered a new injunction that prohibited petitioner from imposing *any* commission or fee on directed off-app purchases and from imposing *any* restrictions on the design or placement of buttons, links, or other calls to action. Pet. App. 159a-160a. The court further sanctioned petitioner for abusing attorney-client-privilege designations in order to delay proceedings and obscure its decision-making process, and it ordered petitioner to pay attorneys' fees. *Id.* at 161a. The court also referred petitioner and its Vice President of Finance for a criminal investigation. *Id.* at 163a.

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-49a.

In a subsection of its opinion entitled "The Injunction's Spirit," the Ninth Circuit agreed with the district court that "parties may be held in contempt for violating the spirit of an injunction." Pet. App. 12a; see *id.* at 11a-13a. The Ninth Circuit had adopted the "spirit of the injunction" standard in *Institute of Cetacean Research* v.

Sea Shepherd Conservation Society, 774 F.3d 935 (2014), cert. denied, 576 U.S. 1005 (2015), and it reaffirmed that standard here. The court reasoned that the standard "makes practical sense" because "[w]ere narrow literalism the rule of interpretation, injunctions would spring loopholes, and parties in whose favor injunctions run would be inundating courts with requests for modification in an effort to plug the loopholes." Pet. App. 12a (brackets, ellipsis, and quotation marks omitted). The court also affirmed the district court's finding that petitioner had engaged in "bad faith" conduct. *Id.* at 14a-17a.

Applying the "spirit of the injunction" standard, the Ninth Circuit largely affirmed the contempt finding. Pet. App. 19a-34a. Most relevant here, the court held that the 27% commission violated the injunction because it "ha[d] a prohibitive effect" on directed off-app purchases. *Id.* at 20a. The court explained that petitioner "knew that processing linked-out purchases would cost developers more than 3%," and reiterated the district court's finding that petitioner "'willfully set a commission rate that in practice made all alternatives to its platform economically non-viable.'" *Ibid.* (brackets omitted). The court of appeals further reasoned that an injunction need not "specifically enjoin[]" every conceivable "plan or scheme," and that "[h]aving 'experimented with disobedience of the law,' [petitioner] must now bear the burden of being found in contempt." *Id.* at 21a (quoting *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949)) (brackets and citation omitted).

The Ninth Circuit also held that petitioner's restriction on all but "plain buttons" violated the injunction's "strict letter." Pet. App. 22a-23a. The court explained that "the 'plain button' is no button at all" because it is "invisible": "A plain button 'may not be enclosed in a shape that uses a contrasting background fill'; instead, the 'background surrounding text must match the background of the app's page.'" *Id.* at 23a (brackets omitted). "Because the Injunction requires [petitioner] to permit both 'buttons' and 'links,'" the court concluded, "merely making the link, not the button, visible does not comply with the Injunction; the Injunction contemplates *both* 'buttons' and 'links,' not one of the two." *Ibid.* The court likewise largely affirmed the contempt findings predicated on four other restrictions petitioner had imposed on the design and placement of buttons, links, and other calls to action. *Id.* at 23a-25a.

But the Ninth Circuit modified the civil-contempt sanctions in several ways. Pet. App. 34a-35a. Relevant here, the court permitted petitioner to impose some degree of commission or fee on linked-out purchases, as long as it is not so high as to be "prohibitive" (as the court believed 27% to be). *Id.* at 22a, 35a-36a. The court also permitted petitioner to impose some of the restrictions on the design and placement of buttons, links, and other calls to action in petitioner's new policy, though not the plain-button limitation. *Id.* at 27a, 34a-35a.

SUMMARY OF ARGUMENT

A. Civil contempt for violating an injunction is improper if there is a "fair ground of doubt" whether the defendant's conduct violates the injunction's express terms, reasonably construed in context. See *Taggart* v. *Lorenzen*, 587 U.S. 554, 557 (2019). That demanding standard reflects the seriousness of civil contempt and ensures that parties are not sanctioned for violating ambiguous orders. Of course, in some circumstances, an injunction may include more general language banning broad categories of conduct, especially where the defendant is a persistent violator of the law. But contempt still requires the defendant's conduct to be clearly covered by that express language.

B. The Ninth Circuit's "spirit of the injunction" standard contravenes *Taggart* because it is untethered to the injunction's express text, does not provide sufficient notice, and improperly relies on subjective states of mind. The "fair ground of doubt" standard is capable of addressing any gamesmanship, and in any event it is not contempt for a defendant to employ new means to achieve the same goal if the new means are not clearly banned by the injunction's express text.

C. To provide useful guidance to lower courts, this Court should apply the "fair ground of doubt" standard to some of the conduct at issue in this case. Specifically, the Court should reverse the contempt finding as to the 27% commission, affirm as to the "plain button" limitation, and vacate and remand for the lower courts to apply the standard to the remaining actions. The injunction's text banned petitioner only from prohibiting directed off-app purchases, not from imposing a commission on them. And while an exorbitant commission (say, 300%) could perhaps be the functional equivalent of a prohibition, there is at least a fair ground of doubt whether that is true for the 27% commission, which is *less* than the 30% commission for in-app purchases. By contrast, the injunction's text itself required petitioner to allow both "buttons" and "links," and so it was objectively unreasonable for petitioner to permit only a "plain button," which the lower courts correctly found to be indistinguishable from a link and thus clearly not a "button" under the ordinary meaning of that term.

ARGUMENT

CIVIL CONTEMPT IS IMPROPER IF A FAIR GROUND OF DOUBT EXISTS WHETHER THE PARTY'S CONDUCT VIOLATES THE INJUNCTION'S TERMS

A. Civil Contempt For Violating An Injunction Requires A Clear Violation Of The Injunction's Express Terms, Reasonably Construed In Context

1. As this Court reaffirmed in *Taggart* v. *Lorenzen*, 587 U.S. 554 (2019), "a court may hold a [party] in civil contempt for violating" an injunction only "if there is *no fair ground of doubt* as to whether the order barred the [party's] conduct." *Id.* at 557; accord *id.* at 565. "This standard reflects the fact that civil contempt is a 'severe remedy,' and that principles of 'basic fairness require that those enjoined receive explicit notice' of 'what conduct is outlawed' before being held in civil contempt." *Id.* at 561 (brackets and citations omitted). As "[t]his standard is generally an *objective* one," a party's "belief that [it] was complying with [the] order" must be "objectively unreasonable" to sustain a civil-contempt finding. *Ibid.* In other words, in the context of the alleged violation of an injunction, civil contempt is improper unless the party's conduct is clearly covered by the order's express terms, reasonably construed in context.

The precise question in *Taggart* concerned the proper standard for holding a creditor in civil contempt for attempting to collect on a debt discharged in bankruptcy. 587 U.S. at 556. Although the Bankruptcy Code does not prescribe a sanction for such conduct, it specifies that a discharge order "operates as an injunction." 11 U.S.C. 524(a)(2). The Court in *Taggart* thus looked to "the 'old soil' that has long governed how courts enforce injunctions." 587 U.S. at 560. The Court concluded that the "fair ground of doubt" standard was the "traditional standard[] in equity practice for determining when a party may be held in civil contempt for violating an injunction." *Id.* at 561.

That "fair ground of doubt" standard traces back in this Court's decisions at least as far as *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609 (1885) (*Stone Paving*). The defendant there had previously been enjoined from infringing a patent for "an improvement in concrete pavement" to avoid cracking, which consisted of "laying the pavement in detached blocks" rather than in a "continuous sheet." *Id.* at 610-611. After being enjoined, the defendant "varied his mode" of production by "only making a mark or indentation on the surface" of the pavement, which was "sufficient to produce the [same] results obtained by [the patented] process." *Id.* at 613. Observing that the lower-court judges had "disagree[d]" about whether the new method violated the injunction, this Court held that "there can be no judgment of contempt" given the "fair ground of doubt as to the wrongfulness of the defendant's conduct" under the injunction. *Id.* at 618.

This Court's subsequent cases have confirmed that civil contempt requires the challenged conduct to be clearly covered by the injunction's express terms. In *Longshoremen* v. *Philadelphia Marine Trade Association*, 389 U.S. 64 (1967), this Court reversed a finding of contempt that had been entered against a union for violating an order requiring compliance with an arbitral award. *Id.* at 74. The Court observed that the order "contain[ed] only an abstract conclusion of law, not an operative command capable of 'enforcement.'" *Ibid.* Echoing *Stone Paving*, the Court warned that "[t]he judicial contempt power is a potent weapon" and that "[w]hen it is founded upon a decree too vague to be understood, it can be a deadly one." *Id.* at 76. To that end, this Court has admonished that "defendants ought to be informed as accurately as the case permits what they are forbidden to do." *Swift & Co.* v. *United States*, 196 U.S. 375, 401 (1905). An "injunction to obey the law" is typically unenforceable, *ibid.*, in part because "a general injunction against all possible breaches of the law" would be too "vague" to justify putting a defendant "at the peril of a summons for contempt," *id.* at 396.

Federal Rule of Civil Procedure 65(d) incorporates those traditional principles, requiring "[e]very order granting an 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) and (C). Those provisions are "designed 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). As contempt requires a "clear and unambiguous" injunction, *Latino Officers Association City of New York, Inc.* v. *City of New York*, 558 F.3d 159, 164 (2d Cir. 2009), "courts must construe any ambiguity in favor of the party charged with contempt," *Gascho* v. *Global Fitness Holdings, LLC*, 875 F.3d 795, 800 (6th Cir. 2017), cert. denied, 584 U.S. 1002 (2018).

2. That said, while "a decree will not be expanded by implication or intendment" in contempt proceedings, when determining whether "a plain violation of the decree" occurred, its "terms" must be "read in the light of the issues and the purpose for which the suit was brought." *Terminal Railroad Association* v. *United States*, 266 U.S. 17, 29 (1924). Such context cannot alter the plain meaning of those terms, but can inform what in-

terpretation is best and clearest. See Antonin Scalia & Bryan A. Garner, *Reading Law* 168 (2012). For instance, in some cases, the entry of an injunction of greater "generality" may have been "necessary to prevent further violations where a proclivity for unlawful conduct ha[d] been shown." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). Where such an injunction is entered and later violated, there is no "immunity from civil contempt" merely because the violative conduct "was not specifically enjoined." *Ibid.* So long as there "is not a 'fair ground of doubt' as to whether the [party]'s conduct might be lawful" under the more general language, civil contempt is appropriate. *Taggart*, 587 U.S. at 565.

In *McComb*, for example, a broad injunction had previously been entered against an employer that, "[b]y its terms[,] * * * enjoined *any* practices which were violations of" "the provisions of [a federal labor statute] dealing with minimum wages, overtime, and the keeping of records." 336 U.S. at 191-192 (emphasis added). The employer had "no[t] appeal[ed] from" that sweeping injunction on vagueness grounds, and even if it had, its "record of continuing and persistent violations of the [statute] would indicate that that kind of a decree was wholly warranted." *Id.* at 192. Thus, when the employer failed to "compl[y] with the minimum wage, overtime, and record-keeping provisions of the judgment in many specified respects," *id.* at 189, this Court held that "civil contempt" was warranted even though "the precise arrangement worked out to [avoid] the duty to pay which both the statute and the decree imposed was not specifically enjoined," *id.* at 192-193. Because the employer was "alerted by the decree against any violation of specified provisions of the [statute]," it "acted at [its] peril" when it "undertook to make [its] own determination of what the decree meant," rather than seeking "modification" or "clarification" from the trial court. *Id.* at 192.

Critically, though, *McComb* never suggested that there was any "fair ground of doubt" that the employer had actually violated the statutory provisions incorporated into the injunction's express terms. To the contrary, as the Court described the violations, the employer had, among other things, "set up a completely false and fictitious method of computing compensation without regard to the hours actually worked" and "classified some employees as executive or administrative employees in plain violation of the [applicable] regulations." 336 U.S. at 190. Although the Court observed that "the burden of any uncertainty in the decree is on [the employer's] shoulders," that meant only that the employer "took a calculated risk" by engaging in new violations that were factually different from the form of the previously adjudicated violations that had given rise to the decree. *Id.* at 193; see *id.* at 189-190.

3. Thus, whether an injunction's express terms are limited specifically to the violation adjudicated or phrased more generally to preempt a threat of potential gamesmanship, civil contempt requires that there be "no fair ground of doubt as to whether the order barred the [party]'s conduct"—*i.e.*, there must be "no objectively reasonable basis for concluding that the [party]'s conduct might be lawful" under the injunction when construed in context. *Taggart*, 587 U.S. at 557 (emphasis omitted). As noted, that high standard reflects that "[t]he judicial contempt power is a potent weapon." *Longshoremen*, 389 U.S. at 76.

In addition to the reputational harms of being labeled a contemnor, a civil-contempt finding authorizes monetary sanctions "to coerce the defendant into compliance with the court's order" or "to compensate the complainant for losses sustained," regardless of whether the underlying source of law authorizes such remedies for violations. See *United States* v. *Mine Workers*, 330 U.S. 258, 303-304 (1947). "[B]asic fairness requires" that the defendant at least have "receive[d] explicit notice" that its conduct would trigger those monetary exactions. See *Schmidt*, 414 U.S. at 476. Moreover, it is no defense to contempt that the injunction was incorrect on the merits. See *Walker* v. *City of Birmingham*, 388 U.S. 307, 314 (1967). Finding contempt based on an ambiguous injunction would thus deprive the defendant of the opportunity to argue that the newly challenged conduct was not the proper subject of an injunction in the first place. Cf. *Schmidt*, 414 U.S. at 477 ("In the absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made impossible.").

Accordingly, "where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct" under an "objectively reasonable" reading of the injunction's express terms, the plaintiff must pursue options other than civil contempt. See *Taggart*, 587 U.S. at 560-561 (brackets and emphasis omitted). For example, the plaintiff might have "a persuasive argument for modifying the original [injunction]" if enjoining the new conduct is necessary to ensure complete relief on the original claim, or if that conduct was originally intended to be covered by the injunction but the court's intent was not clearly expressed. See *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). Alternatively, the plaintiff can always "bring a new suit" challenging the new conduct. See *Stone Paving*, 113 U.S. at 617-618. But what the plaintiff may not do is insist that the defendant be subjected to civil-contempt sanctions for purported past violations of an injunction that is at best ambiguous.

B. The Court Of Appeals Erred In Holding That A Party May Be Held In Civil Contempt For Violating The Spirit Of An Injunction

1. The Ninth Circuit held that civil contempt is appropriate where a party merely violates "the spirit of the injunction." Pet. App. 12a (quoting *Institute of Cetacean Research* v. *Sea Shepherd Conservation Society*, 774 F.3d 935, 949 (9th Cir. 2014), cert. denied, 576 U.S. 1005 (2015)); see *id.* at 11a-13a. That holding is inconsistent with the traditional "fair ground of doubt" standard. As discussed, that standard bars civil contempt unless the defendant adopted an "objectively unreasonable" reading of an order whose terms provide "explicit notice" of the enjoined conduct when read in context. *Taggart*, 587 U.S. at 561-562 (citing *Schmidt*, 414 U.S. at 476). In direct conflict with *Taggart*, the Ninth Circuit rejected petitioner's objection that contempt is improper where "the injunction's plain terms do not proscribe the conduct at issue." Pet. App. 12a. Importantly, the court was not simply making the point that the "strict letter" of the injunction must be construed in light of "the objects for which the relief was granted." *Ibid.*; see pp. 13-14, *supra*. Rather, the court emphasized that "*Sea Shepherd* means what it says: parties may be held in contempt for violating the spirit of an injunction." Pet. App. 12a. That explains why the court never even mentioned the "fair ground of doubt" standard when articulating and applying its own contrary contempt standard. *See id.* at 11a-15a, 19a-25a.

Exacerbating the conflict with *Taggart*, the Ninth Circuit further held that "[t]he district court did not err in deciding that it could consider evidence of [petitioner's] bad faith." Pet. App. 14a; see *id.* at 14a-15a. But *Taggart* squarely held that the civil-contempt "standard is generally an *objective* one," 587 U.S. at 561, and it expressly rejected the Ninth Circuit's consideration in that case of an alleged contemnor's "subjective" beliefs, which "relie[d] too heavily on difficult-to-prove states of mind," *id.* at 563. To be sure, *Taggart* recognized that "subjective intent" is not "always irrelevant." *Id.* at 561. For example, a defendant's "record of continuing and persistent violations" may result in a sweeping prophylactic injunction that places "the burden" on it to refrain from new violations in the future. *Id.* at 562 (quoting *McComb*, 336 U.S. at 192-193); see pp. 13-15, *supra*. And bad faith might be relevant when imposing sanctions on parties or counsel in other litigation contexts. See *Taggart*, 587 U.S. at 561-562 (citing *Chambers* v. *Nasco, Inc.*, 501 U.S. 32, 50 (1991)). But in the context of civil contempt for violating an injunction, the Ninth Circuit contravened *Taggart* in holding that "evidence of [petitioner]'s bad faith negates" the "defense" that "[petitioner]'s interpretation of the [i]njunction is reasonable." Pet. App. 15a; contra *Taggart*, 587 U.S. at 561-562.

2. The Ninth Circuit defended its "spirit of the injunction" standard on the ground that if an injunction's express text were interpreted under a rule of "narrow literalism," "injunctions would spring loopholes, and parties in whose favor injunctions run would be inundating courts with requests for modification in an effort to plug the loopholes." Pet. App. 12a (brackets omitted). That rationale suffers from multiple flaws.

To begin, it rests on a false dichotomy. The alternative to the "spirit of the injunction" standard is not "narrow literalism." Rather, it is a standard that finds contempt only if the defendant's conduct is "objectively unreasonable" under the injunction's text, *Taggart*, 587 U.S. at 562, when "read in the light of" the context in which it was issued, *Terminal Railroad*, 266 U.S. at 29.

Moreover, that traditional "fair ground of doubt" standard is more than capable of addressing attempted gamesmanship. As *McComb* illustrates, where a defendant, for example, has a "record of continuing and persistent violations" of the law, courts may issue "decrees that are not so narrow as to invite easy evasion." 336 U.S. at 192-193. Thereafter, the defendant cannot claim "an immunity from civil contempt" where a new "plan or scheme" is clearly covered by the injunction's broad prophylactic terms, even if "not specifically enjoined." *Id.* at 192. *McComb* never suggested, however, that violating *only* the "spirit" of the injunction, but *not* its unambiguous text, is sufficient to sustain a civil-contempt finding. To the contrary, *McComb* repeatedly emphasized that the employer there had clearly violated the injunction's express text. See *ibid.* ("By its terms[,] [the decree] enjoined any practices which were violations of [certain] statutory provisions."); *ibid.* ("For they were alerted by the decree against any violation of specified provisions of the [statute]."); *id.* at 193 (noting "the duty to pay which both the statute and the decree imposed"); *id.* at 190 (describing the employer's "plain violation" of certain provisions and "completely false and fictitious method of computing compensation without regard to the hours actually worked").

Finally, the Ninth Circuit was fundamentally mistaken in assuming that a defendant's ability to "evade [an] injunction's goals" through a different course of conduct is necessarily a "loophole[]." Pet. App. 12a. The mere fact that a defendant continues to pursue the same *ends* hardly proves that the new *means* are unlawful (much less clearly barred by the injunction). Indeed, this Court's seminal decision adopting the "fair ground of doubt" standard involved precisely such a case. After being enjoined from infringing a patent, the defendant "varied his mode" of production in a slight way, which was "sufficient to produce the [same] results obtained by [the patented] process." *Stone Paving*, 113 U.S. at 613. Because "fair" minds could "disagree" about whether the new method also infringed the patent, contempt was improper and "a new suit" for infringement was required. *Id.* at 618. As that case illustrates, using contempt to extend an injunction to new factual circumstances where it does not clearly apply risks depriving the defendant of its right to raise legal defenses that were not implicated during the prior litigation. Thus, even if a court has a certain "goal[]" in mind when it enters an injunction, Pet. App. 12a, it cannot impose civil contempt for violating the injunction simply because the defendant takes new action that the court views as trying to thwart that goal, unless the injunction's text and context clearly proscribe the new course of action too. Cf. *Armour*, 402 U.S. at 682 ("[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.").

C. This Court Should Provide Guidance To Lower Courts By Applying The "Fair Ground Of Doubt" Standard To At Least Some Of The Contempt Charges In This Case

In opposing certiorari, respondent did not even try to defend the "spirit of the injunction" standard. Instead, it argued that the Ninth Circuit did not actually apply that standard in this case. See Br. in Opp. 14-17. But that is an untenable reading of the decision below.

See p. 17, *supra*. Given that the Ninth Circuit applied the wrong legal standard, this Court could simply announce the correct standard and then remand for the courts below to apply it. See, *e.g.*, *Taggart*, 587 U.S. at 565. But in the view of the United States, it would be prudent for this Court to say more.

After all, this Court already announced the correct standard applicable to this case more than seven years ago in *Taggart*, and yet the Ninth Circuit did not apply (or even acknowledge) the "fair ground of doubt" standard. More important, that standard is of the type that is best articulated through illustrative applications. Cf., *e.g.*, *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) (explaining that probable cause and reasonable suspicion are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed").

Accordingly, lower courts would greatly benefit if this Court took the opportunity not just to reaffirm the appropriate standard but also to provide illustrations of how it applies in practice. And this case presents an especially good vehicle in which to do so because it involves at least one example where civil contempt is improper and one example where it is proper. In particular, there is a fair ground of doubt that the injunction bars the 27% commission on directed off-app purchases, but no such doubt that the injunction bars the "plain buttons"-only restriction. This Court should so hold, and then remand the rest of the case for further proceedings consistent with its judgment.

1. Civil contempt is improper for the 27% commission on directed off-app purchases

The injunction's sole substantive provision reads as follows: "[Petitioner is] hereby permanently restrained and enjoined from prohibiting developers from (i) including[,] in their apps and their metadata[,] buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to In-App Purchasing[;] and (ii) communicating with customers through points of contact obtained voluntarily from customers through account registration within the app." Pet. App. 166a. That injunction cannot reasonably be read to ban petitioner from charging developers a 27% commission on directed off-app purchases; at a minimum, there is a fair ground of doubt that the injunction bans that commission.

On its face, of course, the injunction provides no "explicit notice" about whether petitioner may charge developers a 27% commission for directed off-app purchases. *Taggart*, 587 U.S. at 561. While it enjoins petitioner from "*prohibiting* developers" from directing off-app purchases, Pet. App. 166a (emphasis added), it says nothing whatsoever about what petitioner may *require* of developers who choose to direct off-app purchases. That is unsurprising, because at the time of the injunction, petitioner's "anti-steering" policy banned such directions rather than trying to charge for them. *Id.* at 3a. Consistent with Rule 65, the injunction thus specifies "precisely what conduct [was] outlawed." *Schmidt*, 414 U.S. at 476. Nor is this a situation, like *McComb*, where the court has issued an injunction of broader "generality" with "terms [that] enjoined any practices" of a certain class, thereby clearly encompassing a subclass "not specifically" mentioned. 336 U.S. at 192. Again, the injunction's operative provision addressed only petitioner's previous prohibition on directing off-app purchases, and a 27% commission on such purchases presupposes that such directions are *not* prohibited. In fact, even the Ninth Circuit conceded that "it would be difficult to say that *all* commissions violate the [i]njunction," and it "decline[d] to do so." Pet. App. 22a.

The Ninth Circuit instead reasoned that "'prohibit'" is a term that "can be interpreted to mean 'to prevent, preclude, or severely hinder,'" Pet. App. 19a (brackets omitted), and that the "27% commission ha[d] a prohibitive effect" because it made directing off-app purchases "economically non-viable," *id.* at 20a. In particular, the court's rationale was that petitioner "charges 30% commission" for in-app purchases but "charged 27%" for directed off-app purchases, knowing that processing the payments for off-app transactions "would cost developers more than 3%." *Ibid.* That rationale cannot sustain a civil-contempt finding in these circumstances, as it is subject to a fair ground of doubt, to say the least.

Of course, one can imagine a commission on directing off-app purchases that is so exorbitant that it would be the functional equivalent of a prohibition—for instance, a 300% commission, which would be multiple times both the commission for in-app purchases (30%) and the price of the purchases themselves. Reading the injunction not to ban such a punitive commission might even be "objectively unreasonable." *Taggart*, 587 U.S. at 561.

But petitioner's 27% commission is different not just in degree, but in kind. The Ninth Circuit did not purport to find that a 27% commission, in isolation, had the effect of a prohibition. Rather, the court found a prohibitive effect based solely on the *difference* between the 27% commission for off-app purchases and the 30% commission for in-app purchases. While the district court found the 30% in-app commission "supracompetitive," Pet. App. 51a, 60a, 134a; see 67 F.4th at 984-985, the injunction clearly permitted petitioner to continue to charge that commission. Pet. App. 166a. In the Ninth Circuit's view, the 27% rate was contemptuous because it was not sufficiently discounted vis-à-vis the 30% rate in light of respondent's anticipated costs of processing payments for off-app purchases. *Id.* at 20a.

But a complaint about payment-processing costs was not the theory of liability on which the injunction in this case was based, and the injunction's terms (unsurprisingly) say nothing about petitioner's pricing structure. According to petitioner, it charges 30% for purchases (whether in-app or off-app), in part because it supplies the platform and user base that lead to the purchases, but then offers a 3% *discount* for off-app purchases because it does not provide payment-processing services for those purchases. See Pet. App. 77a-79a. Those who process payments for off-app purchases apparently charge or incur costs of more than 3%, see *id.* at 5a, 20a, 77a-79a, but petitioner's refusal to provide a greater discount in light of that fact is far afield from the competitive harms addressed by the injunction in this case.

There was thus far more than an "objectively reasonable basis for concluding" that the injunction did not preemptively outlaw that pricing structure. *Taggart*, 587 U.S. at 557. As the Ninth Circuit itself stressed, an injunction's terms must be construed in the context of "the objects for which the relief was granted." Pet. App. 12a; accord *Terminal Railroad*, 266 U.S. at 29. The injunction here was granted to remedy a particular type of competitive harm: The injunction barred only prohibitions on directed off-app purchases, Pet. App. 166a, based on the holding that petitioner's "'anti-steering'" "ban on developers directing customers to non-IAP purchasing mechanisms" was preventing "informed choice" among iOS users, *id.* at 3a. That is a fundamentally different claim from one objecting that petitioner did not provide a sufficiently large discount for steered off-app purchases to enable those steering such purchases to fairly compete. For example, if an injunction barred a manufacturer from prohibiting retailers from stocking its rival's products, that would not come close to providing "explicit notice," *Taggart*, 587 U.S. at 561, that the manufacturer is also barred from pricing its goods so low that it "has a prohibitive effect" on the rival's ability to compete, Pet. App. 20a. If respondent wishes to complain about competitive harms in the payment-processing market, it cannot do so through civil contempt; respondent must raise that new argument in a proceeding in which it could be litigated and petitioner could raise any new defenses it might have. *Stone Paving*, 113 U.S. at 617-618.

Tellingly, unlike the court of appeals, the district court did not even try to explain how the 27% commission "violated the literal text" of the injunction, despite making a conclusory assertion to that effect. Pet. App. 132a; see *id.* at 69a-87a, 136a-138a. Instead, the court emphasized that the pricing structure "*forecloses competitive alternatives*" to the in-app payment system, *id.* at 136a, which the court seemed to think was a self-evident violation of the injunction because it deemed "the central mandate of [its] orders" to be that petitioner may "not foreclose competitive alternatives to IAP," *id.* at 140a.

The glaring flaw in that reasoning, however, is that the purported "central mandate" is nowhere to be found in the injunction's actual text. To repeat, the injunction bars petitioner only from "prohibiting developers from * * * direct[ing] customers" to off-app purchasing mechanisms. Pet. App. 166a. That cannot reasonably, let alone unambiguously, be construed to prohibit *any* action that forecloses competitive alternatives to the in-app payment system, even if that action bears no legal or factual resemblance to the "anti-steering" ban (*id.* at 3a) that gave rise to the injunction. Just as petitioner obviously could not be held in contempt under this injunction for improving the quality of in-app purchasing so much that no developer wants to direct off-app purchases, it cannot be held in contempt for providing a discount from its commission for in-app purchases that is too small for any developer to choose to direct off-app purchases.

If the district court wished to enjoin petitioner from taking any action that "forecloses competitive alternatives" to in-app purchasing, Pet. App. 136a (emphasis omitted), then the court needed to actually write an injunction whose "terms" were phrased at that level of "generality." *McComb*, 336 U.S. at 192. Had the court "carefully frame[d] its order[]" that way, petitioner could have challenged "the correctness of th[at] judgment" on appeal. *Schmidt*, 414 U.S. at 477. Because the court failed to do so, it cannot radically expand the scope of its injunction after the fact through "the 'potent weapon' of civil contempt." *Taggart*, 587 U.S. at 560.

In sum, the 27% commission is not close to the line of civil contempt. That the Ninth Circuit held otherwise starkly underscores the need for this Court not just to reject the "spirit of the injunction" standard, but to provide guidance through proper application of the "fair ground of doubt" standard. The judgment below should be reversed as to the 27% commission.

2. Civil contempt is proper for the "plain buttons"-only restriction

In contrast, there is no fair ground of doubt that petitioner's prohibition on buttons other than "plain buttons" violated the injunction. As discussed, the injunction bars petitioner from "prohibiting developers" from including "buttons, external links, or other calls to action" directing users to off-app purchasing mechanisms. Pet. App. 166a. Because the injunction forbids a prohibition on buttons, that necessarily means petitioner must permit at least some buttons. As the Ninth Circuit explained, however, petitioner "did not allow buttons: it allowed developers to use something it calls a 'plain button,' but the 'plain button' is no button at all." *Id.* at 23a. A so-called plain button is "invisible" as it "'may not be enclosed in a shape that uses a contrasting background fill'" and "the 'background surrounding text must match the background of the app's page.'" *Ibid.* (brackets omitted) That makes a plain button indistinguishable from an ordinary link. See *id.* at 96a (pictures of the "'plain link or button' style"). Accordingly, the district court correctly observed that "[n]othing about" petitioner's plain button "appears to be a 'button,' by the ordinary usage and understanding of the word." *Ibid.*

If the injunction had restricted petitioner from forbidding only buttons, without mentioning external links, perhaps a fair ground of doubt might have existed whether the "plain button" restriction would violate that injunction. But the actual injunction separately protects both buttons and links, thus making clear that it treats a "button" as something different from a "link." See *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450, 457-458 (2022) ("meaningful-variation canon"). Indeed, even petitioner equates plain buttons and links, without providing any explanation of why that does not render surplusage the injunction's separate protection of buttons. See Pet. Br. 42 ("The plain button style * * * is most consistent with other links users could activate to go [off-app], and [petitioner] wanted it 'to be clear that this is a web link and not an in-app purchase.'"). By allowing only "plain buttons," therefore, petitioner in effect allowed only "links" while prohibiting "buttons."

That is an "objectively unreasonable" reading of the injunction. *Taggart*, 587 U.S. at 562. And it is the type of "evasion" of decrees that courts need not tolerate. *McComb*, 336 U.S. at 193. While the Ninth Circuit applied the wrong legal standard, it thus reached the right result under the "fair ground of doubt" standard, and this Court should provide guidance to lower courts that this sort of conduct rises to the level of civil contempt. The judgment below should be affirmed as to the "plain buttons"-only restriction.

3. This Court should remand on the remaining issues

The Ninth Circuit further held that the petitioner was properly found in civil contempt for four other design restrictions imposed on developers in directing users to off-app purchasing mechanisms. See Pet. App. 22a-25a. As to those holdings, this Court should vacate and remand for the Ninth Circuit to reconsider under the "fair ground of doubt" standard and this Court's guidance about how the standard properly applies.

The Ninth Circuit also noted (though did not appear to further rely on) the district court's finding that petitioner had acted in bad faith. See Pet. App. 14a-17a. As discussed, bad-faith conduct may sometimes provide a basis for sanctions wholly independent of civil contempt for violation of an injunction. See p. 18, *supra*. The government takes no position on whether petitioner engaged in bad-faith conduct or, if so, whether that conduct would support any of the sanctions imposed in this case. Those issues too are best left for remand.

CONCLUSION

The judgment of the court of appeals should be reversed in part, affirmed in part, and vacated in part.

Respectfully submitted.

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