No. 25A1213

IN THE
Supreme Court of the United States

APPLE INC.,

Applicant,

v.

EPIC GAMES, INC.,

Respondent.

RESPONSE TO APPLICATION FOR STAY PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

GARY A. BORNSTEIN
Counsel of Record
YONATAN EVEN
LAUREN A. MOSKOWITZ
MICHAEL J. ZAKEN
M. BRENT BYARS
CRAVATH, SWAINE & MOORE LLP
Two Manhattan West
375 Ninth Avenue
New York, NY 10001
(212) 474-1000
gbornstein@cravath.com

PAUL J. RIEHLE
FAEGRE DRINKER BIDDLE & REATH LLP
Four Embarcadero Center
San Francisco, CA 94111
(415) 591-7500

KEVIN RUSSELL
DANIEL WOOFTER
RUSSELL & WOOFTER LLC
1701 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006
(202) 240-8433

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Counsel for Respondent

IDENTITY OF PARTIES

Applicant is Apple Inc. ("Apple"). Respondent is Epic Games, Inc. ("Epic").

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Epic states that it has no parent corporation and that each of Tencent Holdings Limited and The Walt Disney Company owns more than 10% of Epic stock.

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INTRODUCTION

For well over a decade, Apple has been suppressing competition to its in-app payment solution by prohibiting developers from steering their users to cheaper and better alternatives. In 2021, the district court found that conduct unlawful and ordered Apple to stop. App'x 14a-15a. The Ninth Circuit affirmed liability and the resulting Injunction, *Epic Games, Inc. v. Apple Inc.* ("*Apple I*"), 67 F.4th 946 (9th Cir. 2023) (at App'x 139a-229a), the full circuit denied rehearing en banc, *Apple I*, No. 21-16506, Dkts. 224, 246, and this Court denied certiorari, 144 S. Ct. 681-82 (2024).

Apple responded with evasion and defiance. It retained its prohibition on certain forms of steering that the Injunction required it to permit, and even as to the steering links it nominally allowed, it implemented multiple measures intended to prevent those links from being used. Among other things, it imposed a new fee on steered transactions set so high that Apple knew—and intended—that it would make steering financially infeasible. App'x 16a. Apple's plan worked. When called to account, Apple could not identify a single developer that implemented steering. App'x 31a. And when ordered to explain how it arrived at its fee, Apple "outright lied" to the district court about what it had done. App'x 60a. After extensive hearings, the district court held Apple in civil contempt, finding that it violated both the letter and the spirit of the Injunction in myriad ways. *Id.* The court then entered a remedial order that removed the multitude of frictions Apple imposed on steering and imposed a permanent ban on any steering-targeted commission. *Id.* The Ninth Circuit affirmed the contempt finding and the remedial order, with the exception of the district court's perpetual ban on commissions, which the Ninth Circuit remanded for further proceedings. *See* App'x 30a-36a, 41a-42a. After the full court denied Apple's petition for rehearing, C.A. Dkt. 184, the panel initially granted Apple's request to stay the mandate without awaiting Epic's response, but then—with the benefit of Epic's position—denied Apple's request for a stay, App'x 1a.

Apple's stay request to this Court should likewise be denied. There is no irreparable harm from participating in remand proceedings while seeking certiorari. If that were a cognizable form of irreparable harm, this Court would be staying hundreds of decisions each year. *See, e.g.*, *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 746 (2023) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."). Apple's harm claim is particularly weak here, because as the Ninth Circuit explained, even if this Court "agrees with Apple's arguments, there would still be further proceedings on remand, particularly on the question of commission, and those proceedings are likely to look similar, if not the same, regardless of certiorari." App'x 3a. Apple says this case is unique because absent a stay, Apple will enter the remand proceedings with the "taint" of having been found a contemnor. But this Court regularly denies stays in interlocutory appeals with the result that the applicant must undergo further proceedings after having been found in violation of a court order, statutory obligation, or even criminal law. There is no reason to think that in this case, Apple faces some special risk of unfair treatment.

In addition to failing to show irreparable harm, Apple has not shown any prospect of certiorari, much less reversal. This Court has already denied certiorari on both of the questions Apple presents, including one instance in this very case. *See* App'x 2a-3a. And this case is a poor vehicle to re-examine either. Contrary to Apple's repeated representations in its application, the Ninth Circuit held that Apple's commission violated the *letter* of the Injunction, not just its spirit. *See* App'x 30a. Accordingly, Apple's lengthy complaints about reliance on the spirit of an injunction are a red herring, having nothing at all to do with the only issue on which the Ninth Circuit remanded for further proceedings. Epic will respond to Apple's merits arguments more completely in its opposition to certiorari.

Apple's willful contempt has successfully delayed the restoration of competition by more than two years, allowing it to reap billions of dollars in what the Ninth Circuit previously affirmed were supracompetitive fees. *See Apple I*, App'x 186a. Full relief will not be forthcoming until the remand proceedings are complete because developers are understandably reluctant to make the investments needed to implement steering until the district court decides what fees Apple can impose on steered transactions. There is no reason why those remand proceedings should not begin while this Court considers Apple's petition.

The Court should therefore deny Apple's stay request. But the Court should accept Apple's request to treat Apple's application as a petition for certiorari and consider that petition after receiving Epic's opposition, which Epic will file within 30 days, providing adequate time to reach a decision on certiorari before the end of the Term.

STATEMENT

I. Factual Background

A. Apple's Original Illegal Conduct And The 2021 Injunction.

Apple operates the only app store available to U.S. iPhone users and requires all third-party apps to use Apple's own in-app payment ("IAP") system for digital purchases. For each digital purchase, Apple charges a "supracompetitive" commission—typically 30%—"not tied to the value of its intellectual property" or any services it provides developers. App'x 60a. For years, Apple protected its ability to extract those extraordinary fees by prohibiting developers from informing users that they could buy the same digital content more cheaply outside the app, from the developer's own website or competing app stores, such as respondent's Epic Games Store. App'x 149a-150a.[1]

The district court found that Apple's conduct constituted an "incipient violation of antitrust law by preventing informed choice among users of the iOS platform" and violated California law by "preventing substitution among platforms for transactions." *See* App'x 63a (quotation marks omitted). The court issued an

[1] In the United States, Epic wears three hats. It is a developer of apps, including apps it distributes on the App Store, such as the immensely popular game *Fortnite*. Epic also runs the Epic Games Store, through which it distributes its apps and apps from third parties on personal computers and other platforms. And Epic also provides a payment processing solution that competes with Apple's IAP system. App'x 13a-14a, 150a-152a.

Injunction barring Apple from "prohibiting developers from (i) including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms" other than Apple's in-app purchase system. App'x 230a.

The Ninth Circuit affirmed liability and the resulting Injunction. On appeal, Apple had contested the scope of the Injunction by claiming that "Epic was not entitled to obtain 'relief' for anyone other than Epic." Principal and Response Brief for Apple, *Apple I*, No. 21-16506, Dkt. 80 at 109-111. The court of appeals agreed with Apple that under *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), "injunctive relief must be no 'more burdensome to the defendant than necessary to provide complete relief to the plaintiff.'" App'x 221a-222a. Applying that standard, the court rejected Apple's argument on the facts, finding that a more limited injunction "would fail to address the full harm caused by the anti-steering provision," *Apple I*, App'x 215a-223a. No judge called for a vote on Apple's subsequent petition for rehearing en banc. *Apple I*, No. 21-16506, Dkts. 224, 246. Apple then petitioned for certiorari, arguing that the Ninth Circuit had failed to find that the scope of the remedy was necessary to provide Epic complete relief. *See* Pet. 10, No. 23-344 (U.S. Sept. 28, 2023). This Court denied the petition without dissent. *See* 144 S. Ct. 681 (2024).

B. Apple's Scheme To Evade The Injunction And Cover-Up.

At Apple's request, the Injunction was stayed for the duration of the appeal process—well over two years. *See* App'x 66a n.4. Once the Injunction finally went into effect, instead of complying, Apple devised a scheme to defy the Injunction and mislead the district court about its actions.

Despite the Injunction's requirement that Apple allow buttons and other calls to action, Apple maintained an outright prohibition on any button-like graphic and on any other call to action except a link. App'x 13a, 89a, 120a. And as for links, Apple implemented multiple measures intended to make them unusable. App'x 35a (describing a series of restrictions that "significantly reduce[d] developers' ability to steer consumers to any competitive, favorable alternatives" (quoting App'x 119a)). For example, Apple prohibited developers from placing links anywhere in the in-app purchase flow, thereby shunting the links to parts of the app where they were unlikely to be found. App'x 34a, 119a. It restricted the language developers could use for steering to a handful of Apple-approved templates. App'x 34a-35a, 119a-120a. When users nonetheless managed to find a link, Apple erected full-screen "scare screen[s]" designed to make steering appear dangerous and deter consumers from completing purchases. App'x 34a-35a; *see also* App'x 93a-97a, 119a-120a. And although Apple allows developers selling physical goods to use "dynamic URLs"—which streamline purchases by passing information like the user's name and account information from the app to the outside website where the purchase will be executed—Apple prohibited developers selling digital goods in competition with IAP from doing so. App'x 40a n.7, 119a.

On top of all that, Apple imposed the commission on which it focuses in its application: a new 27% commission on steered transactions that was deliberately "reverse engineer[ed]" to render steering "economically non-viable" by ensuring that "every linked-out transaction [would be] more expensive to a developer than an IAP transaction at 30% commission." App'x 80a, 117a, 118a, 121a; *see also* App'x 18a-19a.

II. Procedural Background

When Apple disclosed its new restrictions and fees, Epic filed a motion to enforce the Injunction. Months of litigation followed during which Apple continued to charge its supracompetitive fees on IAP and no developer implemented steering to competitor sites. App'x 31a. The district court eventually found Apple in contempt and the Ninth Circuit affirmed.

1. After extensive discovery and lengthy evidentiary hearings, the district court issued an 80-page decision on April 30, 2025, finding that Apple had used its new set of rules to defeat the Injunction rather than comply. App'x 59a-138a. At "every step," the court found, "Apple considered whether its actions would comply, and at every step Apple chose to maintain its anticompetitive revenue stream over compliance." App'x 117a. Apple thus "*willfully* chose to ignore the Injunction, *willfully* chose to create and impose another supracompetitive rate and new restrictions, and thus *willfully* violated the injunction." App'x 116a-117a.

Apple tried to defend its restrictions as necessary to protect consumers' privacy and security, but the district court found that these claims were "pretextual" and, in some respects, "outright misrepresentations to the Court." App'x 88a-89a. Apple further tried to claim that its 27% commission was the product of an objective, outside analysis but the court found the report was "entirely manufactured" for litigation and a "sham," reinforced by "outright lies" under oath by Apple's Vice President of Finance. App'x 27a, 82a-83a.[2] The court further found that Apple had "hid its decision-making process from the Court," App'x 72a, interposing privilege claims over more than 57,000 documents that required the appointment of special masters and months of delay before Apple eventually withdrew the majority of its objections and the court rejected many of the rest. *See* App'x 70a-71a & nn.7-9.

The court then turned to the remedy. Apple took the position that the court had no authority to limit Apple's commission *at all* and made the strategic choice not to propose any lesser commission. Confronted with Apple's all-or-nothing approach, the district court enjoined Apple from charging any commission on steered purchases. *See* App'x 133a. The court likewise enjoined the remaining practices it had found to be unlawful violations and evasions of the text of the original order. App'x 133a-134a.

2. After denying Apple's request for a partial stay pending appeal, the Ninth Circuit affirmed the contempt finding and substantially affirmed the district court's remedial order. *See* App'x 13a, 21a-22a, 44a-46a. Several features of the panel's decision bear directly on the questions Apple now presents to this Court.

First, the panel held that Apple's 27% commission violated the *text* of the Injunction. The Injunction barred Apple from "prohibiting" steering, *see* App'x 230a. Accordingly, the parties' dispute "turn[ed] on the meaning of the key word 'prohibit,'

[2] The court referred the executive and Apple to the local U.S. Attorney for him to consider criminal contempt proceedings. App'x 136a.

which can be interpreted to mean '[t]o prevent, preclude, or severely hinder.'" App'x 30a (quoting *Prohibit*, Black's Law Dictionary (12th ed. 2024)). Applying that definition, the panel held that "charging a 27% commission ha[d] a prohibitive effect, in violation of the Injunction," because "[o]nce Apple's commission on those transactions was large enough, no rational developer would offer them." App'x 30a-31a; *see id.* (noting that "'the power to tax involves the power to destroy'" (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 317-18 (1819)). "The Injunction prohibits that kind of conduct." App'x 31a.

Second, the panel held that two of Apple's link design restrictions—the prohibition against traditional buttons and the limitation of developers to five fixed templates—violated "the strict letter of the Injunction." App'x 33a. The remaining design restrictions independently violated the Injunction's "implicit command to refrain from action designed to defeat it." *Id.* (quoting *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 413 (1960) (Frankfurter, J., concurring)).

Third, the panel rejected Apple's challenges to the scope of the Injunction. The court noted that its decision in the first appeal "previously determined that the Injunction is consistent with *CASA*'s underlying principle because its 'scope is tied to Epic's injuries' as a developer and games distributor, not to the other developers' injuries." App'x 55a (quoting *Apple I*, App'x 223a; citing *Trump v. CASA, Inc.*, 606 U.S. 831, 1003 (2025)). "To the extent that Apple is challenging the original Injunction, the Injunction does nothing more than provide complete relief to Epic, and this court has already considered, and rejected, arguments to the contrary." *Id.* An Injunction limited to Epic "would fail to address the full harm caused by the anti-steering provision." *Id.* (quoting *Apple I*, App'x 223a). The panel further held that "the complete relief here is molded to 'the necessities of th[is] particular case,'" which "centers on anticompetitive conduct by Apple and aims to restore the information to consumers that is necessary to foster competition." App'x 56a (quoting *CASA*, 606 U.S. at 854; alteration in original).

Fourth, the Ninth Circuit reversed only the district court's perpetual commission ban, agreeing with Apple that, as written, it functioned "more like a punitive criminal contempt sanction than a civil contempt sanction or modification of the Injunction." *See* App'x 41a. But the panel was careful to preserve the district court's full authority on remand, noting that the district court could choose to enter "either a purgeable civil contempt sanction or properly tailored modification of the Injunction." App'x 44a.

3. Apple sought rehearing and rehearing en banc, but both were denied with no judge calling for a vote. C.A. Dkt. 184.1. Apple then sought a stay of the mandate. *Id.*, Dkt. 187.1. The motion was quickly granted, before Epic had an opportunity to respond. *Id.*, Dkt. 188.1 (order granting stay one business day after request). Later that same day, Epic moved for reconsideration. *See id.*, Dkt. 189.1. After full briefing, the panel reversed itself and denied the stay. App'x 1a-3a.

The panel agreed with Epic that Apple had "not raised a substantial question for review that raises a 'reasonable probability' that four justices will vote in favor of granting certiorari, nor a 'significant possibility of reversal' of [its] decision." App'x 2a (quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982)). The panel observed that this "Court previously denied certiorari on Apple's challenges to the injunction's scope"—the same substantive arguments Apple now marshals under this Court's decision in *Trump v. CASA*—and unanimously rejected "Apple's challenges to the injunction here considering *CASA*." *Id.* The panel further observed that this "Court has also denied certiorari on the question whether courts may properly consider the 'spirit' of an injunction when imposing sanctions in contempt proceedings." *Id.* (citing *Sea Shepherd Conserv. Soc'y v. Inst. of Cetacean Rsch.*, 576 U.S. 1005 (2015)).

The panel separately concluded that Apple had "failed to show good cause" for a stay because "Apple has not demonstrated that any proceedings on remand will cause it irreparable harm if our decision is not stayed," as "those proceedings are likely to look similar, if not the same, regardless of certiorari." App'x 3a. The mandate was thus ordered to "issue in its usual course." App'x 1a.

Apple's application to this Court for a stay followed.

ARGUMENT

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The burden of satisfying these criteria is on the applicant, and the "judgment of the lower court, which has considered the matter at length and close at hand, and has found against the applicant both on the merits and on the need for a stay is presumptively correct." *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). Because Apple fails to rebut that presumption, or satisfy any of the requirements for a stay, its application should be denied.

I. Apple Cannot Show Irreparable Harm.

As explained below, neither of the questions Apple raises warrants further review, and even if certiorari were granted, there is no genuine prospect that this Court would reverse. But this Court need not reach those questions in determining whether to grant a stay because Apple so plainly fails to establish that it will suffer any irreparable harm.

Apple emphasizes that it seeks a stay only of the remand to consider Apple's commission. Application 33. Accordingly, the question is whether those remand proceedings will cause Apple irreparable harm. As the Ninth Circuit correctly found, "Apple has not demonstrated that any proceedings on remand will cause it irreparable harm if our decision is not stayed." App'x 3a.

1. The mere fact that Apple will be subject to remand proceedings while it seeks this Court's review of the Ninth Circuit's decision is unremarkable and is no basis for a stay. That happens in virtually every case in which a party seeks this Court's review of an interlocutory order. Yet this Court never grants a stay on

that basis alone. *See, e.g.*, *Bagley v. Byrd*, 534 U.S. 1301, 1302 (2001) (Stevens, J., in chambers) (denying stay where State failed "to demonstrate either that the hearing will cause any irreparable harm to the State of Ohio or that it will affect this Court's jurisdiction to act on [a forthcoming] certiorari petition"); *Nat'l Broadcasting Co. v. Niemi*, 434 U.S. 1354, 1356-57 (1978) (Rehnquist, J., in chambers) (refusing to grant stay of civil trial pending certiorari because no irreparable injury arising from a "requirement to defend an action" and then "prosecute [the] constitutional claims through the normal appellate process to this Court"); *Finance Comm. to Re-Elect the President v. Waddy*, No. 01-461, 1972 WL 123128, at *1 (U.S. Oct. 31, 1972) (Burger, C.J., in chambers) (denying motion to "stay[] commencement of trial" in civil action because the "injury to the petitioners can arise only from an adverse judgment"). To the contrary, this Court has recently and repeatedly held that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 746 (2023) (quoting *FTC v. Standard Oil of Calif.*, 449 U.S. 232, 244 (1980), itself quoting *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974)). For that reason, "courts applying" the traditional test for granting a stay "often do not consider litigation-related burdens . . . to constitute irreparable harm." *Coinbase*, 599 U.S. at 746.

In this case, Apple cannot even show that staying the remand proceedings would avoid significant litigation burdens. As the Ninth Circuit explained, even if this Court "agrees with Apple's arguments, there would still be further proceedings on remand, particularly on the question of commission, and those proceedings are likely to look similar, if not the same, regardless of certiorari." App'x 3a. For example, even if this Court accepted Apple's objections to the scope of the Injunction, a remand would still be required to decide what commission may be charged to whatever group of developers remained protected. Nor would the number or identity of those developers make any material difference to the district court's deliberations. *See* App'x 45a-46a (describing factors to consider in approving commission, none of which turns on the number or identity of the protected developers).[3] Apple suggests that remand proceedings would look "far different" if the Court accepted Apple's *CASA* arguments. Application 40. But it does not explain why. Moreover, this Court regularly denies stays even when it is clear that success in this Court would mean that the remand proceedings were entirely for naught. The mere inconvenience of having to participate in potentially unnecessary litigation while certiorari is pending is not a cognizable form of irreparable harm.

For that reason, it would make no difference even if Apple were right that prevailing on its "spirit of the injunction" objection would mean there was "no justification for *any* 'remand proceeding.'" Application 39. But Apple clearly is not right. Even if this Court accepted Apple's "spirit of the injunction" arguments, a remand on commissions would be required because, despite Apple's attempts to argue otherwise, the Ninth Circuit clearly held that Apple's commissions violated the *letter*

[3] In seeking a stay below, Apple briefly asserted that the scope of the Injunction could be important because what counts as a "prohibitive" commission could vary by developer. C.A. Dkt. 190.1 (Apple Opp. to Motion to Reconsider Order Staying the Mandate) at 6. The Ninth Circuit was unpersuaded, for good reason: Apple has never individualized commissions for specific developers, its motion made no effort to suggest that such individualization was feasible, and the Ninth Circuit's remand order does not contemplate such a remedy. App'x 57a-58a.

of the Injunction, not simply its spirit. In the relevant section of the opinion, the panel began with the Injunction's language, noting that under its provisions "Apple could not 'prohibit[] developers from'" steering. App'x 30a (quoting Injunction, App'x 230a). The Ninth Circuit then explained that "the parties' dispute turns on the meaning of the key word 'prohibit,' which can be interpreted to mean '[t]o prevent, preclude, or severely hinder.'" *Id.* (quoting *Prohibit*, Black's Law Dictionary (12th ed. 2024)). Turning to the commission, the court explained that under this definition, it was necessary to assess whether Apple's "commission has a prohibitive effect, *in violation of the Injunction*." *Id.* (emphasis added). The court "agree[d] with the district court that it does." *Id.* It explained that once "Apple's commission on those [linked-out] transactions was large enough, no rational developer would offer them. *The Injunction prohibits* that kind of conduct." App'x 31a (emphasis added). And a commission with a "prohibitive effect" falls easily within the dictionary definition of "prohibit" given its tendency to "severely hinder" steering. Apple's link-out commission was thus "in violation of the Injunction," not merely its spirit. App'x 30a. The section of the opinion affirming the contempt finding does not even mention the "spirit of the injunction" or the relevant caselaw on that theory of contempt, such as the Ninth Circuit's decision in *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 774 F.3d 935 (9th Cir. 2014). *Cf.* App'x 33a-35a (finding other restrictions not at issue in the remand violated the "spirit" of the Injunction).

Apple's counterarguments fail. It points out that the Injunction does not expressly mention commissions. Application 21. But as the panel explained, the

Injunction's text bars Apple from "prohibiting" steering by *any* means, which includes imposing a fee on steering that is so high that "no rational developer would" undertake it. App'x 31a.[4] Apple also points to a footnote in the remedies section of the opinion in which the panel rejected the possibility that the district court could modify the Injunction on remand to prohibit any fees at all. *See* Application 21 (citing App'x 44a n.9). In that context, the court observed that "the UCL violation . . . does not require that *all* commissions and *all* fees be prohibited" because "the spirit of the Injunction contemplates the *prohibitive* commissions, and the text of the Injunction does not address commissions at all." App'x 44a n.9. All that means is that neither the text nor the spirit of the Injunction prohibits Apple from charging *some* commission. But that is entirely consistent with the Ninth Circuit's independent finding that Apple's commission violated the text of the Injunction by prohibiting steering.

That is not the end of the obstacles for Apple to get a stay. Even if this Court ultimately vacated the contempt finding, the Ninth Circuit's remand instructions allow the district court to consider whether to modify or clarify the Injunction in light of Apple's conduct. App'x 45a. The power to modify an injunction in light of changed circumstances is at least as broad as the court's contempt authority and does not depend on any finding of contempt. *See Brown v. Plata*, 563

[4] Apple claims the panel "overlooked the context in which that word ['prohibit'] was used." Application 21. It did not. Apple outright prohibited the use of actual buttons and "other calls to action" and it "severely hinder[ed]" developers from including "external links . . . that direct customers to [external] purchasing mechanisms" by making that choice prohibitively expensive. App'x 30a (quotation marks omitted).

U.S. 493, 542 (2011) ("The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible." (citation omitted)); *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942) (district court may modify injunction to "effectuate . . . the basic purpose of the original . . . decree"). The district court thus would still have the power to modify the Injunction on remand to prevent conduct that completely defangs it, even if that conduct is determined not to be contemptuous.[5]

2. Apple gamely tries to argue that being subject to remand proceedings while certiorari is pending will be unusually prejudicial in this case for a handful of reasons. But none comes close to sustaining its burden of showing irreparable harm.

a. Apple claims that without a stay it will be required to litigate under "the highly prejudicial taint of being (improperly) found to have acted in contempt of the court's initial order," which may "color[]" the proceeding. Application 4. That fuzzy speculation fails many times over. Apple carefully avoids articulating any legal significance that it believes the contempt finding would have on remand and grounds its argument solely on mood and "color[]." But the district court has been charged

[5] Apple says that if the contempt finding were overturned, the district court "would be under no obligation to consider a modification of the injunction." Application 39-40. But the Ninth Circuit properly understood that Apple's thwarting of the Injunction required altering its terms to make it effective. *See* App'x 30a-31a, 44a. And even if the Ninth Circuit did not order the district court to consider modification, it would be required to consider Epic's inevitable modification request if the contempt finding were overturned. Moreover, Apple will have ample notice and opportunity to be heard, *see* App'x 51a-52a, which is all that is required. *See, e.g.*, *Chrysler*, 316 U.S. at 561-62 (affirming modification to injunction after notice and evidentiary hearing). Nor would any change to the Injunction be impermissibly "retroactive[]," *contra* Application 24, as the new limitations would apply only to Apple's post-modification practices.

with making a limited determination on remand. *See* App'x 45a-46a (describing factors to consider, such as Apple's "necessary costs" in facilitating linked-out transactions and the value of Apple's intellectual property). There is no basis for Apple's suggestion that the district court's assessment of the relevant factors will be "colored" by its belief that Apple violated the prior Injunction. The whole premise of the remand is that the restrictions on Apple's fees cannot be designed to punish Apple's misconduct because that would be a form of impermissible criminal contempt. *See* App'x 41a. Apple's suggestion that the district court will not be able to follow that instruction has no basis and is disrespectful to the trial judge, who has repeatedly ruled for and against both parties at different stages of this nearly six-year-old case. *See* App'x 14a; *cf.* App'x 57a (Ninth Circuit rejecting Apple's request to reassign case to different judge, explaining that "Apple seeks reassignment based solely on the district court's rejection of its arguments and its determination that Apple willfully violated the court's order").[6]

Apple argues that an appeal would be inadequate because "if the district court orders a new commission rate before this Court can decide whether remand proceedings are warranted, the rate will be difficult to unwind and will reshape Apple's business." Application 35. Not so. To start, it is highly unlikely that the district court will complete the fact-intensive remand before this Court can rule on

[6] Apple also ignores that it will face any remand as a proven contemnor even if it prevails in this Court. The Ninth Circuit affirmed that several of Apple's design restrictions violated the unambiguous text of the injunction, *see* App'x 33a-34a, which are fact-bound findings Apple does not ask this Court to review. Nor does Apple challenge the district court's findings that Apple lied to the court. *See* App'x 60a, 83a.

Apple's petition. *Cf. id.* 37-38 (Apple acknowledging need for discovery on remand). Moreover, Apple will need to "unwind" the change in its commissions whether this Court grants a stay or not—as Apple emphasizes, it is presently enjoined from charging *any* commission. *Id.* 33.

b. Apple also professes concern about the potential reaction of international regulators to the remand decision. Application 36. That concern piles speculation on top of speculation.[7] Judicial proceedings in the U.S. should not be delayed by speculation over how those proceedings might or might not influence foreign regulators. Other sovereign governments are entitled to make their own regulatory decisions under their own laws and should be presumed capable of doing so. The proper concern of American courts is ensuring compliance with U.S. law, which has already been too long delayed in this case.

c. Apple complains that it "may also be forced to divulge valuable information" in the remand proceedings. Application 37. That is true of a great many cases in which a remand is allowed to proceed while this Court considers a certiorari petition. It also ignores that the district court has put in place protective orders designed to address precisely that concern. *See* Dist. Ct. Dkt. 274. Apple provides no basis to believe that those measures are inadequate to protect any legitimate interest it has in protecting its records. And Apple remains free to ask for additional protections during the remand proceedings if needed. Apple's speculation that the

[7] Purportedly in support of this speculation, Apple quotes an article in which an Australian official supposedly said that "these proceedings" will affect how Apple distributes apps in Australia. Application 36 n.3. But the "proceedings" referred to by that official (as the article makes clear) refer to ongoing litigation *in Australia*, not to the remand at issue here.

district court "may" conduct inappropriate "inquiries" into Apple's decision-making process on remand, Application 39, is also no basis for a stay. If that were to come to pass, Apple can seek relief from the Ninth Circuit or this Court at that time. *See id.* (citing *Ohio v. EPA*, 603 U.S. 279, 291 (2024)). Apple's suggestion that the prior proceeding involved such supposedly inappropriate "inquiries" likewise fails; every court to have looked at the issue found that Apple misused privilege to improperly shield discoverable information, and Apple chose not to challenge these findings before this Court.

II. The Balance Of Equities Strongly Favors Denying A Stay.

Even if Apple could show some cognizable injury, that harm is greatly outweighed by the harm a stay will impose on Epic and the public. *See Hollingsworth*, 558 U.S. at 190.

The panel affirmed in the last appeal that Apple's unlawful restrictions on steering were causing Epic irreparable injury in its roles as the provider of an app store and a payment solution. *See Apple I*, App'x 222a. *Three years later*, Epic continues to suffer the same injuries while developers who would otherwise be open to using Epic's competing services await final word on what commissions Apple can charge. Industry observers predicted as much within days of the panel's decision: Developers would "likely await the next phase of proceedings where that [steering] fee structure is hammered out," and "[c]onsumers are unlikely to see immediate change." Apple Magazine, *Apple Can Charge Commission on External Payment Links After Appeals Court Modifies Epic Ruling* (Dec. 18, 2025), http://applemagazine.com/apple-app-store-external-payment-fees/. That prediction has proven correct. Thus it makes no difference that Apple is not charging commissions on links while it seeks certiorari: The uncertainty about the rates Apple will ultimately be permitted to charge after remand is now doing the work that Apple's 27% commission was doing before, *i.e.*, it is preventing developers from using links. The status quo Apple seeks to preserve does not avoid harm—it *is* the harm—which is why Apple is fighting what would otherwise be a peculiar battle to delay proceedings that will allow it to charge a commission.

The delay in restoring competition also continues to prop up Apple's supracompetitive commissions on sales through Apple's own in-app payment solution. That inflicts a continuing injury on Epic in its capacity as a developer with millions of users who make in-app purchases using IAP—supracompetitive commissions that exist only because Apple has insulated IAP from competition from not just Epic, but from every competing payment provider that could be used by developers offering digital items for use in-app. The district court so found at the merits stage: Apple's anti-steering conduct prevented competition from "driving the commission rate" and allowed Apple to extract "excessive operating margins." *See* App'x 62a (quoting *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1054 (N.D. Cal. 2021)). The Injunction, as the panel later held, was thus "molded to 'the necessities of th[is] particular case,'" centered on Apple's "anticompetitive conduct" and "aim[ed] to restore the information to consumers that is necessary to foster competition." App'x 56a (first modification in original). Because consumers ultimately bear much of the cost of Apple's continued supracompetitive pricing, a stay is also contrary to the public interest.

III. This Court Is Unlikely To Grant Certiorari Or Reverse.

The Ninth Circuit also refused to stay the mandate because "Apple has not raised a substantial question for review that raises a 'reasonable probability' that four justices will vote in favor of granting certiorari, nor a 'significant possibility of reversal' of our decision." App'x 2a. That is correct as well. [8]

A. "Spirit of the Injunction"

Apple asks this Court to decide whether civil contempt can be premised on a violation of the "spirit" of an injunction. Application 14. That question provides no basis for a stay. The Ninth Circuit correctly pointed out that this Court has "denied certiorari on the question whether courts may properly consider the 'spirit' of an injunction when imposing sanctions in contempt proceedings." App'x 2a (citing *Sea Shepherd Conserv. Soc'y v. Inst. of Cetacean Rsch.*, 576 U.S. 1005 (2015)). Apple identifies no reason for the Court to change course.

Certiorari would be particularly unwarranted here because this case does not raise the abstract question of when a court can look to the spirit of an injunction in a contempt proceeding. As noted, Apple's commissions were found to violate the *letter* of the Injunction, and that is enough to dispense with Apple's argument. Moreover, when the Ninth Circuit affirmed that Apple *also* violated the

[8] Epic addresses the merits here solely in the context of responding to Apple's stay application. Epic filed this opposition one day after receiving Apple's application and intends to file a more complete opposition to certiorari, as discussed further below.

spirit of the Injunction with respect to commissions and certain design restrictions, the court did so on the ground that Apple *intentionally* attempted to *defeat* the decree through conduct not expressly enumerated therein. Apple did not inadvertently cross a line it was unaware of; rather, it purposefully took steps to nullify the Injunction's effect and then misled the district court about what it did. In that context, the Ninth Circuit affirmed the district court's authority to "look to the spirit of the injunction when a litigant applies a *dubiously literal interpretation* of the injunction, particularly where that interpretation is *designed to evade* the injunction's goals." App'x 23a (quoting *Apple II-Dist.Ct.*, App'x 115a) (emphases added). In other words, the court applied Justice Frankfurter's observation that the text of every injunction contains an "implicit command to refrain from action designed to defeat it." *See* App'x 33a (quoting *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 413 (1960) (Frankfurter, J., concurring)).

This Court applied that principle in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). There, the Court rejected the claim, which Apple repeats here, that "[c]ivil contempt is avoided . . . by showing that the specific plan adopted by [the defendant] was not enjoined" by the express text of an injunction. *Id.* at 192. The Court explained that it "does not lie in their mouths to say that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined." *Id.* "Such a rule would give tremendous impetus to the program of experimentation with disobedience of the law." *Id.* Instead, the Court held, when the contemnor "took a calculated risk when under the threat of contempt," and "where as here the aim is remedial and not punitive, there can be no complaint that the burden of any uncertainty in the decree is on [the defendant's] shoulders." *Id.* at 193; *see also Taggart v. Lorenzen*, 587 U.S. 554, 561-62 (2019) (citing *McComb* as an example of a case suggesting that "civil contempt sanctions may be warranted when a party acts in bad faith").

Following that precedent in this case, the Ninth Circuit properly held that Apple's conduct—internally modeling the precise level of friction needed to prevent any viable alternative to its in-app purchasing system, then constructing pretextual justifications for imposing frictions that surpassed that level—not only violated the plain text of the Injunction ("prohibiting" steering by "severely hinder[ing]" the practice, *see* App'x 30a-31a) but also transgressed *McComb*'s anti-evasion principle. And even when it "assume[d] arguendo that Apple did not violate the strict letter of the Injunction" with some of its link design restrictions, the Ninth Circuit affirmed the contempt finding because Apple's actions were "designed to defeat" the Injunction. App'x 33a.[9]

In addition to failing to show any error in the Ninth Circuit's decision, "Apple does not convincingly argue that this case implicates a circuit split" on the scope of a court's contempt authority either. App'x 3a. Apple cites no case from any other circuit accepting comparable intentional evasion of an injunction or calling into

[9] Apple argues that contempt cannot be "sustained on account of Apple's supposed 'bad faith,'" the finding of which, it claims, was "driven by [the] improper focus on the 'spirit'" of the Injunction. Application 24-25. But the Ninth Circuit found that Apple's objections to the district court's consideration of its bad faith was waived. *See* App'x 25a. And it did not rely on that bad faith finding in affirming contempt. *See id*. 30a-36a. Moreover, the district court's finding of bad faith was driven principally by Apple's litigation misconduct, not by the court's belief that contempt may be based on violations of the spirit of an injunction. *See* App'x 26a-28a.

question *McComb*'s anti-circumvention principle. Apple's alleged circuit conflict rests instead on passages in factually distinguishable cases requiring that a contemnor's conduct violate "a clear and unambiguous" order of the court based on the "four corners" of the decree. Application 16, 20-22 (citations omitted). But that formulation is in harmony with the anti-evasion principle, which both this Court and the Ninth Circuit have embraced alongside the requirement that injunctions be sufficiently clear. *See, e.g.*, *Taggart*, 587 U.S. at 561-62 (acknowledging that "basic fairness require[s] that those enjoined receive explicit notice of what conduct is outlawed before being held in civil contempt" while also reaffirming *McComb*) (cleaned up); *Inst. of Cetacean Rsch. v. Sea Shepherd Conserv. Soc'y*, 774 F.3d at 953-54 (recognizing the "well-established rule that a 'vague' order may not be enforced" through civil contempt but also embracing *McComb*'s anti-circumvention rule).

Finally, this case presents an especially poor vehicle for deciding whether a party can ever be held in contempt for violating the spirit of an injunction. For one thing, the conduct for which the Ninth Circuit invoked the spirit of the Injunction also violated its letter by severely hindering the steering Apple was enjoined from prohibiting. *See* App'x 34a (restrictions on link-out placement had the "practical effect" of "prohibit[ing] linked-out purchases"); *id.* ("Apple designed the scare screen to prevent external purchases."); App'x 35a ("Apple designed the purchasing experience to make external links as hard to use as possible."); *see also* C.A. Dkt. 124.1 (Epic Answering Br.) at 25-27.

In addition, the only consequence of the contempt finding here was to enjoin the specific practices the district court found to be interfering with the Injunction's effective operation. Apple and amici have repeatedly acknowledged that district courts have the power to make such modifications even absent a finding of contempt. *See* C.A. Dkt. 59.1 (Apple Opening Br.) at 36 ("On remand, the district court can hold a proceeding to consider whether the injunction should be modified to prohibit Apple's existing commission."); C.A. Dkt. 80.1 (Amicus Br. of Prof. Bray *et al.*) at 13-14 (any error in holding Apple in contempt "does not mean that the court lacked the power to modify the injunction" because "[m]odification is always possible for injunctions") (citing, *e.g.*, Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 547 & n.81, 564-65, 583 (2016)). All that is required is a finding that the enjoined conduct was thwarting the purposes of the decree. *See, e.g.*, *Brown*, 563 U.S. at 542 ("The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible." (citation omitted)); *Chrysler Corp.*, 316 U.S. at 562 (when reviewing modification of decree, the "test to be applied . . . is whether the change served to effectuate or to thwart the basic purpose of the original . . . decree"). And while Apple has consistently argued that something akin to a full blown trial is required before an injunction may be so altered, the Ninth Circuit rejected that claim, *see* App'x 51a-52a (explaining that a defendant is entitled to "notice and an opportunity to be heard," which the district court provided). Apple does not propose to ask this Court to review that rejection, which in any event is entirely consistent with this Court's precedents. *See, e.g.*, *Chrysler Corp.*, 316 U.S. at 561-62 (affirming modification to injunction after notice and evidentiary hearing).

Accordingly, even if Apple persuaded this Court to hold that it could not be held in *contempt* for its conduct, the district court would be fully empowered to make the same changes to the Injunction pursuant to its modification authority. This Court is unlikely to grant certiorari in what amounts to nothing more than a dispute about labels.

B. Scope Of The Injunction

Apple also asks this Court to decide whether the Injunction in this particular case is appropriately tailored to Epic's injury. Application 14. But as the Ninth Circuit observed, this Court "previously denied certiorari on Apple's challenges to the injunction's scope" in the first appeal. App'x 2a (citing *Epic Games, Inc. v. Apple Inc.*, 144 S. Ct. 682 (2024)). There, Apple argued that the Injunction violated this Court's decisions holding that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Pet. 3, No. 23-344 (U.S. Sept. 28, 2023) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). The district court violated that rule, Apple argued, by extending relief beyond Epic and the "developers that distribute apps on Epic Games Store." *Id.* 10. Apple reprises the same argument here. *See* Application 29. The Court's "recent denial" of the same argument in the same case "demonstrates quite clearly the unlikelihood that four Justices would vote to grant review on this issue." *Packwood v.*

Senate Select Comm. on Ethics, 510 U.S. 1319, 1321 (1994) (Rehnquist, C.J., in chambers).

Nothing in this Court's subsequent decision in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), suggests the second try will be more successful. *CASA* reaffirmed the "complete relief" principle the Ninth Circuit applied in the last appeal, citing the same authority. *See CASA*, 606 U.S. at 851-53 (citing *Califano*, 442 U.S. at 702); *Apple I*, App'x 221a-223a (same). Apple does not identify any circuit conflict regarding this principle that is implicated by the decision below. Instead, it disputes only the Ninth Circuit's application of the settled complete relief rule to this particular litigation, a fact-bound objection this Court is unlikely to review as demonstrated by its denial of Apple's last petition raising the same basic objection.

Apple's objection to the Injunction is also meritless. The Ninth Circuit "agree[d] with Epic" that Apple's proposed limitation "would not facilitate the competition necessary to grant Epic complete relief." App'x 56a. Epic had explained that Apple requires Epic to make IAP available for users to purchase digital goods within apps, and Epic must pay Apple's IAP commission when users do so. *See* C.A. Dkt. 155 (Reply on Motion for Judicial Notice) at 2-3. And the evidence proved that the IAP commissions are supracompetitive because Apple's anti-steering measures had insulated IAP from competition. *Id.*; *see also Apple I*, App'x 218a; *Epic Games*, 559 F. Supp. 3d at 1054-57. The narrower injunction Apple belatedly proposes would leave that harm unremedied. The only way to fully redress Epic's injury as an app developer subjected to supracompetitive IAP commissions is to allow all developers (including large ones like Spotify and Microsoft) to steer to lower-priced out-of-app payment methods in order to generate the competitive pressure needed to discipline Apple's commissions. *See* App'x 56a; App'x 223a (Apple's anti-steering rules "increas[ed] the costs of Epic's subsidiaries' apps"); C.A. Dkt. 189.2 (Epic Opposition to Motion to Stay Mandate) at 15.

Apple is thus wrong to argue that Epic would get complete relief from an Injunction limited to developers who "seek to link out to the Epic Games Store." Application 28. Apple also failed to make that argument to the Ninth Circuit in the first appeal, and to the district court when it moved the district court for relief from the Injunction or when Epic moved the district court to enforce the Injunction. *See, e.g.*, Apple's Motion for Relief from the Judgment at 2, Dkt. 1018, No. 20-cv-5640-YGR (N.D. Cal. Sept. 30, 2024); Apple Principal and Response Br., Dkt. 80 at 111, Nos. 21-16506 & 21-16695 (9th Cir. Mar. 24, 2022) ("Any injunctive relief, therefore, must be limited 'to apply only to' Epic, the 'named plaintiff[].'" (citation omitted)). Instead, Apple raised the possibility of limiting the Injunction to those who link to the Epic Games Store for the first time in its *reply brief* to the Ninth Circuit in the present appeal. *Compare* C.A. Dkt. 59.1 (Apple Opening Br.) at 41 n.4 *and* C.A. Dkt. 108.1 (Apple's Rule 28(j) Letter), *with* C.A. Dkt. 148.1 (Apple Reply Br.) at 31-32. As the Ninth Circuit noted, "[w]hen a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter." App'x 47a (quoting *United States v. Nagra*, 147 F.3d 875, 882 (9th Cir. 1998)).[10] The

[10] Below, Apple did not dispute that it raised its present tailoring objection for the first time on reply, but insists that "Epic never made" the waiver argument. C.A. Dkt. 190.1 (Apple Opp. to

new argument was thus forfeit. And even if this Court has jurisdiction to address Apple's new position, it is unlikely to exercise its discretion to do so when Apple's maneuvering prevented the district court from addressing the request in the first instance and limited the briefing and argument on the issue before the court of appeals.

Apple tries to argue that the Ninth Circuit separately erred in creating an "antitrust exception" to *CASA*. Application 27. Again, Apple points to no circuit conflict over this question. More fundamentally, the panel created no such exception. Instead, it affirmed because it found that the Injunction complied with *CASA*'s framework. In the very passage Apple attacks, the panel distinguished this case from *CASA* not because of an antitrust exception, but because the *scope* of the Injunction was "molded to 'the necessities of th[is] particular case.'" App'x 56a (quoting *CASA*, 606 U.S. at 854). In other words, the panel explained, the Injunction "does nothing more than provide complete relief to Epic"—relief tied to Epic's own injuries "as a developer and games distributor, not to the other developers' injuries." App'x 55a (quoting *Apple I*, App'x 223a). That is *CASA*'s central test.[11]

Motion to Reconsider Order Staying the Mandate) at 3. But Apple never explained how Epic *could have* done so, given that Apple raised the argument for the first time in its reply brief.

[11] Nor is the fact that other developers settled their claims with Apple on different terms ground for refusing to prove Epic complete relief for its injuries. *Contra* Application 7. Nothing in *CASA* holds that Epic's remedy can be cabined by a settlement Epic is not party to, on terms Epic did not accept, addressing a harm Apple concedes that settlement did not redress.

IV. The Court Should Deny Apple's Request For Certiorari After Appropriate Briefing In Due Course.

Apple requests that "if this Court concludes that a stay is not warranted, it should treat this application as a petition for certiorari and grant review." Application 42. While Epic is not opposed to having Apple's stay papers treated as a petition for certiorari in order to expedite review of the petition, Epic strongly opposes Apple's attempt to force Epic to file its brief in opposition to that petition in the few days allowed to respond to a stay application. Apple has had more than four and a half months since the Ninth Circuit decision to prepare its filing. It would be extremely unfair, and disserve this Court, to require Epic to provide a complete defense to certiorari in just a few days.

Moreover, the need for expedition is a problem entirely of Apple's own making. It could have sought this Court's review immediately after the court of appeals' decision in December of last year, which would have allowed ample time to consider its petition in due course before the summer recess. Instead, it sought and received an extension of time to file a petition for rehearing until early March. Even after the Ninth Circuit denied that petition on March 30, 2026, C.A. Dkt. 184.1, Apple delayed seeking certiorari for more than a month while it pursued a stay of the mandate in the Ninth Circuit.

Nonetheless, Epic agrees that the Court should order Apple's application to be treated as a petition for certiorari and is willing to commit to respond to the petition within 30 days of its filing, without extensions (*i.e.*, by June 3, 2026).[12] That will allow this Court to rule on the petition before the summer recess.[13]

V. There Is No Need For An Administrative Stay.

There is no justification for an administrative stay. While Apple complains that it may be injured by the result of the remand proceedings, or perhaps certain discovery that may be required in the lead up to the hearing, it provides no basis to believe any of those harms will come to pass in the short time it will take this Court to resolve the pending application.

[12] To avoid any confusion, Epic respectfully requests that the Court issue an order directing that Apple's stay application be treated as a petition for certiorari, lest a simple denial of the stay request raise questions about whether Apple is entitled to file another petition at a later date and whether Epic should wait to file its opposition until an ordinary petition for certiorari is filed.

[13] The last distribution date for the June 25 conference is June 9.

CONCLUSION

For the foregoing reasons, the application should be denied.

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Respectfully submitted,

GARY A. BORNSTEIN
Counsel of Record
YONATAN EVEN
LAUREN A. MOSKOWITZ
MICHAEL J. ZAKEN
M. BRENT BYARS
CRAVATH, SWAINE & MOORE LLP
Two Manhattan West
375 Ninth Avenue
New York, NY 10001
(212) 474-1000
gbornstein@cravath.com

PAUL J. RIEHLE
FAEGRE DRINKER BIDDLE & REATH LLP
Four Embarcadero Center
San Francisco, CA 94111
(415) 591-7500

KEVIN RUSSELL
DANIEL WOOFTER
RUSSELL & WOOFTER LLC
1701 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006
(202) 240-8433

Counsel for Respondent