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 THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION.....2

SUMMARY OF ARGUMENT.....5

ARGUMENT 7

I. Under The Objectively Reasonable Standard, Injunctions Can Only Be Understood In Context.....7

A. The Nature of the Suit Provides Essential Context for an Injunction Remedying Anticompetitive Conduct.....7

B. Context Reveals that Apple Should Have and Did Understand that the New Commission and Design Restrictions Violated the Injunction 12

C. The United States Misapplies Context to the 27% Commission 17

II. Apple's Proposal To Require Modification Proceedings, In Lieu Of Contempt, Fails To Protect Consumers From Anticompetitive And Unfair Conduct And Invites Defendants To Evade Injunction Obligations.....20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases **Page(s)**

American Needle, Inc. v. *National Football League*,
560 U.S. 183 (2010) 10, 11

Apple Inc. v. *Pepper*,
587 U.S. 273 (2019).....11

Bates v. *State Bar of Ariz.*,
433 U.S. 350 (1977).....13

Biden v. *Nebraska*,
600 U.S. 477 (2023).....20

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*,
509 U.S. 209 (1993).....18, 19

Brown Shoe Co. v. *United States*,
370 U.S. 294 (1962).....10, 15

California Artificial Stone Paving Co. v. *Molitor*,
113 U.S. 609 (1885).....5

Carter Carburetor Corp. v. *Federal Trade Comm'n*,
112 F.2d 722 (8th Cir. 1940) 12, 14

Cel-Tech Commc'ns, Inc. v. *Los Angeles Cellular Tel. Co.*,
20 Cal. 4th 163 (1999) 22

Consumers Union of U.S., Inc. v. *Alta-Dena Certified Dairy*,
6 Cal. Rptr. 2d 193 (Cal. Ct. App. 1992).....3

TABLE OF AUTHORITIES (CONTINUED)

Cases (continued) **Page(s)**

Continental T.V., Inc. v. *GTE Sylvania Inc.*,
433 U.S. 36 (1977).....9, 18

Conwood Co. v. *United States Tobacco Co.*,
290 F.3d 768 (6th Cir. 2002) 14

Copperweld Corp. v. *Independence Tube Corp.*,
467 U.S. 752 (1984).....10

Eastman Kodak Co. v. *Image Technical Services, Inc.*,
504 U.S. 451 (1992).....10

Epic Games, Inc. v. *Apple Inc.*,
559 F. Supp. 3d 898 (N.D. Cal. 2021) 13

Federal Trade Comm' v. *Indiana Fed'n of Dentists*,
476 U.S. 447 (1986).....13

Federal Trade Comm'n v. *Brown Shoe Co.*,
384 U.S. 316 (1966).....3

Federal Trade Comm'n v. *Staples, Inc.*,
970 F. Supp. 1066 (D.D.C. 1997).....15

Federal Trade Comm'n v. *Whole Foods Mkt., Inc.*,
548 F.3d 1028 (D.C. Cir. 2008).....15

Ford Motor Co. v. *United States*,
405 U.S. 562 (1972).....20

TABLE OF AUTHORITIES (CONTINUED)

Cases (continued) **Page(s)**

Illinois Brick Co. v. *Illinois*,
431 U.S. 720 (1977).....11

In re Surescripts Antitrust Litig.,
608 F. Supp. 3d 629 (N.D. Ill. 2022) 12

International Boxing Club of N.Y., Inc. v. *United States*,
358 U.S. 242 (1959).....2

LePage's Inc. v. *3M*,
324 F.3d 141 (3d Cir. 2003) 12

Mayor & Aldermen of Vicksburg v. *Henson*,
231 U.S. 259 (1913).....9

McComb v. *Jacksonville Paper Co.*,
336 U.S. 187 (1949).....5, 7, 8, 16, 22

Monsanto Co. v. *Spray-Rite Serv. Corp.*,
465 U.S. 752 (1984).....18

National Collegiate Athletic Ass'n v. *Alston*,
594 U.S. 69 (2021).....9, 11

Ohio v. *American Express Co.*,
585 U.S. 529 (2018).....11

Reed v. *Cleveland Bd. of Educ.*,
607 F.2d 749 (6th Cir. 1979) 8

Schering Corp. v. *Illinois Antibiotics Co.*,
62 F.3d 903 (7th Cir. 1995) 16

TABLE OF AUTHORITIES (CONTINUED)

Cases (continued) **Page(s)**

Taggart v. *Lorenzen*,
587 U.S. 554 (2019).....5, 7, 8

Terminal R.R. Ass'n of St. Louis v. *United States*,
266 U.S. 17 (1924).....8

Texas & Pac. Ry. Co. v. *Behymer*,
189 U.S. 468 (1903).....8

United States v. *E.I. du Pont de Nemours & Co.*,
366 U.S. 316 (1961).....20

United States v. *Grinnell Corp.*,
384 U.S. 563 (1966).....10

United States v. *H&R Block, Inc.*,
833 F. Supp. 2d 36 (D.D.C. 2011).....15

United States v. *Microsoft Corp.*,
253 F.3d 34 (D.C. Cir. 2001).....14

United States v. *Sealy, Inc.*,
388 U.S. 350 (1967).....11

United States v. *United Shoe Mach. Corp.*,
391 U.S. 244 (1968).....21

United States v. *United States Gypsum Co.*,
340 U.S. 76 (1950).....20

Verizon Commc'ns Inc. v. *Law Offices of Curtis V. Trinko, LLP*,
540 U.S. 398 (2004).....22

TABLE OF AUTHORITIES (CONTINUED)

Rules **Page(s)**

Fed. R. Civ. P. 56(c) 10

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U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (2023), https://perma.cc/X2NW-K7V7 15

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BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund the preparation or submission of this brief.

Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See https://www.antitrustinstitute.org.[2]

Petitioner's argument that a defendant can only be held liable for contempt when an injunction expressly identifies the challenged conduct ignores the context in which such conduct occurs and threatens the ability of courts to remedy violations of antitrust and unfair competition laws. AAI submits this brief to emphasize that contempt standards must be applied so as to avoid undermining important principles that motivate injunctions intended to remedy anticompetitive conduct. Specifically, enforcement of an injunction cannot be separated from the demonstrable economic effects that gave rise to the violation the injunction seeks to cure and that result from violation of the injunction itself. Furthermore, an injunction should not be enforced so narrowly that the defendant, through formalistic stratagems, can evade an effective remedy for its violations. The Court's ruling should be faithful to these principles.

INTRODUCTION

This case presents issues of fundamental importance to American competition policy. Where a court finds liability under antitrust or unfair competition law but cannot issue a remedy that effectively restores competition, the American public has "won the battle but lost the war." *International Boxing Club of N.Y., Inc.* v. *United States*, 358 U.S. 242, 259 (1959). Antitrust and unfair competition law

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

therefore preserve broad equitable authority for courts to remedy violations. See, *e.g.*, *Federal Trade Comm'n* v. *Brown Shoe Co.*, 384 U.S. 316, 320-321 (1966); *Consumers Union of U.S., Inc.* v. *Alta-Dena Certified Dairy*, 6 Cal. Rptr. 2d 193, 198 (Cal. Ct. App. 1992). Petitioner's position, however, would unduly cabin that authority and should be rejected.

The case began in 2020 when Epic alleged, among other things, that Apple used a system of rules and restrictions that prohibited competing app developers from steering users making in-app purchases away from Apple, including as a means to avoid Apple's 30% commission on in-app purchases. After a bench trial, the district court concluded in 2021 that Apple's system violated California's Unfair Competition Law, J.A. 370-379, and it permanently enjoined the relevant rules and restrictions. The text of the court's order provides that Apple may not prohibit developers from configuring their apps and metadata to "direct customers to purchasing mechanisms." Pet. App. 166a. The injunction's purpose is to enable steering on so-called "linked-out purchases" so as to "increase competition, increase transparency, [and] increase consumer choice and information" when consumers decide whether to purchase from Apple or another seller. J.A. 405; see *id.* at 374-375.

Apple, however, did not enable steering. Instead, it reassembled the same system using different parts. Specifically, Apple imposed a 27% commission on linked-out purchases so that, when combined with developers' unavoidable payment-handling costs, linked-out purchases would be more expensive than Apple's 30% commission. Pet. App. 75a, 82a, 136a. Apple also imposed five new design restrictions to

deter users from ever making linked-out purchases. *Id.* at 23a, 93a-94a, 96a-99a, 102a, 106a, 109a-110a; J.A. 512. Apple knew that, functionally, the effect of its rules and restrictions would be to prevent steering. Pet. App. 90a, 106a, 108a.

Epic filed a motion to enforce the Injunction and for contempt, which the district court granted. Pet. App. 50a-167a. It found that Apple deliberately picked "the most anticompetitive option" in response to the injunction, with the intent to effectively prohibit linked-out purchases. *Id.* at 74a-75a, 77a-78a. Apple chose the new system specifically to "defeat" the injunction: "Apple was modeling precisely that amount of friction needed in a transaction to ensure that link-out transactions were not viable for a developer." *Id.* at 24a. The 27% commission, coupled with the necessary payment-handling costs, set a price floor on linked-out purchases that, functionally if not formally, exceeded Apple's 30% commission, and the design restrictions made links difficult to find and painful to use. *Id.* at 93a. Apple's new system succeeded. Developers responded rationally to the new obstacles to price competition and communication with consumers that Apple laid down: they did not offer linked-out purchases. See *id.* at 20a.

The court of appeals affirmed the district court's contempt holding, Pet. App. 19a-25a, while reversing part of the district court's sanction: a blanket ban on Apple's charging of any commission on linked-out purchases. *Id.* at 32a-34a. It remanded the case so the district court could modify the ban "mindful of the threshold upon which commissions become 'prohibitive.'" *Id.* at 34a n.9.

In this Court, Apple claims that it lacked "explicit notice" that its 27% commission would violate the Injunction, Apple Br. 40, and that, "at a minimum, there was a 'fair ground of doubt'" on that issue, *id.* at 38 (quoting *Taggart* v. *Lorenzen*, 587 U.S. 554, 557 (2019) (emphasis omitted)). Yet as the lower courts correctly held, no fair reading of the Injunction supports Apple's claim. There is no objectively reasonable basis to find that Apple doubted its new system of rules and restrictions violated the Injunction.

Epic's brief convincingly shows that the lower courts correctly applied this Court's contempt standards established in *Taggart*, 587 U.S. 554, *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), and *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609 (1885). AAI submits this brief to expand on Epic's and the United States' correct position that an injunction's express terms must be "reasonably construed in context," U.S. Br. 11, and to alert the Court to significant harm to American consumers if Apple's "dubiously literal" approach to interpreting injunctions prevails. Pet. App. 12a, 132a, 133a.

SUMMARY OF ARGUMENT

When applied to an injunction intended to remedy anticompetitive and unfair conduct, the objective standard asks what conduct a corporation would reasonably understand to fall within the injunction's scope. See *Taggart* v. *Lorenzen*, 587 U.S. 554, 557 (2019). Neither injunctions nor the defendants subject to them operate in a vacuum. Context, including the purposes for which the suit was brought and the injunction entered, is essential to the objective

inquiry. Apple ignores the role of context, which, in a case such as this one, must account for market realities, including the demonstrable economic effects of Apple's conduct. As applied here, the injunction standard must incorporate this Court's consistent requirement that economic substance, not formalistic distinctions, controls.

The economic reality here is that, given its dominant market position and the mechanisms by which the market operates, Apple should have understood that its 27% commission and design restrictions would operate as a prohibition in violation of the Injunction. Indeed, Apple's own documents and testimony, which provide objective evidence of how the market operates, show that Apple, in fact, did understand the practical effect of its actions and why they would violate the Injunction. For that reason, the district court, as affirmed by the court of appeals, properly held Apple in contempt.

Correctly applied in this case, market context should lead to the conclusion that Apple's 27% commission violates the Injunction. The United States' argument to the contrary misapplies context. Given market realities and the economic evidence that the 27% commission operates to prohibit linked-out purchases, there is no difference in kind between the 27% commission and the hypothetical 300% commission that the United States effectively concedes would operate as a prohibition.

Apple errs in asserting that prospective modifications are an answer to the inequitable outcomes associated with its formalistic and literalistic interpretation of injunction standards. Especially in cases involving anticompetitive and

unfair economic conduct, courts have broad remedial power to provide effective relief. Apple's approach would delay such relief and impose significant costs as parties seeking to enforce an injunction would have to essentially re-litigate a defendant's liability each time a defendant rolled out a new means of artful compliance that might not fall under the literal terms of the injunction. Moreover, that approach would be contrary to the anti-circumvention principle that is part of this Court's injunction standard. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192-193 (1949).

ARGUMENT

I. UNDER THE OBJECTIVELY REASONABLE STANDARD, INJUNCTIONS CAN ONLY BE UNDERSTOOD IN CONTEXT

A. The Nature of the Suit Provides Essential Context for an Injunction Remedying Anticompetitive Conduct

Taggart v. *Lorenzen*, 587 U.S. 554 (2019), states that a court may appropriately hold a defendant in civil contempt for violating an injunction "if there is *no fair ground of doubt* as to whether the [injunction] barred" the defendant's conduct. *Id.* at 557 (emphasis in original). Under this standard, contempt is inappropriate if there is an "objectively reasonable basis for concluding" that the defendant's conduct is lawful under the injunction. *Ibid.* The "standard is generally an *objective* one." *Id.* at 561 (emphasis in original).

Under an objective standard, an injunction's meaning should reflect what a defendant, acting reasonably under the circumstances, would understand the injunction to prescribe or proscribe.

See *Taggart*, 587 U.S. at 561; *Reed* v. *Cleveland Bd. of Educ.*, 607 F.2d 749, 752 (6th Cir. 1979). Applied in an antitrust or unfair competition case such as this one, the standard thus asks what anticompetitive conduct a corporation subject to the injunction would understand to fall within the injunction's scope. While the corporation's subjective belief is generally not relevant to the inquiry, see *Taggart*, 587 U.S. at 561, the actions of market participants can shed light on what the corporation reasonably would have understood. See *Texas & Pac. Ry. Co.* v. *Behymer*, 189 U.S. 468, 470 (1903) (Holmes, J.) ("What usually is done may be evidence of what ought to be done."). Likewise, a corporation's knowing avoidance of its obligations can satisfy the objective standard. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949).

An injunction is not written on a *tabula rasa*, and actors subject to injunctions do not operate in a vacuum. As the United States correctly observes, a principal circumstance bearing on an objectively reasonable reading of the injunction is the context in which it arose. U.S. Br. 11 (explaining that an injunction must be "reasonably construed in context"); see also *id.* at 13-14.[3] This follows from this Court's observation that an injunction must be read "in the light of the issues and the purpose for which the suit was brought." *Terminal R.R. Ass'n of St. Louis* v. *United States*, 266 U.S. 17, 29 (1924). Its scope is not to be determined by "seizing upon isolated parts of it," but rather by "what the decree was really designed to

[3] The United States adds: "Such context cannot alter the plain meaning of those terms, but can inform what interpretation is best and clearest." U.S. Br. 13-14.

accomplish." *Mayor & Aldermen of Vicksburg* v. *Henson*, 231 U.S. 259, 273 (1913).

The Injunction here is designed to enable steering on linked-out transactions and thus put downward competitive pressure on commissions, *i.e.*, price. Apple's challenge to the district court's contempt finding relies on the formalistic argument that the Injunction's prohibition on Apple's rules and restrictions does not explicitly list "commissions." Apple Br. 32-33. Apple's argument ignores the context in which the Injunction arises: a lawsuit seeking to apply competitive pressure to Apple's 30% commission. It invites the Court to ignore this economic reality, not to mention the district court's findings regarding its purpose, J.A. 405; see *id.* at 374-375.

Apple's argument fails because the legality of arguably anticompetitive conduct depends "upon demonstrable economic effect rather than * * * upon formalistic line drawing." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977). "Always," in antitrust and unfair competition cases, "[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *National Collegiate Athletic Ass'n* v. *Alston*, 594 U.S. 69, 81 (2021) (cleaned up). A reasonably objective understanding of the injunction thus cannot ignore the violation's demonstrable economic effect, which was to prevent price competition against Apple's 30% commission.

Among the many cases where this Court has emphasized the need to elevate function over form in

the competition context,[4] *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), stands out as instructive. Independent service organizations ("ISOs") alleged that Kodak anticompetitively tied the sale of Kodak parts for its equipment to Kodak-provided servicing for that equipment, thus excluding the ISOs from the servicing market. Among other issues, the Court addressed whether Kodak had satisfied its burden on summary judgment to show "'no genuine issue as to any material fact' on the market power issue." *Id.* at 466 (quoting Fed. R. Civ. P. 56(c)). Kodak advanced a legal presumption that it claimed left no doubt about its lack of market power. *Ibid.* To decide the issue, the Court focused on "actual market realities," rejecting Kodak's proposed legal presumption as a "formalistic distinction[] * * * generally disfavored in antitrust law." *Id.* at 466-467. To determine the "existence of market power," the Court instead "examined closely the economic reality of the market at issue." *Id.* at 467.

Likewise, the Court "eschewed * * * formalistic distinctions" in *American Needle, Inc.* v. *National Football League*, 560 U.S. 183, 191 (2010). An issue in the case was the extent and nature of competition between NFL teams, specifically with respect to the teams' intellectual property. The Court emphasized that it relies upon "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate," not labels. *Id.* at 191-192.

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[4] See, *e.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 773 n.21 (1984); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572 (1966); *United States* v. *Continental Can Co.*, 378 U.S. 441, 458 (1964); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 321-322 (1962).

"'[W]e seek the central substance of the situation,'" the Court explained. *Ibid.* (quoting *United States* v. *Sealy, Inc.*, 388 U.S. 350, 353 (1967)).

In *Apple Inc.* v. *Pepper*, the Court rejected a rule proposed by Apple that, like Apple's position here, "would elevate form * * * over substance." 587 U.S. 273, 284 (2019). The case involved buyers who alleged that Apple monopolized the aftermarket for iPhone apps. The issue was whether the buyers were direct purchasers with standing to sue under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 745-746 (1977). *Pepper*, 587 U.S. at 276. Apple sought to recast the relationship between buyers and sellers to support a claim that buyers did not purchase the apps directly from Apple, and it proposed a rule based on whether Apple or an app developer set the retail price charged to buyers. *Id.* at 281. Under Apple's rule, buyers could sue if Apple were deemed to set the price but could not if app developers were deemed to set the price. *Ibid.* The Court rejected Apple's rule, among other reasons, because for all the parties involved—buyers, Apple, and the app developers—"everything turns out to be economically the same." *Id.* at 283.

Thus, in cases involving anticompetitive conduct, the conduct's demonstrable economic effect determines liability. See *Ohio* v. *American Express Co.*, 585 U.S. 529, 541 (2018) ("The rule of reason requires courts * * * 'to assess the [restraint]'s actual effect' on competition.") (alteration in original; internal citation omitted). This Court "[a]lways" requires that it be considered. *Alston*, 594 U.S. at 81. An objectively reasonable interpretation of an injunction aimed at remedying anticompetitive conduct cannot ignore this context.

B. Context Reveals that Apple Should Have and Did Understand that the New Commission and Design Restrictions Violated the Injunction

Under an objective reasonableness standard, Apple should have understood that economically and practically the new 27% commission, coupled with the necessary payment-handling costs, would functionally, if not formally, operate to prohibit linked-out purchases and thus would violate the Injunction. (And as discussed below, Apple did understand.)

Antitrust and unfair competition law and economics have long recognized that defendants sometimes use pricing tactics to achieve the same anticompetitive effect as contractual restrictions. For example, firms can use contractual exclusive dealing restrictions to disincentivize counterparties from dealing with rivals, or, alternatively, firms can use pricing tactics to achieve the very same effect. See *In re Surescripts Antitrust Litig.*, 608 F. Supp. 3d 629, 646 (N.D. Ill. 2022) (finding that "loyalty discounts" caused anticompetitive exclusivity); see also *LePage's Inc.* v. *3M*, 324 F.3d 141, 154 (3d Cir. 2003) (affirming that contractual restraints and bundled rebates "effectuat[ed] exclusive dealing arrangements because of the way in which they were structured"); *Carter Carburetor Corp.* v. *Federal Trade Comm'n*, 112 F.2d 722, 732 (8th Cir. 1940) (holding that a preferential discount was "as fully effective as" a contractual restraint). Before the injunction, Apple used contractual restrictions to disincentivize app developers from informing their users about less costly options. After the injunction, Apple simply

switched to a pricing tactic that effectively achieved the same practical effect.

Similarly, Apple's original design restrictions found to violate California's Unfair Competition Law and Apple's new design restrictions shared the same unfair economic mechanism: impeding the "open flow of information" between app developers and their users. Pet. App. 56a. Apple's original strategy used a set of contractual provisions that limited all "calls to action," "encourag[ing]" the use of alternative payment options, and communicating even truthful information about Apple's 30% commission. *Id.* at 55a-56a. These contract restrictions carried a threat of negative action by Apple that was, in economic terms, a cost to app developers. See generally Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986) (describing how a variety of raising-rivals'-cost strategies can maintain an incumbent's market power). Imposing that cost economically disincentivized app developers from communicating with their users about alternative payment options. Apple's initial unfair tactics thus leveraged a familiar economic mechanism: "increas[ing] the difficulty of discovering the lower cost seller." *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 377 (1977). That, in turn, "ha[d] the effect of preventing substitution." *Epic Games, Inc.* v. *Apple Inc.*, 559 F. Supp. 3d 898, 1056 (N.D. Cal. 2021), aff'd in part, rev'd in part, 67 F.4th 946 (9th Cir. 2023); see also 55a-56a. As a result, Apple's conduct deprived consumers of meaningful choice—an archetypical harm, long familiar to antitrust and unfair competition law. See, *e.g.*, *Federal Trade Comm'n* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986).

Apple's new strategy in response to the injunction simply used different design tactics to achieve the same demonstrable economic effect. Apple deployed them "to dissuade customer usage of alternative purchase opportunities." Pet App. 52a. Like contractual restrictions, design tactics can impede the free flow of information. See Gregory Day & Abbey Stemler, *Are Dark Patterns Anticompetitive?*, 72 Ala. L. Rev. 1, 3-4, 35 (2020) (explaining how a technology platform can use subtle design choices to guide users toward behaviors preferred by the platform). An incumbent firm can, for example, conceal or bury information about rival offerings to boost usage of the incumbent's product. See, *e.g.*, *United States* v. *Microsoft Corp.*, 253 F.3d 34, 65-66 (D.C. Cir. 2001) (en banc) (affirming antitrust liability where defendant commingled web-browsing code with operating-system code); *Conwood Co.* v. *United States Tobacco Co.*, 290 F.3d 768, 783-784, 788 (6th Cir. 2002) (affirming liability where defendant removed rivals' point-of-sale advertisements and concealed rivals' products below retail counters). Such conduct effectively raises the cost of competing against the incumbent, thereby propping up demand for the incumbent's product. See *Day & Stemler*, 72 Ala. L. Rev. at 35. Alongside its pricing tactics, Apple's design tactics helped to ensure that its post-injunction conduct would be "as fully effective" at achieving the same anticompetitive effect as its pre-injunction conduct. *Carter Carburetor*, 112 F.2d at 732.

Particularly given its dominant market position, Apple should have understood the just-described mechanisms by which its pricing and design decisions would impact competition and consumers and, thus, violate the Injunction in the same manner as its

previous decisions. Indeed, Apple's own documents and testimony, as well as documents from Apple's customers, confirm that Apple did in fact understand the market dynamics that would cause the 27% commission and design restrictions to violate the Injunction, because they would function as a prohibition on linked-out purchases. Pet. App. 76a-85a, 90a-111a.

Courts and the antitrust agencies routinely consider company documents and testimony as a source of objective evidence on how markets operate. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 332, 344 (1962); *Federal Trade Comm'n* v. *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1039-1040 (D.C. Cir. 2008) (opinion of Brown, J.); *id.* at 1054 (Kavanaugh, J., dissenting); *United States* v. *H&R Block, Inc.*, 833 F. Supp. 2d 36, 52 (D.D.C. 2011); *Federal Trade Comm'n* v. *Staples, Inc.*, 970 F. Supp. 1066, 1079 (D.D.C. 1997); U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 4.1 (2023); see also *Brown Shoe*, 370 U.S. at 325 (industry and public recognition are "practical indicia" of market dynamics). As shown above, such evidence helps to elucidate what a reasonable market participant, like Apple, would understand the Injunction to mean. And here, that evidence led the district court to conclude Apple had "constructive and actual notice" that the commission was "core to compliance with the injunction." Pet. App. 71a-72a.

For example, Apple understood that the Injunction's purpose was to create "competitive pressure" that "would drive spend[ing] outside the app." Pet. App. 73a (citing evidence). A large app developer told Apple that the 3% commission

reduction was not "economically viable" because its external costs would exceed that amount. *Id.* at 75a. Apple's own documents corroborated the app developer's assessment. *Ibid.* Indeed, Apple questioned whether it could even charge a commission under the Injunction. *Id.* at 77a-78a. The evidence led the district court to conclude that "Apple investigated the landscape, knew how it would harm developers, and understood that it would not comply with the goal of the Injunction." *Id.* at 83a.

In addition to the documentary and testimonial evidence cited by the district court, Apple's actions to create a post-hoc and deceptive justification for the 27% commission support the objective conclusion that Apple would have understood and did understand that the Injunction applied to the commission. While Apple's contemporaneous business documents show that Apple settled on the 27% commission in July 2023 based on its adverse impact on app developers, Apple later represented to the district court that it decided on the commission only in January 2024 based on a study prepared by a consultant it had hired to create a cost justification for the commission. Pet. App. 85a-87a. The district court found that Apple had "lied" when it made that representation. *Id.* at 87a.

Apple would have had no reason to engage in such bad faith conduct if it were objectively reasonable to conclude that the 27% commission did not fall within the Injunction's scope. See *McComb*, 336 U.S. at 191-193 (conscious avoidance of an injunction requirement satisfies the objective standard); *Schering Corp.* v. *Illinois Antibiotics Co.*, 62 F.3d 903, 907 (7th Cir. 1995) (Posner, J.) (defendant's "elaborate

efforts * * * to conceal * * * show his consciousness" that the injunction was violated).

In sum, the context of the Injunction's prohibitions gave Apple notice that the prohibitions reflected competitive dynamics between Apple and other app developers, and Apple's actions show it in fact had such notice. A rational company that created and dominated the market, as Apple did, would have understood the practical effect of the 27% commission and design restrictions. And that effect would provide fair notice that the Injunction, reasonably understood, covered Apple's actions. As the evidence here confirms, there can be no objectively reasonable doubt that Apple knew the Injunction reached its choices.

C. The United States Misapplies Context to the 27% Commission

In asking the Court to apply the injunction standard to Apple's 27% commission on linked-out purchases, the United States correctly accepts that an injunction barring a prohibition on steering would cover "the functional equivalent of a prohibition" on steering. U.S. Br. 10. But on these facts, it incorrectly argues that "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." *Ibid.* The 27% commission, the United States reasons, is a "3% *discount* for off-app purchases," and refusing to provide a greater discount is "far afield from the competitive harms addressed by the injunction in this case." *Id.* at 24 (emphasis in original).

The United States appears to be concerned that Apple could be held in contempt for procompetitive conduct. See *Brooke Group Ltd.* v. *Brown &*

Williamson Tobacco Corp., 509 U.S. 209, 226-227 (1993) (warning against mistaken inferences from price-cutting behavior).[5] It warns that if ends rather than means determine what is within the scope of the Injunction, then "*any* action that forecloses competitive alternatives" would be grounds for contempt. U.S. Br. 26. And it observes that Apple surely would not violate the Injunction if it were to improve the quality of in-app purchasing so much that no developer wants to direct off-app purchases, yet the end result would be the same absence of steering. *Ibid.*

The United States errs in perceiving fair ground of doubt simply because the new 27% commission on linked-out transactions is numerically lower than Apple's 30% commission on its own transactions. Its concern is misplaced because it is focused on the wrong ends. "Context * * * suppl[ies] the requisite clarity." U.S. Br. 2.

Here, liability is determined by effects on competition, not simply effects on developers. *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984) ("[T]he legality of arguably anticompetitive conduct should be judged primarily by its 'market impact.'") (quoting *GTE Sylvania*, 433 U.S. at 51). Conduct that induces developers to forgo linked-out purchases by better serving them—such as quality improvements—does not have the same demonstrable economic effect as conduct that raises developers'

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[5] The United States misses that Apple has not cut the price of its own sales; it has set a new price floor on developers' and other app stores' sales of linked-out transactions.

costs, which is the effect that rendered Apple's conduct illegal.[6]

The district court made a finding that the new commission on linked-out purchases is a functional increase (by design) above Apple's 30% commission, because developers cannot avoid payment-handling costs. The United States thus misses that the difference between a 300% commission and Apple's 27% commission net of payment-handling costs is in fact a difference "just in degree;" it is not a difference "in kind," as the United States claims. U.S. Br. 23. Under Apple's new system of rules and restrictions, "everything turns out to be economically the same" as it was under the old, unlawful system. *Pepper*, 587 U.S. at 281. In labeling the 27% commission a "discount" on grounds that the number 27 is lower than the number 30, the United States engages in the the formalism that antitrust and unfair competition

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[6] While fair ground of doubt is obvious where there is economic evidence that the conduct is procompetitive, it may also lie where the conduct has a different anticompetitive effect from the one(s) the injunction is designed to remedy. For example, if Apple had responded to the Injunction by reducing, below its costs, the price of its own sales rather than raising the price of developers' linked-out sales, then there would be a fair ground of doubt whether the Injunction covers the conduct because this Court has held that successful predatory pricing is contingent on recoupment, unlike raising rivals' costs. See *Brooke Group*, 509 U.S. at 222, 224-225. The proper course would be for Epic to seek a modification of the injunction or bring a new claim, in which the court would be required to make findings on the appropriate measure of Apple's costs and the recoupment issue. *Ibid*. But that is not the case where, as here, the defendant uses only different means to achieve the same anticompetitive effect the Injunction was designed to remedy.

law, and the literalism that the objective, context-driven contempt standard, abhor.

II. APPLE'S PROPOSAL TO REQUIRE MODIFICATION PROCEEDINGS, IN LIEU OF CONTEMPT, FAILS TO PROTECT CONSUMERS FROM ANTICOMPETITIVE AND UNFAIR CONDUCT AND INVITES DEFENDANTS TO EVADE INJUNCTION OBLIGATIONS

In lieu of applying a reasonably objective standard for assessing conduct subject to an injunction, Apple suggests courts should interpret injunctions formalistically and literally because they can be modified on a prospective basis. Apple Br. 29-31. Beyond the fact that "[c]ase reporters and casebooks brim with illustrations why literalism—the antithesis of context-driven interpretation—falls short," *Biden* v. *Nebraska*, 600 U.S. 477, 512 (2023) (Barrett, J., concurring), Apple's proposal is wholly inadequate.

A court's remedial power to address anticompetitive conduct extends beyond the particular practices found to be illegal at the liability stage. *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 90 (1950) ("[R]elief, to be effective, must go beyond the narrow limits of the proven violation."). Relief in such cases "must be 'effective to redress the violations' and 'to restore competition.'" *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 (1972) (quoting *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961)). It "should 'cure the ill effects of the illegal conduct, and *assure the public freedom from its continuance*.'" *Id.* at 575 (emphasis added) (quoting *United States Gypsum Co.*, 340 U.S. at 88).

Apple's proposal for forward-looking modifications provides no such assurances. A party seeking to remedy a violation of an injunction would, under Apple's proposal, have to seek a modification and prove "new or unforeseen circumstances." Apple Br. 29-30. Apple intimates that a modification might also require a showing that the injunction had not achieved its original objectives. See Apple Br. 30 (citing *United States* v. *United Shoe Mach. Corp.*, 391 U.S. 244, 251-252 (1968)). Such a proceeding could amount to a re-litigation of the defendant's liability.

The type of re-litigation apparently contemplated by Apple would terribly disserve the law's goals of providing effective relief from anticompetitive and unfair conduct. Liability proceedings in antitrust and unfair competition cases are already notoriously lengthy and resource-intensive. Beyond the unjust delay in providing consumers relief, holding what would amount to a second (or third, or fourth, or fifth) trial would compound those litigation costs considerably. More discovery, expert testimony, motions practice, and the like would stretch compliance proceedings out for years. Defendants who enjoy prolonged market power during the pendency of such proceedings may be perfectly happy with such a system. See Erik Hovenkamp & Steven C. Salop, *Litigation with Inalienable Judgments*, 52 J. Legal Stud. 1, 18 (2023) (explaining that antitrust defendants with market power generally have an asymmetrically strong incentive to expend resources litigating to maintain the status quo). But many plaintiffs, both public and private, would find it cost-prohibitive.

The incentives that defendants with market power have to maintain the status quo would invite circumvention of the injunction. In rejecting a rule that would make civil contempt unavailable if a defendant's "plan or scheme" were "not specifically enjoined," this Court observed that "[s]uch a rule would give tremendous impetus to the program of experimentation with disobedience of the law." *McComb*, 336 U.S. at 192-193. Apple's modification rule would likely yield the same result. Suppose a court modifies an injunction. "Thereafter the defendants work out a plan that was not specifically enjoined." *Ibid*. According to Apple, there could be no contempt liability, only another decree modification proceeding to chase down the defendant's serial violations. See *id.* at 193.

In the context of antitrust and unfair competition cases, these concerns are not theoretical. "[T]he means of illicit exclusion, like the means of legitimate competition, are myriad." *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Microsoft*, 253 F.3d at 58); see also *Cel-Tech Commc'ns, Inc.* v. *Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (UCL's unfair prong is "intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive") (cleaned up).

Indeed, this Court's prior rejection of an Apple proposal in *Pepper* illustrates the danger. As noted above at page 11, the Court refused to accept Apple's attempt to recast its relationship with App Store buyers so that they were no longer deemed "direct purchasers" under *Illinois Brick*. The Court observed

that such "restructuring would allow a monopolistic retailer to insulate itself from antitrust suits by consumers, even in situations where a monopolistic retailer is using its monopoly to charge higher-than-competitive prices to consumers." *Pepper*, 587 U.S. at 285. It concluded that "Apple's theory would disregard statutory text and precedent, create an unprincipled and economically senseless distinction among monopolistic retailers, and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws." *Ibid.* Much of the same can be said about Apple's proposal to circumvent its obligations under the Injunction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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