No. 23-344

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

EPIC GAMES, INC.,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND TECHFREEDOM AS AMICI CURIAE SUPPORTING PETITIONER

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

November 1, 2023

QUESTION PRESENTED

Whether a court may enjoin conduct nationwide because the conduct violates the law in one State.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION 1

STATEMENT 3

SUMMARY OF ARGUMENT....................................5

ARGUMENT 6

I. STATES' EXERCISING POWER OUTSIDE THEIR BORDERS VIOLATES HORIZONTAL FEDERALISM PRINCIPLES 6

II. OTHER STATES REJECT CALIFORNIA'S POLICY VIEWS ON WHAT CONSTITUTES UNFAIR COMPETITION 9

III. COURTS' ISSUING NATIONWIDE INJUNCTIONS IS WORSE THAN STATES' LEGISLATING OUTSIDE THEIR BORDERS 14

A. Courts' Acting As Superlegislatures Violates Core Separation-Of-Powers Principles...14

B. Federal Courts' Applying State Laws Across State Borders Violates Vertical Federalism Principles................16

CONCLUSION...19

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Beverage Ass'n v. Snyder,
735 F.3d 362 (6th Cir. 2013)..................................1

Baldwin v. G.A.G. Seelig,
294 U.S. 511 (1935)..8

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996)..9

Bruton v. United States,
391 U.S. 123 (1968)..16

Carson v. Here's Johnny Portable Toilets, Inc.,
810 F.2d 104 (6th Cir. 1987)................................12

Commonwealth v. Woods,
2018 WL 4499704
(Pa. Super. Sept. 20, 2018) 16

Elks Nat. Found. v. Weber,
942 F.2d 1480 (9th Cir. 1991)..............................17

H. P. Hood & Sons, Inc. v. Du Mond,
336 U.S. 525 (1949)..7

Healy v. Beer Inst.,
491 U.S. 324 (1989)..8

Hernandez v. Mesa,
140 S. Ct. 735 (2020)..18

Hughes v. Oklahoma,
441 U.S. 322 (1979)..7

Huntington v. Attrill,
146 U.S. 657 (1892)..8

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Island Mortg. of N.J., Inc. v. 3M,
860 A.2d 1013
(N.J. Super. Law 2004)..10

Johnson v. Microsoft Corp.,
834 N.E.2d 791 (Ohio 2005) 10

Johnson v. Williams,
568 U.S. 289 (2013)...16

Lambrix v. Singletary,
520 U.S. 518 (1997)...17

Lockhart v. Fretwell,
506 U.S. 364 (1993)..16, 17

McCulloch v. Maryland,
17 U.S. 316 (1819)..18

Milwaukee v. Illinois,
451 U.S. 304 (1981)..18

Molo Oil v. River City Ford Truck Sales,
578 N.W.2d 222 (Iowa 1998) 10

Muskrat v. United States,
219 U.S. 346 (1911)..14

*Nat'l Fed'n of Indep. Bus. v.
Dep't of Lab., Occupational
Safety & Health Admin.*,
595 U.S. 109 (2022)..17, 18

Nat'l Pork Producers Council v. Ross,
598 U.S. 356 (2023)..1

New York Life Ins. Co. v. Head,
234 U.S. 149 (1914)..8

TABLE OF AUTHORITIES
(*continued*)

Page(s)

S. Pac. Co. v. Arizona ex rel. Sullivan,
325 U.S. 761 (1945)....9

Samia v. United States,
599 U.S. 635 (2023)....16

Shelby Cnty., Ala. v. Holder,
570 U.S. 529 (2013)....8

State v. Daicel Chem. Indus.,
840 N.Y.S.2d 8 (N.Y. App. Div. 2007)....10

Constitutional Provision

U.S. Const. art. I, § 8, cl. 3....7

Statutes

28 U.S.C. § 1257....17

Ala. Code § 8-19-5....10

Ariz. Rev. Stat.
§ 44-1528....10
§ 44-1528(A)....11

Ark. Code
§ 4-75-206....11
§ 4-75-207....11
§ 4-75-208....11
§ 4-75-209....11

La. Rev. Stat. § 51:1409....10

Mont. Code
§ 30-14-103....10
§ 30-14-133....10

N.M. Stat. § 57-12-15....10

TABLE OF AUTHORITIES
(*continued*)

Page(s)

S.C. Code Ann.
§ 39-5-50 10
§ 39-5-140 10

Tenn. Code
§ 47-18-106 10
§ 47-18-109 10

Wis. Stat. § 100.20 10

Other Authorities

1 Montesquieu, Spirit of the Laws (1750) 15

ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* (5th ed. 2014) 10

Boyd Garriott et al., *The Case for Uniform Standards Grows as States Sew More Laws into Patchwork of Data-Privacy Regulations*, WLF LEGAL BACKGROUNDER (Sept. 27, 2019) 1

Bryan Garner et al., The Law of Judicial Precedent (2016). 16

The Federalist
No. 6 7
No. 7 7
No. 10 7
No. 42 7
No. 45 8
No. 47 15
No. 78 14

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 Notre Dame L. Rev. 1309 (2015) 9

Hyland Hunt, *Court Finds NY Unconstitutionally Shifted Cost Of "Opioid Stewardship Fund" To Out-Of-State Commerce*, WLF LEGAL OPINION LETTER (Mar. 15, 2019)............................1

John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001) 15

Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057 (2009) 8, 9

Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 15 The Writings of Thomas Jefferson 277 (Andrew A. Lipsomb & Albert Ellery Bergh eds. 1903-04).......................15

Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 Ore. L. Rev. 275 (1999) 9

Merrill Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789* (1950) 7

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Michael Acton, *Epic Games-Apple US Appeals Court Ruling Shows Power of California's Competition Law, Blizzard Says,* MLex (May 10, 2023) 9

S. Rep. No. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3 13

Steven H. Steinglass, 1 Section 1983 Litigation in State and Federal Courts § 5:16 (Oct. 2023 update).........................17

INTEREST OF AMICI CURIAE[1]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus curiae to advance its view that state laws may not regulate conduct beyond the State's borders. *See, e.g.*, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023); *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362 (6th Cir. 2013).

WLF also regularly publishes, through its Legal Studies Division, articles by outside experts on why state laws should reach no further than the State's borders. *See, e.g.*, Boyd Garriott et al., *The Case for Uniform Standards Grows as States Sew More Laws into Patchwork of Data-Privacy Regulations*, WLF LEGAL BACKGROUNDER (Sept. 27, 2019); Hyland Hunt, *Court Finds NY Unconstitutionally Shifted Cost Of "Opioid Stewardship Fund" To Out-Of-State Commerce*, WLF LEGAL OPINION LETTER (Mar. 15, 2019). WLF believes ensuring that States do not legislate outside their borders is crucial to economic growth and the continued viability of our federal form of government.

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. To that end, it promotes antitrust policies and legal interpretations that foster efficiency

[1] No person or entity, other than amici and their counsel, paid for the brief's preparation or submission. Amici timely notified both parties of their intent to file this brief.

and innovation. *See*, *e.g.*, Brief of TechFreedom, *Epic Games v. Apple*, No. 21-16506 (9th Cir., June 20, 2023).

INTRODUCTION

Like clockwork, people change their minds on the propriety of nationwide injunctions every time control of the White House changes hands. Those Democratic attorneys general who fully supported nationwide injunctions during President Trump's administration now adamantly oppose them under President Biden's. And vice versa for Republican attorneys general. Besides chief law enforcement officers, other politicians and partisan interest groups also change allegiances whenever the keys to 1600 Pennsylvania Avenue switch partisan hands.

In recent years, litigants have wised up and realized that single-judge divisions within judicial districts are a great tool when combined with the power of nationwide injunctions. Parties can find a plaintiff in a single-judge division where the judge's judicial philosophy is well known, file suit, and win a nationwide injunction blocking policies that they dislike in all fifty States. And when the regional court of appeals generally shares the judicial philosophy of that district judge, such injunctions are unlikely to be disturbed. That is one reason why the number of emergency applications to this Court from solicitors general skyrocketed in the last two administrations. It also helps explain why the Court's discretionary docket is shrinking. It is hard for this Court to allow two competing nationwide injunctions to remain in place. So the Court feels compelled to resolve the issues in quick order.

Academics, politicians, judges, and lawyers have all proposed solutions to what some view as the problem with nationwide injunctions. These proposals include eliminating single-judge divisions, requiring that any nationwide injunction be issued by a three-judge district court, and barring nationwide injunctions altogether. But because both political parties use nationwide injunctions, it is doubtful that there will be any meaningful legislative reform on these issues.

So far, this Court has been reluctant to delve into the thorny question of when nationwide injunctions are appropriate. Are they permitted by the Administrative Procedure Act's express language? Or does the phrase "set aside" not require a nationwide injunction? Are nationwide injunctions necessary in some arenas, such as immigration enforcement? Or do district judges always maintain the inherent authority to issue such broad relief? These are all knotty questions that the Court will likely have to unravel one day.

This petition, however, does not ask the Court to decide all these vexing issues at once. True, the question presented is drafted in a way that the Court can choose to make broad statements about the propriety of nationwide injunctions if it wants to go down that path. But this case also gives the Court the chance to issue a narrower ruling about when nationwide injunctions are inappropriate.

STATEMENT

Apple created its successful iOS ecosystem by spending over $100 billion. Independent software

developers use this ecosystem and create most of the App Store's apps. Although most are free, some apps allow users to make in-app purchases. Apple makes money by charging a 30% commission on most paid transactions.

To ensure the apps are safe and provide consumers a quality experience, Apple requires that developers distribute iOS apps only in the App Store. It also forbids developers from directing, inside the apps, users to an outside site for making payments.

Epic makes Fortnite, one of the most successful video games in history. Despite making over $700 million after commission from Fortnite purchases, Epic did not like Apple's in-app purchase requirement because it had to share a portion of its revenue. So Epic breached its contract and allowed users to make purchases using Epic's own payment vehicle. When Apple removed Fortnite from the App Store, Epic sued.

Epic argued that Apple's app requirements violated the Sherman Act. After a long bench trial, the District Court held that Apple did not violate the Sherman Act. Yet the District Court also held that Apple's anti-steering restrictions violated California's unfair competition law. It entered a nationwide injunction barring Apple from enforcing those provisions for any developer. Epic appealed, and Apple cross-appealed.

The Ninth Circuit affirmed the District Court's decision on everything but attorney fees. The en banc court then denied both parties' petitions for

rehearing. Now, both parties seek this Court's review of different parts of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

I. When the thirteen colonies won their independence from England, they did not immediately form a constitutional republic. Rather, the Articles of Confederation governed States' relations. This led to major problems because the States refused to respect each other's views. They acted aggressively by enacting laws that imposed their policy views on other States.

This Balkanization hurt the new nation's economic stability. Realizing these errors, the Founders desired a new governing document. They gathered in Philadelphia in the summer of 1787 and drafted the Constitution. The Framers came up with a solution to the problem of State aggrandizement by allowing States to govern their territory without interference from other States. Collectively, these horizontal federalism principles have helped our nation prosper for over 230 years.

II. States have the power to regulate transactions within their borders. And every State has used that power to pass various unfair competition laws. California's law is quite broad and discourages commerce. That is just one reason why so many businesses have fled the State for better environments in Nevada, Arizona, or Texas. At least twenty-two States have rejected California's views on whether a plaintiff like Epic could seek injunctive relief for conduct like Apple's. The nationwide

injunction, however, imposes California's UCL on the rest of the nation.

III.A. Congress makes the laws while federal courts interpret those laws. In our federal system, the courts cannot make law. Yet that is exactly what the Ninth Circuit's decision here does. It allows a single federal judge to make law for at least twenty-two States. That violates the separation of powers that is key to our republican form of government.

B. Having federal courts make laws also violates vertical federalism principles. The Constitution gives the federal government limited powers and reserves all remaining powers for the States. This includes the power to pass unfair competition laws. But under the Ninth Circuit's decision, a single federal judge sitting in California or Hawaii can dictate the unfair competition laws across the country. This Court's intervention is necessary to ensure that States retain their ability to make laws governing conduct within their borders.

ARGUMENT

I. STATES' EXERCISING POWER OUTSIDE THEIR BORDERS VIOLATES HORIZONTAL FEDERALISM PRINCIPLES.

When people invoke federalism, they usually mean vertical federalism—the relationship between the federal government and the States. Horizontal federalism is the other side of the federalism coin. It concerns how the States interact with each other. When adopting the Articles of Confederation after the Revolutionary War, the thirteen States included no

safeguards against burdening interstate commerce. *See* Merrill Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789*, 245-57 (1950). The Founders quickly recognized that this structure was broken and needed reform. Indeed, one reason why the Constitutional Convention happened was as a response to the "Balkanization that [] plagued" the States "under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (citing *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949)); *see* The Federalist No. 7, 62-63 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

To solve that problem, States gave Congress authority to "regulate Commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3; *see* The Federalist No. 42 at 267-68 (James Madison). The Commerce Clause was so critical to a functioning federal government that it was the first substantive power the new Constitution gave Congress. States disclaimed any ability to regulate interstate commerce. They ceded this power so commerce could flourish.

The Framers also thought all States were disposed "to aggrandize themselves at the expense of their neighbors." The Federalist No. 6 at 60 (Alexander Hamilton) (quotation omitted). They feared this would lead to factions—the ultimate poison for the Union; the "most common and durable source" of factions is economic inequality. The Federalist No. 10 at 79 (James Madison).

Maintaining each State's sovereignty was the solution to the problem. Every State retained its

"ordinary course of affairs, concern[ing] the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45 at 293 (James Madison); *see Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 543 (2013). Sovereignty necessarily includes prohibiting encroachment of state power across borders. Otherwise, state sovereignty is illusory.

Factions quickly arise if state borders are merely nominal. So the Court has zealously guarded them: "Laws have no force of themselves beyond the jurisdiction of the State which enacts them." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892); *see also New York Life Ins. Co. v. Head*, 234 U.S. 149, 160-61 (1914). The Framers built the new Constitution on the premise that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.G. Seelig*, 294 U.S. 511, 523 (1935). The solution included non-interference in interstate trade while respecting the States' sovereignty within their own borders.

The Constitution prevents States from legislating extraterritorially. It strikes a balance between limiting actions that discriminate against fellow States and maintaining "the autonomy of the individual States within their respective spheres" on the other. *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989). Properly limiting States' jurisdiction "confin[es] each state to its proper sphere of authority[ ]in a federalist system." Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1093

(2009). When "the burden of state regulation falls on" other States, typical "political restraints" are ineffective. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68 n.2 (1945) (collecting cases).

At bottom, States must "recognize, and sometimes defer to, the laws, judgments, or interests of another." Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 Notre Dame L. Rev. 1309, 1309 (2015). Policy judgments must be respected even if the people or leaders of another State vehemently disagree. The Constitution requires that "while an individual state may make policy choices for its own state, a state may not impose those policy choices on the other states." Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 Ore. L. Rev. 275, 292 (1999) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-73 (1996)). But the Ninth Circuit blessed California's imposing its outlier UCL views throughout the nation. *See* Michael Acton, *Epic Games-Apple US Appeals Court Ruling Shows Power of California's Competition Law, Blizzard Says,* MLex (May 10, 2023), https://perma.cc/A6XN-XNEE. This violates the horizontal federalism that is key to our federal form of government.

II. OTHER STATES REJECT CALIFORNIA'S POLICY VIEWS ON WHAT CONSTITUTES UNFAIR COMPETITION.

The Ninth Circuit's ruling affirming a nationwide injunction harms other States' sovereign interests. Many States have rejected California's broad definition of unfair competition and the law's broad remedies provision. But even if every State's

UCL statute mirrored California's, that would not excuse the Ninth Circuit's affirming a nationwide injunction for a mere violation of California law.

Fourteen States' UCLs do not cover anticompetitive conduct.[2] In these States, unfair competition is generally defined as deceiving customers, not harming competitors. *E.g.*, Ala. Code § 8-19-5. The Ninth Circuit did not hold that Apple deceived Epic or other app developers. The relevant contract was clear about prohibited conduct. Enjoining Apple's conduct in these fourteen States means that those state legislatures' policy choices are being overridden by California's legislature. This is a quintessential violation of horizontal federalism.

Another eight States do not permit injunctive relief in private suits for UCL violations.[3] In many of these States, only the sovereign may seek an

---

[2] The States are Alabama, Delaware, Georgia, Indiana, Kansas, Maryland, New Jersey, New York, Ohio, Oklahoma, Oregon, South Dakota, Virginia, and Wyoming. *See* ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* (5th ed. 2014) at 2-48, 9-15, 12-1, -19, -20, 17-31, 19-27, 23-40, 35-1, 39-21 to -22, 40-1, -37 to -38, 45-1, -12, 50-32, and 55-23; *see also State v. Daicel Chem. Indus.*, 840 N.Y.S.2d 8, 12 (N.Y. App. Div. 2007); *Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 802 (Ohio 2005); *Island Mortg. of N.J., Inc. v. 3M*, 860 A.2d 1013, 1016 (N.J. Super. Law 2004).

[3] The States are Arizona, Iowa, Louisiana, Montana, New Mexico, South Carolina, Tennessee, and Wisconsin. *See* Ariz. Rev. Stat. § 44-1528; La. Rev. Stat. § 51:1409; Mont. Code §§ 30-14-103, 30-14-133; N.M. Stat. § 57-12-15; S.C. Code Ann. §§ 39-5-50, 39-5-140; Tenn. Code §§ 47-18-106, 47-18-109; Wis. Stat. § 100.20; *Molo Oil v. River City Ford Truck Sales*, 578 N.W.2d 222 (Iowa 1998).

injunction. *E.g.*, Ariz. Rev. Stat. § 44-1528(A). But this is a suit brought by a single private party—not a government. The amount of political capital necessary for a sovereign to sue is significant. And this political accountability is one reason why many legislatures bar private plaintiffs from seeking injunctive relief for UCL violations. They want the party seeking an injunction to face the voters. But the nationwide injunction disregards these state-level policy choices. The injunction here permits California to dictate the remedies available in other States. This is another afront to horizontal federalism.

Although some States permit private parties to seek injunctive relief for UCL violations based on anticompetitive conduct, many of those States severely limit the claim. For example, Arkansas provides that only four types of anticompetitive behavior are actionable under its UCL. *See* Ark. Code §§ 4-75-206 to -209. So many States do not allow for a claim for injunctive relief like California does. Again, enjoining Apple's conduct in these States violates horizontal federalism.

Combined, twenty-two States bar an injunction for an anticompetitive-conduct claim brought by a private party. Although some of these States' attorneys general supported Epic (likely for political reasons), the States themselves are in fact injured by California's legislating outside its borders. One State, Texas, joined a panel-stage amicus brief supporting Epic but recently sought leave to file a bill of complaint against California for similar behavior. *See* Mot. for Leave to File a Bill of Compl., *Texas v. California*, 141 S. Ct. 1469 (2021) (per curiam) (No. 153 Original). The Court should look to Texas's

arguments there for how the nationwide injunction hurts the States; it tracks the arguments above.

The number of States that bar an injunction for an anticompetitive-conduct claim by a private party is important when analyzing the horizontal federalism concerns with the District Court's overbroad injunction. When a party shows that its conduct in other States would be legal but for a nationwide injunction based on one State's laws, that party is entitled to reformation of the injunction.

A decision from the Sixth Circuit illustrates how courts look to differing state laws when deciding whether there are federalism problems with a nationwide injunction like that entered here. In *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104 (6th Cir. 1987) (per curiam), the district court entered a nationwide injunction barring a port-a-potty company from using Johnny Carson's slogan "Here's Johnny" on its products. The Sixth Circuit affirmed only because it could not find a single jurisdiction in the United States that had different laws from Michigan's on the right of publicity. *See id.* at 105. Thus, the court essentially found that there was "no harm, no foul" in the nationwide injunction. *See id.*

But the key part of the Sixth Circuit's decision was its realization that the district court's nationwide injunction would violate horizontal federalism principles if another State's laws differed from Michigan's law. In such a case, the defendant could rightfully seek to have the injunction modified so it would not be overbroad. *See Carson*, 810 F.2d at 105.

Here, almost half the country has laws that differ significantly from California's UCL. And even among the remaining States that have laws resembling California's, there likely are small differences between the UCLs that may make Apple's conduct legal or that may make this injunction improper. Yet under the Ninth Circuit's decision, California's UCL is being imposed on those other States that have made different policy decisions. The Court should not allow that afront to horizontal federalism to stand.

The Ninth Circuit's decision did not address these federalism issues. The words "federalism" and "extraterritorial" are absent from the opinion. That is because there is no discussion of whether the injunction is too broad geographically. The Ninth Circuit's opinion includes one paragraph of analysis about the "[s]cope of the [i]njunction." Pet. App. 82a. That paragraph doesn't rebut the federalism arguments made above. Nor does it even touch on the geographic scope of the injunction. Rather, it touches on what conduct is covered—the non-geographic scope of the injunction.

The Ninth Circuit's allowing California law to be applied outside the State's borders is a problem. As the Senate recognized, courts' "dictat[ing] the substantive laws of other states by applying" a State's laws outside its borders is "a breach of federalism principles." S. Rep. No. 109-14, 61 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 57 (quotation omitted). Yet the Ninth Circuit did not even try to address the underlying federalism concerns. Rather, it pretended that the nationwide injunction has no federalism problems. This Court should review that decision.

III. COURTS' ISSUING NATIONWIDE INJUNCTIONS IS WORSE THAN STATES' LEGISLATING OUTSIDE THEIR BORDERS.

The horizontal federalism problems with allowing California to regulate conduct outside its borders applies to all attempts to apply California's UCL extraterritorially. But the problem is exacerbated when federal courts issue a nationwide injunction that extends the reach of California's law beyond its borders. These separation-of-powers and vertical federalism problems also warrant granting the petition and reviewing the Ninth Circuit's decision.

A. Courts' Acting As Superlegislatures Violates Core Separation-Of-Powers Principles.

A key difference between legislative and judicial power is that the legislature has the power to bind every person within its jurisdiction, while the judiciary has the power to bind only the people in the case before it. "The legislature * * * prescribes the rules by which the duties and rights of every citizen are to be regulated." The Federalist No. 78 at 465 (Alexander Hamilton). On the other hand, the "judicial power" is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (cleaned up).

"Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then

be the legislator." The Federalist No. 47 at 303 (James Madison) (quoting 1 Montesquieu, Spirit of the Laws 181 (1750) (cleaned up)). That is why the "Constitution explicitly disconnects federal judges from the legislative power and, in doing so, undercuts any judicial claim to derivative lawmaking authority." John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 59 (2001). This "sharp separation of legislative and judicial powers was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws." *Id.* at 61.

If a judge can issue a nationwide injunction, he or she can bind not only the parties in a particular case, but also nonparties. Here, the dispute was between Epic and Apple. But by issuing a nationwide injunction, one unelected federal judge decided a matter between Apple and millions of other app developers. *See* Pet. 15.

The Founders would have been shocked to learn that a single judge could issue such a broad nationwide injunction. For example, Thomas Jefferson said that giving the federal judiciary too much power "would place us under the despotism of an Oligarchy." Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 15 The Writings of Thomas Jefferson 277 (Andrew A. Lipsomb & Albert Ellery Bergh eds. 1903-04). If Jefferson was concerned that one branch of government could become despotic, he would have been even more aghast at the idea that one federal judge could bind millions of nonparties to a lawsuit. Giving such legislative power to a single judge resembles a dictatorship—not an oligarchy. This

Court should grant the petition to uphold republican values.

B. Federal Courts' Applying State Laws Across State Borders Violates Vertical Federalism Principles.

This Court has rejected the idea that decisions of lower federal courts bind state courts. "[T]he views of the federal courts of appeals do not bind [state courts] when [they] decide[] a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law." *Johnson v. Williams*, 568 U.S. 289, 305 (2013); *see also* Bryan Garner et al., The Law of Judicial Precedent 691 (2016). An example shows how this works. For many years, the Supreme Court of Pennsylvania and the Third Circuit disagreed about what *Bruton v. United States*, 391 U.S. 123 (1968) required. *See Commonwealth v. Woods*, 2018 WL 4499704, *2 n.10 (Pa. Super. Sept. 20, 2018). The Pennsylvania courts refused to apply the Third Circuit's holding, which they could do under our federal system. *See id.* Eventually, this Court vindicated the Pennsylvania courts' interpretation of *Bruton* and rejected the Third Circuit's interpretation. *See generally Samia v. United States*, 599 U.S. 635 (2023).

In other words, although "the Supremacy Clause demands that state law yield to federal law," it does not require that "a state court's interpretation of federal law give way to a (lower) federal court's interpretation" of federal law. *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring). Rather, "[i]n our federal system, a state trial court's

interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located." *Id.* The same holds true for interpretations of federal law by state appellate courts.

"This proposition may seem surprising, but it flows from the nature and structure of the federal judicial system. Lower federal courts do not have appellate jurisdiction over state courts, and both state and federal courts make independent judgments as to the meaning of federal law." Steven H. Steinglass, 1 Section 1983 Litigation in State and Federal Courts § 5:16 (Oct. 2023 update) (footnote omitted). State courts are bound by this Court's interpretation of federal law because the Constitution and the United States Code give this Court alone the ability to review final decisions of state courts involving federal law. *See* 28 U.S.C. § 1257; *Elks Nat. Found. v. Weber*, 942 F.2d 1480, 1483 (9th Cir. 1991).

Even this Court cannot review decisions about state law. *See Lambrix v. Singletary*, 520 U.S. 518, 523 (1997); *cf.* 28 U.S.C. § 1257 (limiting this Court's jurisdiction over judgments of state courts). This principle is key to vertical federalism. Each State may enact laws and policies that it deems appropriate so long as those laws and policies are not repugnant to the Constitution or laws of the United States. If this Court could review state law issues, it would essentially strip the States of this sovereign authority.

The Constitution makes clear that "[t]he federal government's powers" "are not general but limited and divided." *Nat'l Fed'n of Indep. Bus. v.*

Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring) (citing *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)). This means that there is no general federal common law. *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020). Yet there is general state common law. *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981).

When a court can review state-law issues in a common-law regime, it can make the laws for that State. For example, most state courts of last resort have rejected the idea that an independent cause of action for medical monitoring exists. But if this Court could review that determination, it could overturn these policy judgments made by common-law courts and substitute its judgment for that of the state courts. If that happened, there would be no more laboratories of democracy operating independently. Rather, there would be a single sovereign—the Federal Government—with the power to make laws for the entire nation.

The Ninth Circuit's decision allows such federal court involvement in state law. The District Court's nationwide injunction essentially rewrites the laws of at least twenty-two States. That is the antithesis of vertical federalism, which has allowed our nation to survive for over 230 years. Allowing the Ninth Circuit's decision to stand therefore violates both horizontal and vertical federalism principles. The Court should grant the petition to reaffirm that federalism is essential to our nation's structure.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

November 1, 2023