No. 23-344

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

EPIC GAMES, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

THOMAS C. GOLDSTEIN
Counsel of Record
4323 Hawthorne Street, NW
Washington, DC 20016
(202) 674-7594
tom@tomgoldstein.net

Counsel for Respondent

325529

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Epic states that it has no parent corporation and that Tencent Holdings Ltd. owns more than 10% of Epic stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS. ii

TABLE OF CITED AUTHORITIES iii

INTRODUCTION. 1

STATEMENT 1

REASONS FOR DENYING THE WRIT 4

I. Apple's Argument Rests on a Factual Dispute, Not a Legal Question That Was Either Pressed or Passed Upon Below. 5

II. There Is No Merit to Apple's Claim that the Ruling Below Conflicts with this Court's Precedent. 12

III. The Scope of this State Law Injunction Presents No Important Federal Law Question, Including with Respect to "Nationwide Injunctions." 16

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

CASES

Califano v. Yamasaki,
442 U.S. 682 (1979) 12, 13

Gill v. Whitford,
138 S. Ct. 1916 (2018) 13

Hansberry v. Lee,
311 U.S. 32 (1940) 6, 15

L.A. Haven Hospice, Inc. v. Sebelius,
638 F.3d 644 (9th Cir. 2011) 4, 5

Madsen v. Women's Health Ctr., Inc.,
512 U.S. 753 (1994) 13

STATUTES AND OTHER AUTHORITIES

U.S. Const., amend. V 5

9th Cir. R. 41-1 4

Fed. R. Civ. P. 23 7

INTRODUCTION

Respondent Epic Games, Inc. (Epic) brought this lawsuit challenging, among other things, practices and agreements under which Petitioner Apple Inc. (Apple) maintains a 30% commission on purchases of digital content within iPhone applications (apps). Epic's federal law claims are addressed in its pending Petition for Certiorari. *See* No. 23-337, *Epic Games, Inc. v. Apple Inc.* (the Epic Cert Petition). By contrast, Apple's Petition arises from Epic's state law claims. Apple now contends that the remedial injunction imposed by the district court based on its finding that Apple violated California law violates the Constitution.

Certiorari is not warranted for several independent reasons. Apple did not preserve these constitutional claims below. In turn, the Ninth Circuit did not decide the Question Presented. Indeed, Apple has already admitted in this Court that "the Ninth Circuit said nothing about any of the legal issues Apple intends to ask the Court to decide." Apple Opp. to Epic's Motion to Vacate Stay 20. Further, Apple's argument that the court of appeals' decision conflicts with this Court's precedent lacks merit. And, Apple does not seriously argue that the Question Presented is the subject of a circuit conflict. Finally, there is no dispute in this case about the propriety of a "nationwide injunction." The Petition accordingly should be denied.

STATEMENT

Apple imposes and maintains its 30% commission through a variety of anticompetitive practices and

agreements. As relevant here, Apple has adopted certain "anti-steering rules" that it applies uniformly to all app developers. Specifically, while an app developer may sell digital goods to be used in an iPhone app through various means, such as through the developer's website, Apple prohibits the developer from informing its customers in the app about these alternative options. The obvious, intended effect of the anti-steering rules is to prevent consumers from receiving truthful information about and using those alternatives, which would be less expensive because they are free from Apple's exorbitant commission. The rules generate billions of dollars in supracompetitive profits for Apple.

Respondent Epic is a diversified computer software company, with several lines of business. Its best-known application is *Fortnite*. Epic also operates a personal computer (PC) store (the Epic Games Store) for developers to sell apps. These include "cross-platform" apps, in which a consumer can purchase a digital good through the app on one platform (such as a PC) that the consumer can then use in an iPhone app. Epic seeks to offer a competing store to the Apple App Store and distribute iPhone apps directly. Epic also has various subsidiary companies that make iPhone apps.

Epic brought suit challenging, *inter alia*, the anti-steering rules. As relevant here, the district court held that those rules violate California's Unfair Competition Law. Appendix B at 370a, 372a. As noted, Apple applies the same rules identically to all developers. Apple did not argue to the district court that it should develop a record regarding whether enjoining Apple from enforcing the rules would sweep more broadly than necessary to

remedy Epic's injury. The district court straightforwardly enjoined Apple from enforcing the rules. *Id.* at 376a.

Separately, the district court dismissed Epic's federal antitrust claims. Epic appealed, and the Ninth Circuit affirmed with respect to the federal claims by a divided vote. Appendix A at 85a. Those claims are the subject of the Epic Cert Petition.

Apple separately appealed the state-law judgment. In relevant part, it argued that the district court had misinterpreted California law. Specifically, in Apple's view, the district court's dismissal of Epic's federal antitrust claims barred its state law claim as a matter of law. The Ninth Circuit unanimously rejected Apple's argument on the merits. *Id.* at 78a.

Apple also challenged Epic's standing under Article III, arguing that Epic had no interest in the case that could justify bringing suit because Apple had terminated Epic's account in Apple's app developer program. The Ninth Circuit rejected that argument as well, based on the factual finding that Epic had an independent interest in the case both through the Epic Games Store and through its subsidiaries that continued to distribute iPhone apps through the App Store. *Id.* at 81a-82a.

In passing, Apple also included what can only fairly be called a throwaway challenge to the breadth of the injunction, asserting that it was impermissible for the district court to forbid Apple from enforcing the anti-steering rules against third-party developers. *See* Apple Opening Br. 111. Epic's interest as an app developer, Apple argued, justified only applying an injunction with respect to Epic itself. *Ibid.*

The panel rejected that argument, applying the exact rule Apple requested, and quoting the same language from the same Ninth Circuit precedent as Apple. Appendix A at 81a (citing *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)). It found that Apple's argument failed for a factual, not a legal reason: Epic had an independent interest as the provider of an alternative app store, because transactions on other developers' apps could be processed through the Epic Games Store. *Id.* at 82a. Apple did not argue, as it now does, that there were too few other apps available through the Epic Games Store to justify the scope of the injunction, so the panel did not address that question.

Apple sought and received from the panel a stay of the mandate pending this Court's disposition of this Petition for Certiorari, invoking the Ninth Circuit's standard that a stay is appropriate when the petition "will not be frivolous." 9th Cir. R. 41-1. Judge Milan Smith issued an opinion concurring in the order granting a stay. He explained in detail how Apple's arguments "challenge an imagined panel opinion on an imagined record." Appendix H at 429a.

Justice Kagan subsequently denied Epic's motion to vacate the stay. Order, App. No. 23–78 (Aug. 9, 2023). Apple's Petition followed.

REASONS FOR DENYING THE WRIT

Apple does not argue that the Question Presented is the subject of a circuit conflict. Instead, it principally claims that certiorari is warranted because of a conflict between the ruling below and a supposed holding of this

Court that the Constitution forbids a federal court from granting injunctive relief that extends to nonparties, absent a specific finding that doing so is necessary to remedy injury to the plaintiffs. In fact, Apple did not preserve that argument, the Ninth Circuit did not decide it, and this Court has not adopted such a rule. Nor does this case give rise to any question about the propriety of nationwide injunctions. Certiorari should accordingly be denied.

I. Apple's Argument Rests on a Factual Dispute, Not a Legal Question That Was Either Pressed or Passed Upon Below.

Apple did not preserve its federal constitutional argument below. Apple's argument against the injunction on appeal—and the entire basis for the stay pending appeal—relied principally on state law. It has now abandoned each of those points. Apple did briefly assert back on page 110 of its opening appellate brief that as a matter of federal *remedies* law "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff[]." Apple Opening Br. 110 (quoting *Sebelius*, 638 F.3d at 664). But in affirming the nationwide injunction the panel adopted the exact rule cited by Apple, quoting that exact language, from that exact precedent. Appendix A at 81a (citing *Sebelius*, 638 F.3d at 664).

Beyond that, Apple presented its current federal law arguments in its opening brief in only a single throwaway paragraph on page 111—which does not even mention the Article III argument Apple principally invokes now, and which mentions due process in only one sentence. Apple argued:

> Any injury to Epic from the anti-steering provisions would be remedied by an injunction prohibiting Apple from applying those provisions to *Epic*. Conversely, an injunction applicable to other developers provides no benefit to Epic. Such an injunction, however, subverts Federal Rule of Civil Procedure 23(b)(2), which expressly addresses injunctive relief extending beyond the named plaintiff. Allowing what is essentially classwide relief without certifying a class action creates an inequitable asymmetry whereby non-parties can claim the benefit of a single favorable ruling without being bound by it. Among other problems, this kind of one-way preclusion violates Apple's due process rights. *See Hansberry v. Lee*, 311 U.S. 32 (1940).

Apple Opening Br. 111.

At most, Apple thereby preserved an argument that the district court's injunction was inconsistent with Rule 23. And Apple in turn represented to both the Ninth Circuit and this Court that its Cert Petition would present that question. Apple Stay Br. 14-18. It moreover stressed the significance of Rule 23 to the propriety of granting an individual plaintiff supposedly class wide relief. *Id.* at 9-11. But Apple now has reversed course and abandoned its argument that the injunction should be overturned because it violates Rule 23, framing the Question Presented to rely only on the Constitution. *See* Pet i. On Apple's own view, to the extent this Court ever reviews the appropriateness of such an injunction, it should await a case that presents a question that encompasses the role of Rule 23.[1]

1. Apple argues here only that the existence of "a properly certified class" is a circumstance when it is proper to extend

In addition, Apple has conspicuously excluded from the Question Presented its previous argument that the district court's injunction violates the limitations on a federal court's equitable powers. Again, its argument here is firmly limited to the claim that the injunction is unconstitutional. But there is plainly no constitutional violation: There is a live case or controversy that the district court can redress for Article III purposes, and the extensive proceedings gave Apple far more than the minimum "process" to which it was "due" under the Fifth Amendment. To the extent that the Court has any interest in the question whether a federal court's equitable authority is limited to the parties to the litigation, it should await a case in which that question is actually preserved and presented.

Apple previously asserted that it had not waived its constitutional arguments because its "*first* argument on its cross-appeal" addressed Article III standing. Motion to Vacate Stay Opp. 18. But that is entirely misleading. Apple argued there that Epic lacked standing to assert a violation of California law because "Epic had not proven any injury *to itself* from the anti-steering provisions." *Id.* at 6 (emphasis added). The Ninth Circuit rejected this argument because it found standing on two different grounds that did not depend on Epic's own apps: Epic's subsidiaries have apps and Epic provides a competing app store. *See* Appendix A at 76a. Apple's current Article III argument, which did not appear in its opening brief

---

injunctive relief to a non-party. Pet. 10. Apple does not make the distinct argument—which also is by its express language excluded from the Question Presented—that granting such relief in a single-plaintiff case cannot be reconciled with Rule 23.

at all, is quite different: that through the injunction, Epic is effectively asserting the interests of third-party developers, which violates Article III as a matter of law, even if Epic can assert a claim on its own behalf. *See* Pet. 14-16.

No doubt because Apple did not preserve its constitutional argument, the Ninth Circuit appropriately did not decide the Question Presented. Nor did it address the application of the precedents cited by Apple to an injunction such as this one. Those issues accordingly remain open to be litigated in the Ninth Circuit should they ever arise in an appropriate later case.

In addressing the arguments that Apple actually did make (in passing), the Ninth Circuit provided what the Petition itself stresses is "just one sentence of analysis." Pet. 9. The Ninth Circuit said nothing of substance about the Question Presented. The opinion thus does not even mention Article III or due process. The Ninth Circuit instead merely rejected Apple's factual premise—nothing more:

> Second, the district court did not abuse its discretion when setting the scope of the injunctive relief because the scope is tied to Epic's injuries. The district court found that the anti-steering provision harmed Epic by (1) increasing the costs of Epic's subsidiaries' apps that are still on the App Store, and (2) preventing other apps' users from becoming would-be Epic Games Store consumers. Because Epic benefits in this second way from consumers of other developers' apps making

> purchases through the Epic Games Store, an injunction limited to Epic's subsidiaries would fail to address the full harm caused by the anti-steering provision.

Appendix A at 82a.

Apple has already admitted in this Court that "the Ninth Circuit said nothing of substance about any of the legal issues Apple intends to ask this Court to decide." Apple Opp. to Epic's Motion to Vacate Stay 20. "This is not a point in the court of appeals' favor," Apple argues, because the fact "that both the lower courts failed to address them shows only that these important federal issues have not been given the careful and adequate consideration they deserve." *Ibid.* It would be very hard to find a more obvious (if back-handed) concession by a sophisticated litigant represented by experienced counsel that this case is *not* an appropriate vehicle to decide the Question Presented. This Court almost never resolves questions that were not decided below—it is a court of review, not first view—including because the court of appeals could reach a different result when it later decides the question expressly.

Apple's arguments thus reduce to a disagreement with the Ninth Circuit's understanding of the facts. Judge Smith took pains to explain in detail that, "[w]hen our reasoning and the district court's findings are considered, Apple's arguments *cannot withstand even the slightest scrutiny*." Appendix H at 421a (emphasis added). Judge Smith documented how Apple's arguments "ignore key aspects of the panel's reasoning and key factual findings by the district court," so that they "simply masquerade

[Apple's] disagreement with the district court's findings and objection to state-law liability as contentions of legal error." *Id.* at 421a-422a. Apple's "conclusory statement" that the lower courts' rulings are supported by no substantial evidence "is simply false." *Id.* at 423a. The record and district court's findings also refute Apple's assertion that its anti-steering rules protect consumers. *Id.* at 425a n.2. "The injunction against the anti-steering provision simply allows developers to let users know that certain content (which Apple has already chosen to allow access to) can be purchased at a lower price elsewhere." *Id.* In sum, Apple's arguments "challenge an imagined panel opinion on an imagined record." *Id.* at 429a.

Apple's argument (such as it was) asserted that Epic was a mere app developer, and in that role Epic was only entitled to an injunction applicable to its own apps. The Ninth Circuit rejected Apple's premise, holding that Epic was injured as well in its capacity as the owner of an app store that would benefit from consumers' receiving the information about alternatives that the anti-steering rules prohibit. Apple did not argue—and so the Ninth Circuit had no cause to address—that there was an insufficient number of apps in the Epic Games Store to justify broader relief.

Now, for the first time, Apple makes that argument. It reaches back to a sentence in the trial record, citing nothing in its briefing in either the district court or court of appeals where it made this point. Apple now asserts that the injunction should have been limited to 100 apps in the Epic Games Store. And it pretends that the Ninth Circuit actually decided that question. *See* Pet. 3 ("The Ninth Circuit affirmed on the ground that extending

injunctive relief to *some* nonparties—approximately 100 other app developers—was necessary to redress Epic's alleged injury."). But the Ninth Circuit did no such thing, because Apple did not raise this point.

Apple's newly manufactured factual claim also lacks merit. The number of apps currently in the Epic Games Store is not the issue, because Epic actively seeks to draw new app clients. The anti-steering rules reduce the number of apps on the Epic Games Store because those rules make it far less likely that consumers purchase virtual goods through non-iPhone apps for use on their iPhones. Epic's lawsuit seeks to enable the free flow of information and hence expand the availability and frequency of such purchases, including in apps acquired through the Epic Games Store.

Apple also apparently hopes to suggest that the district court was required to make a "specific finding" about Epic's interest in the full sweep of the injunction. *See, e.g.*, Pet. 11. But Apple again did not make that argument in either of the lower courts; the claim is waived. Had they been presented with that argument, those courts would have considered Epic's counterpoint that it is factually not possible to determine ex ante which specific apps would allow virtual goods to be purchased through non-iPhone apps and used on iPhones, if the anti-steering rules were invalidated. As a consequence, it is not practicable to attempt in this case to craft an injunction that identifies with specificity certain app developers against which Apple could not apply the rules.

Nor is the lower courts' supposed failing to make such a finding a basis for certiorari. No such requirement

appears in the precedent of this Court (or any other). Apple does not argue otherwise.[2]

II. There Is No Merit to Apple's Claim that the Ruling Below Conflicts with this Court's Precedent.

In any event, this Court has not adopted the legal rule that Apple claims conflicts with the Ninth Circuit's ruling. Apple principally relies on three words in one sentence in the Court's 1979 decision in *Califano v. Yamasaki*, 442 U.S. 682 (1979). That case challenged a nationwide interpretation of the Social Security Act by the Secretary of the Department of Health, Education, and Welfare. The lower courts certified a nationwide class action and entered an injunction. The Secretary urged the Court to adopt a categorical rule against nationwide class actions based on what the defendant characterized as "the rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Id.* at 702. The Court rejected that argument, reasoning that "the scope of injunctive relief is dictated by the extent of the violation established." *Ibid.* In that case, it was sufficient that the injunctive relief addressed the claimed injury. Geography was not relevant. *Ibid.*

At most, *Califano* addressed the scope of federal courts' equitable authority or the scope of Rule 23. But as discussed, Apple has not presented those issues to this Court, limiting the Question Presented to constitutional claims.

---

2. Apple also misreads the ruling below as supposedly holding that an injunction merely be "tied" to the plaintiff's injury. *See* Pet. 15. The Ninth Circuit merely used the word "tied" descriptively, not as a legal rule. As noted—and as Apple omits—the court of appeals applied the exact legal test that Apple invoked—word for word.

Apple also misreads *Califano*. It seizes on the fact that *Califano* only mentions granting relief "to the plaintiffs." Pet. 3. That phrase, Apple says, can only be read to adopt a *per se* rule that injunctive relief can never extend to nonparties unless there is a specific finding that doing so is necessary to remedy the parties' injuries. But *Califano* did not adopt that rule, because it did not address that question. *Califano* involved class action procedure, and merely concluded that nationwide class actions may be appropriate. Because the legal violation in that case occurred nationwide, nationwide relief was appropriate. The same is true here. It is indisputable that any injunctive relief that is granted would extend throughout the country. *See* Appendix B at 376a.

Similarly, there is no merit to Apple's passing citations to *Madsen* and *Gill*. In *Madsen*, this Court cited *Califano* in addressing the "fit between the objectives of an injunction and the restrictions it imposes." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). There was no issue regarding the extension of an injunction to a non-party to the litigation.

In *Gill*, the Court held that individual plaintiffs could not rest their standing to sue on an injury to rights that were fundamentally group political interests. *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018). Such an injury, the Court concluded, did not affect any of the plaintiffs at all. *Id.* Once again, the case did not involve the application of an injunction to non-parties.

Even if this Court had adopted as a constitutional principle that any injunctive relief *generally* must be necessary to redress the individual plaintiff's injury—and

it has not—there are several significant arguments that this unique case is distinct. Hence, there can be no conflict with this Court's precedents, which have never addressed circumstances like these.

Most importantly, as the Ninth Circuit stressed, Epic has a distinct interest in the injunction from other developers—Epic provides the Epic Games Store. It is now settled that the anti-steering rules unlawfully injure Epic at that distinct level of the chain of distribution.

There are still other distinctions, none of which were addressed below because of Apple's waiver. Among other things, there is only one set of anti-steering rules, which Apple applies identically to every developer. Those developers are in turn identically situated vis-a-vis Apple, which itself stresses to this Court that the developers were properly certified as a class in litigation against it relating to these exact rules. The injunction in turn is a single directive to Apple, as opposed to a broad and amorphous order that requires Apple to engage in distinct conduct towards non-parties to the litigation.

Further, any such equitable limitation on the scope of injunctive relief must give way when necessity requires. Here, as explained, it is not possible to identify ex ante the specific subset of app developers that would sell on the Epic Games Store non-iPhone versions of their apps, through which iPhone users could purchase virtual goods to use on iPhones.

Finally, the nature of the statutory scheme underlying Apple's liability is another relevant distinction that this Court has not previously confronted, and which was not addressed by the panel but instead only the concurrence in

a stay of the mandate. As Judge Smith explained, statutes such as California's Unfair Competition Law protect fundamentally public interests in fair and competitive markets. Injunctive relief that protects competition in such cases inevitably will have consequences beyond the particular parties to the litigation. That is obviously not the claim that the Constitution "must bend to the policy goals of the antitrust laws." *Contra* Pet. 18. Rather, competition laws date to the nation's founding, and any interpretation of Article III and due process that would severely limit their historical remedial scope is necessarily suspect.

In these distinct circumstances, no principle supports the conclusion that the federal courts lack the Article III power to issue this injunction against Apple, which is a named party defendant. And the Constitution is not a license for Apple to continue to violate the identical state law until all the developers go through the expensive but inevitable exercise of securing a judgment specific to them.

Apple's argument under the Due Process Clause is, if anything, even weaker. Apple invokes the principle that a court may only *bind* the parties to the litigation. Pet. 12-13 (citing *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). But of course, nothing in this case contravenes that principle. The judgment in this case binds only the named parties: Apple and Epic. Nothing about the injunction purports to require a non-party developer to do anything. It is defendant Apple that may not enforce the anti-steering rules.

Apple's argument that the developers were not given a chance to opt-out of the injunction (Pet. 17) is thus nonsensical. And Apple is notably unable to identify any serious reason any developer would want Apple's

anti-steering rules enforced. The rules simply prohibit *telling* consumers about *permissible*, less expensive, alternative ways to purchase goods that the developers have themselves provided. The developers are perfectly free, for example, to continue not to use alternative transaction platforms or provide this information. The question is whether Apple can *forbid* them from providing consumers with truthful information that the developers would otherwise provide.

III. The Scope of this State Law Injunction Presents No Important Federal Law Question, Including with Respect to "Nationwide Injunctions."

Apple does not seriously argue that cases like this one raise an important and recurring question requiring this Court's attention. Indeed, it does not identify *any* cases presenting a similar factual pattern, injunction, or appellate ruling—much less a ruling that conflicts with the Ninth Circuit's decision.

Instead, Apple, without either explanation or logical support, attempts to tie this case to the current legal zeitgeist, in which there is considerable interest in the propriety of "nationwide injunctions." Indeed, Apple's Petition is strewn with unexplained references to "nationwide injunctions," sometimes paired with the purposefully ambiguous "universal injunction." *E.g.*, Pet. 3, 8, 10, 14, 16. Apple did not argue in the circuit court that the injunction should not be applied nationally. And the Ninth Circuit said nothing about that issue.[3]

3. Apple unsuccessfully argued in the district court that the injunction violated the Commerce Clause. App. B at 374a-76a. But it did not renew that argument in the Ninth Circuit or in this Court.

No doubt, that is because this case raises no issue regarding the geographic scope of the relief. Developers sell their apps throughout the country. Apple uniformly enforces the anti-steering rules everywhere in the United States. No matter whether the injunction barred the rules' application to Epic, to Epic's affiliates, to developers with apps in Epic's store, or to all developers, it would still apply "nationwide."

The propriety of nationwide injunctions arises in very different cases. In those cases, the plaintiff has a geographically delimited interest in the case. For example, a single individual or a single state may challenge a governmental policy. But it nonetheless secures an injunction—such as a prohibition against the policy's enforcement—throughout the country. The propriety of such an injunction may be an interesting question, but it is not one remotely presented by this case.

Finally, it is perfectly appropriate that the judgment rest on California law. As Apple often proudly stresses, its operations are based in that state and its products are designed there. And, indeed, Apple's developer agreement containing the challenged anti-steering provision is, by its terms, governed by California law. See Appendix B at 375a. If by contrast a court held that Apple's relationship with every developer were governed by the law of fifty different states (depending on the residence of the iPhone's owner), Apple would inevitably (and correctly) complain that such a regime was totally unworkable.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

Thomas C. Goldstein
Counsel of Record
4323 Hawthorne Street, NW
Washington, DC 20016
(202) 674-7594
tom@tomgoldstein.net

Counsel for Respondent