No. 25-1311

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

EPIC GAMES, INC.,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a court may hold a party in civil contempt for violating an injunction's "spirit" where the injunction is silent about the conduct on which contempt is based, as the Ninth Circuit holds; or instead, whether a court must ground a finding of civil contempt on the violation of an order whose words clearly and unambiguously proscribe the precise conduct at issue, as other circuits hold.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES
(*continued*)

Page(s)

RULES:

TABLE OF AUTHORITIES
(*continued*)

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation (WLF) is a 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 an amicus curiae to defend the right of parties to fair notice of conduct that could lead to criminal penalties or punitive civil sanctions. *See, e.g., United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739 (2023); *Yates v. United States*, 574 U.S. 528 (2015).

"Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). This case illustrates why that protection remains so essential. When a court may hold a party in civil contempt for conduct an injunction's text does not even mention, much less proscribe, the requirement of fair notice collapses. WLF has a strong interest in ensuring that civil contempt remains tethered to the explicit terms of judicial orders rather than to the judge's after-the-fact musings about their "spirit."

WLF's concern in this case is a practical one. Businesses comply with injunctions by relying on the decree's words. Investors and lenders then price the risk of what those words mean. A rule that punishes conduct the words never mention cannot be priced at all—only feared. Free markets cannot run on such fear.

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* No party's counsel authored any part of this brief. No one, other than WLF and its counsel, helped pay for the brief's preparation or submission.

INTRODUCTION

> *Equity is a roguish thing: for law we have a measure . . . equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a chancellor's foot.*
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> —John Selden, *Table Talk* (1689)

Selden's complaint was old when he made it, and the law answered it long ago. The answer is words. An injunction is a command, set out in advance in terms the enjoined party can follow and a reviewing court can read. Contempt is the punishment for disobeying the command. And because that punishment flows from the command's words, "basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). This Court polices that requirement with care, because the "judicial contempt power is a potent weapon," and when "founded upon a decree too vague to be understood, it can be a deadly one." *Int'l Longshoremen's Ass'n, Loc. 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).

The decree in this case was worse than vague—it was silent about the punished conduct. In 2021, the district court enjoined Apple from "prohibiting developers from . . . including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms." Pet. App. 166a. Not a word about commissions. Nothing about price. The Ninth Circuit said so itself: "the text of the Injunction does not address commissions at all." *Id.* at 34a n.9. No matter, the appeals court affirmed a finding that Apple committed contempt by charging a commission on linked-out purchases.

How could this happen? According to the Ninth Circuit, it's a feature, not a bug. Under that court's outlier precedent, "parties may be held in contempt for violating the spirit of an injunction." Pet. App. 12a. What followed shows what mischief that "spirit" can do: a contempt adjudication, *id.* at 141a; a new decree—effective immediately, no stay to be entertained—fixing Apple's commission at zero on all out-of-app purchases, *id.* at 159a–61a, a sanction so untethered that even the panel reversed it, *id.* at 34a; and a referral of Apple and one of its vice presidents to the United States Attorney for criminal investigation, *id.* at 163a. The chancellor's foot is back, fitted with a steel-toed boot.

American commerce cannot run on an arbitrary rule like that. Businesses live under injunctions—in a national economy, most large ones eventually will—and rational actors obey a decree the only way they can: by turning the words into rules. Engineers build products to the words. Lawyers vet contracts against the words. Compliance officers turn the words into checklists for thousands of employees bound by the decree, along with the company's "officers, agents, servants," and anyone "in active concert or participation." Fed. R. Civ. P. 65(d)(2)(B)–(C); Pet. App. 166a. Words can be distributed, studied, memorized, and followed. A "spirit" cannot.

As Apple has ably shown, the decision below defies *Taggart v. Lorenzen*, 587 U.S. 554 (2019), and this Court's unbroken line of authority confining contempt to an order's explicit terms. But the Ninth Circuit's rule is not merely unlawful. It is also *unnecessary*, as the law of injunctions long ago armed district courts against evasive parties with tools that all run through text.

The law provides at least four. A court may *construe* a genuinely ambiguous term in light of the suit's purpose, *Terminal R.R. Ass'n of St. Louis v. United States*, 266 U.S. 17, 29 (1924)—though it may not construe a decree "as it might have been written," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). It may *draft* its decree broadly enough to foreclose evasion and enforce the broad terms it wrote. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). It may *bind* the confederates and corporate shells through whom a party evades. Fed. R. Civ. P. 65(d)(2); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). And it may *modify* the decree—prospectively, on notice—when events reveal that the words no longer reach the mischief. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). Anything the "spirit" rule might lawfully accomplish, these tools already supply. What remains of the Ninth Circuit's rule is only what the law forbids.

The fourth tool, modification, decides this case. The 2021 decree invited modification "at any time." Pet. App. 166a. When Apple answered the injunction with a commission that Epic thought was contrary to the decree's purpose, the lawful course was a motion to modify—on notice, with Epic bearing the burden of showing that a new command was warranted and within the court's remedial authority. Whether any such command could lawfully reach Apple's commission is a question the district court never asked, because it never had to. It reached the commission by contempt instead, *id.* at 141a, 159a–60a, and supplied the words only afterward. Equity punishes only disobedience of clear commands given. It does not proceed by the Queen of Hearts' rules: "Sentence first—verdict afterwards." Lewis Carroll, *Alice's Adventures in Wonderland* 187 (London, Macmillan & Co. 1866). Here the district court delivered the command and the punishment in the same breath. Allowed to stand, the Ninth Circuit's rule will extinguish the practice of modification altogether. No rational plaintiff will shoulder the burden of justifying a new command when the old one can be stretched retroactively—with sanctions and fees as the prize. Under such a rule, vagueness becomes an asset; precision, a liability.

A failure to make rules known to the party expected to observe them is among the first stages of total failure in a legal system. Lon L. Fuller, *The Morality of Law* 39 (rev. ed. 1969). The Court should reverse and reaffirm what *Taggart* held: no civil contempt can attach where the order's explicit terms leave a fair ground of doubt—and an order silent about the very conduct sanctioned always leaves one. Reversal here takes nothing from district courts confronting evasive parties. All four tools for cabining evasion remain. On remand, the district court stays free to frame explicit, prospective commands within the limits of the violation it actually adjudicated, and to enforce them to the letter. What it may not do is what it did here—punish yesterday's conduct under tomorrow's decree.

ARGUMENT

I. CIVIL CONTEMPT REACHES ONLY CONDUCT THAT AN ORDER'S TERMS EXPLICITLY PROSCRIBE.

Every injunction must "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)–(C). That Rule "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt*, 414 U.S. at 476. It embodies the "one basic principle" that "those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits," *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Loc. No. 70*, 415 U.S. 423, 444 (1974). The need for certainty flows from the recognition that an injunction is "an extraordinary writ, enforceable by the power of contempt." *Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383, 389 (1970).

In *Longshoremen*, a union was fined $100,000 per day under an order so opaque that its counsel protested they had "been shooting in the dark . . . trying to guess at what may be an issue." 389 U.S. at 72–73. This Court reversed: "[t]he most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *Id.* at 76. A command that does not exist until *after* the contempt hearing defies comprehension in the most literal way.

The Court's insistence on text is a constraint on arbitrary power. In civil contempt, "the offended judge [is] solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994). No grand jury screens the charge; no jury finds the facts. The one external constraint is the order itself—and it constrains only if its words, rather than their spirit, measure liability. Strip that away, and the measure becomes the conscience of whoever is chancellor. Selden called that unchecked caprice a scandal in the seventeenth century. It has not improved with age.

Taggart holds all of this, unanimously. Civil contempt lies only where there is "no fair ground of doubt as to whether the order barred the [defendant's] conduct"—that is, "no objectively reasonable basis for concluding that the [defendant's] conduct might be lawful." 587 U.S. at 557. The standard "is generally an objective one," *id.* at 561, and it works in both directions. A defendant gains no safe harbor from good intentions: "[t]he absence of wilfulness does not relieve from civil contempt," *McComb*, 336 U.S. at 191, and a "subjective belief" in compliance "ordinarily will not insulate" a party whose reading is objectively unreasonable, *Taggart*, 587 U.S. at 561.

By the same logic, the motives of a party subject to the order cannot create a violation that the order's text does not describe. The Ninth Circuit's heavy reliance on Apple's supposed bad faith, Pet. App. 14a–16a, fills no textual gap. It cuts against the ancient rule that where the law is silent, there is liberty to act. Thomas Hobbes, *Leviathan*, ch. 21 (1651) ("In cases where the Soveraign has prescribed no rule, there the

Subject hath the Liberty to do, or forbeare, according to his own discretion").

True, *Taggart* observed that sanctions "may be warranted when a party acts in bad faith," *id.* at 561–62, and that *McComb* placed "the burden of any uncertainty in the decree" on a persistent violator, *id.* at 562 (quoting *McComb*, 336 U.S. at 192–93). But "uncertainty in the decree" presupposes a decree whose terms arguably reach the conduct. When the order is silent, there is no uncertainty to allocate. There are no terms. The panel nonetheless placed "the burden of any uncertainty" on Apple, Pet. App. 25a n.5—without explaining what Apple should have asked the court to clarify.

The 2021 liability opinion said that "[e]ven in the absence of IAP, Apple could still charge a commission on developers." *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1042 (N.D. Cal. 2021) (quoted at Pet. App. 21a n.3). The panel itself conceded that it "would be difficult to say that *all* commissions violate the Injunction," Pet. App. 22a (emphasis in original), and observed that the district court had "indirectly acknowledge[d]" as much, *id.* at 22a n.4. A party told by the issuing court that it may charge a commission, under a decree that never mentions one, has no uncertainty to resolve—only a rate to choose. Bad motives may calibrate the sanction for a violation, but they cannot conjure the violation itself.

Measured by that standard, this contempt finding fails at every step. The injunction restrained Apple from *prohibiting* developers from including links in their apps. Pet. App. 166a. Apple *permitted* the links and charged a commission on the resulting sales. An order whose text "does not address commissions at all," *id.* at 34a n.9, cannot supply "explicit notice" that commissions are outlawed—much less notice of the rate at which a lawful commission becomes contempt. If a commission of twenty-seven percent "prohibits," *id.* at 20a, what about one of twenty percent? Of five? No reading of the decree's words answers the question, because the words are not there. Silence of that kind is fair ground of doubt in its purest form. When a decree does not speak to a party's conduct, that party has, by definition, an objectively reasonable basis to conclude the conduct "might be lawful." *Taggart*, 587 U.S. at 557.

The Ninth Circuit's justifications lead nowhere. It answered that "prohibit" can mean "[t]o prevent, preclude, or severely hinder." Pet. App. 19a (citation omitted). But the decree did not forbid Apple from hindering an economic outcome; it forbade Apple from prohibiting an *act*—the inclusion of links—an act that Apple indisputably allowed. Read functionally, "prohibit" converts a decree against conduct into a rate regulation whose lawful rate is a secret until the contempt hearing. A definition that leaves the defendant to guess the number is not fair notice. It is a trap.

Nor does the appeals court's borrowed maxim from *McCulloch v. Maryland*—"the power to tax involves the power to destroy," Pet. App. 20a (citing 17 U.S. (4 Wheat.) 316, 431 (1819))—do the trick. *McCulloch* was a constitutional ruling, announced prospectively, in an opinion anyone could read. Maryland was not held in contempt of an order that never mentioned taxes.

Confronted with Rule 65(d), the panel answered that the Rule "regulates only the 'contents and scope'" of injunctions and "says nothing about contempt." Pet. App. 13a. That reading unravels the Rule. Again, *Schmidt* says it exists precisely "to avoid the possible founding of a contempt citation on a decree too vague to be understood." 414 U.S. at 476. A specificity requirement that governs drafting but evaporates at enforcement protects no one.

All that remains is the panel's candid holding that circuit precedent "means what it says: parties may be held in contempt for violating the spirit of an injunction"—a rule that by the panel's own telling operates on the premise "that the strict letter of the injunction was not violated." Pet. App. 12a. But a doctrine that begins where the order's text ends is, by definition, a doctrine that imposes contempt despite a "fair ground of doubt." One of these standards is the law of this Court. The other is the law of one circuit. Both cannot stand.

II. THE LAW SOLVED THE EVASION PROBLEM LONG AGO WITH TOOLS THAT ALL RUN THROUGH TEXT.

The Ninth Circuit's rule trades on a legitimate fear that a "narrow literalism" would let defendants play cat-and-mouse with the court, greeting each decree with conduct just outside it. Pet. App. 12a; *see McComb*, 336 U.S. at 192–93. That fear is an old one, and the cure is not new.

Equity's own chancellors took Selden's point: Lord Eldon hoped never to "justify the reproach that the equity of this court varies like the Chancellor's foot." *Gee v. Pritchard*, 36 Eng. Rep. 670, 674 (Ch. 1818). What emerged is the modern law of injunctions—equity's flexibility bound by the law's discipline. "Only by announcing rules do we hedge ourselves in." Scalia, *supra*, at 1180. And Congress first supplied the measure in § 19 of the Clayton Act; Rule 65(d) is its successor. Congress enacted it so that defendants would "never be left to guess at what they are forbidden to do." *Longshoremen*, 389 U.S. at 75 (citation omitted). The law gives a district court four textual tools against the evasive defendant. Together they answer any fear of evasion, and they do so through text.

A. A court may construe a genuinely ambiguous term in line with the suit's purpose—but may not backfill a new one.

District courts retain full interpretive latitude over what they have written. Decrees are "read in the light of the issues and the purpose for which the suit was brought," *Terminal R.R.*, 266 U.S. at 29—a principle for resolving doubt about words actually used. A genuinely ambiguous term may be construed in line with its purpose. What a court may not do is invoke ambiguity to write new terms: a decree "must be construed as it is written, and not as it might have been written." *Armour*, 402 U.S. at 682. Justice Scalia stated the premise in the legislative context for a unanimous Court: "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

The principle is symmetrical. A text may reach beyond its author's chief concern—*Oncale* itself so held—or it may stop short of one, as the decree did here. Either way, the words govern, not the worry behind them. This line—between reading and drafting—is both administrable and familiar. Interpretation ends where the text does. "Spirit" contempt begins there.

B. A court may draft its decree broadly enough to foreclose evasion and enforce those broad terms.

The decree in *McComb*, "[b]y its terms," enjoined "any practices which were violations" of the Fair Labor Standards Act, and the defendants violated those incorporated terms. 336 U.S. at 192. *McComb* thus teaches that a court may frame an injunction in terms broad enough to foreclose evasion—and may then enforce the broad terms it wrote. It nowhere holds that a court may enforce terms it never wrote.

The difference is everything. An enjoined party facing a broad-but-explicit decree can locate its outer boundary and, if unsure, seek construction before acting. An enjoined party facing the Ninth Circuit's "spirit" enforcement of a narrow decree can do neither, because the operative command exists only in retrospect. Rule 65(d) posed no obstacle to the district court's issuing a broad-but-explicit decree. Whether the violation the district court actually found—a violation of California's Unfair Competition Law resting on informational harm from Apple's anti-steering provisions, *Epic Games*, 559 F. Supp. 3d at 1055–57—would have supported a decree reaching Apple's pricing is a different question, and one the court never confronted. The problem here is that it punished Apple under the decree it wrote in 2021 for conduct that decree never mentioned.

C. A court may bind the confederates and corporate shells through whom a party evades.

The third tool answers the defendant who hides behind a new corporate shell. An injunction binds not only the parties but "other persons who are in active concert or participation" with them. Fed. R. Civ. P. 65(d)(2)(C). Successors and assigns may be "instrumentalities through which defendant seeks to evade an order." *Regal Knitwear*, 324 U.S. at 14. That is textual enforcement too: the terms stay fixed, and the Rule itself says who is bound.

That is all *Sea Shepherd*—the fountainhead of the Ninth Circuit's "spirit" rule—actually required. There, an enjoined organization transferred assets and operations so that a formally distinct entity could carry on the very conduct the decree forbade. *Inst. of Cetacean Rsch. v. Sea Shepherd Conserv. Soc'y*, 774 F.3d 935, 941–42 (9th Cir. 2014). Holding the defendant to account for enjoined conduct carried out through confederates enforces the decree's terms against persons the Rule explicitly reaches.

The panel below took *Sea Shepherd*'s borrowed "spirit" language, *id.* at 949 (citation omitted), and expanded it into a freestanding license to backfill terms whenever "the strict letter of the injunction was not violated." Pet. App. 12a. It did so even though this case involved no confederates and even though, on the commission issue that drove the contempt finding, the panel conceded that the injunction's words did not reach that conduct. *Id.* at 34a n.9. A phrase became a dictum, the dictum became a doctrine, and the doctrine swallowed the Rule.

D. A court may modify the decree—prospectively, on notice—to capture changed circumstances and evasive conduct.

An injunction is not a statute frozen at enactment. A "continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *Swift*, 286 U.S. at 114; *accord Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 380–81 (1992). "[S]ound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen"—a power that flows from "the fact that an injunction often requires continuing supervision by the issuing court." *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961); *see* Fed. R. Civ. P. 60(b)(5).

And when a decree proves inadequate to its tasks, the issuing court's duty is to strengthen it—prospectively—so that it serves them. *See United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 251–52 (1968). Modification is not a device for expanding a decree beyond the wrong that justified it. In short, "the remedy must be tailored to the violation, rather than the violation's being a pretext for the remedy." *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997) (Posner, J.). The movant must show that a significant change in circumstances warrants revision, and the revision must be "suitably tailored" to that change. *Rufo*, 502 U.S. at 383, 391.

Here the decree said all of that on its face. Paragraph 2: "Any party may seek modification of this Order, at any time, by written motion and for good cause based on changed circumstances or otherwise." Pet. App. 166a. Paragraph 3 retained jurisdiction "over the enforcement and amendment of the injunction." *Id.* at 166a–67a. Epic used that machinery in March 2024, moving to enforce the injunction and to hold Apple in contempt. *Id.* at 66a. But it never moved to modify.

The difference between the two approaches is no technicality; it is a matter of due process. Modification operates forward, upon motion, notice, and a hearing. *See* Fed. R. Civ. P. 60(b)(5). Contempt sanctions only past conduct—and, under *Taggart* and Rule 65(d), only conduct explicitly proscribed by the decree. This Court has enforced the line from both directions. In *Pasadena City Board of Education v. Spangler*, a decree was ambiguous and "the parties to the decree interpreted it in a manner contrary to the interpretation ultimately placed upon it by the District Court." 427 U.S. 424, 438 (1976). The Court held that modification "should have been ordered." *Id*. But if ambiguity plus divergent good-faith readings requires modification rather than punishment, silence calls for it *a fortiori*.

The record shows that the machinery was available here, and the district court invoked its form when it chose to. The April 30, 2025 order permanently enjoins Apple from—among five other explicit prohibitions—"[i]mposing any commission or any fee on purchases that consumers make outside an app." Pet. App. 159a. The panel reversed that provision as an improper contempt sanction and remanded with instructions to set a commission "as either a purgeable civil contempt sanction or properly tailored modification of the Injunction." *Id.* at 34a.

The modification option was always available. And as a matter of form, the 2025 order shows what modification supplies: a command that speaks in words Apple can read, going forward. Had Epic moved to modify in 2024, the court would have had to decide, on notice and with Epic bearing the burden, whether a commission term was warranted and tethered to the violation it had found. It might have concluded that it was not. Either way, Apple would have known its obligations before any attached, with the "explicit notice" *Taggart* requires. 587 U.S. at 561. And any later violation would support contempt without controversy.

But the district court ran the sequence backwards here. It punished Apple under the silent decree—holding the company in civil contempt. Pet. App. 141a. Then it referred Apple and one of its vice presidents to the United States Attorney for criminal investigation. *Id.* at 163a. Only then did it issue the missing words, effective immediately, while announcing that it "will not entertain a request for a stay given the repeated delays and severity of the conduct." *Id.* at 161a. It closed with a flourish: "For this Court, there is no second bite at the apple." *Id.* at 164a.

The wordplay captures what went wrong. Punish first, specify later is the very danger *Bagwell* warned against when it called contempt "uniquely . . . 'liable to abuse,'" 512 U.S. at 831 (citation omitted), and it inverts this Court's admonition that "only the least possible power adequate to the end proposed should be used in contempt cases," *Taggart*, 587 U.S. at 562 (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987)).

III. ADOPTING THE NINTH CIRCUIT'S RULE WILL CORRUPT THE INCENTIVES OF EVERYONE THE DECREE TOUCHES.

The panel's remaining justification was practical. Without the "spirit" rule, it contends, "injunctions w[ould] spring loopholes, and parties in whose favor injunctions run w[ould] be inundating courts with requests for modification in an effort to plug the loopholes." Pet. App. 12a (citation omitted). The district court put the same thought more vividly: it would not play "whack-a-mole." *Id.* at 159a. But the way to end whack-a-mole is with a decree that names the mole—not to whack a party for conduct the order never mentioned.

If a decree's "spirit" is enforceable retroactively, no rational plaintiff will ever move to modify. Why shoulder the burden of justifying a new command when the old one can be stretched after the fact—with compensatory sanctions and attorney's fees as the prize? Vagueness becomes an asset; precision, a liability. The less an injunction says, the more its "spirit" can be made to mean.

Continuing decrees contemplate continuing supervision. *Wright*, 364 U.S. at 647. Requiring the decree's beneficiary to return to court before new obligations attach keeps the burden of justifying coercion where equity has always placed it—on the party seeking it. *See Trump v. CASA, Inc.*, 606 U.S.

831, 854 (2025) ("the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff's story needs to be" (citation omitted)). And it guarantees the defendant notice and a hearing before its conduct becomes punishable. A motion to modify is no quirk in the system. It *is* the system.

Parties subject to arbitrary decrees, meanwhile, cannot price that risk. A business under an "obey the spirit" decree must guess not only at what the words forbid but at what a judge may later say those words secretly meant. This record shows how far that inquiry can travel: from an order about links and buttons, Pet. App. 166a, to a contempt finding about a price term the order never mentioned, *id.* at 34a n.9, to a new decree fixing that price at zero, *id.* at 159a, to a remand at which the price will be fixed yet again, *id.* at 34a. No compliance program can be built on a moving target, because compliance programs distribute words—to the officers, agents, and servants whom Rule 65(d)(2) binds.

The predictable response to all this uncertainty is overcompliance: forgoing products, terms, and prices the order does not address, because proximity to the decree's shadow is itself a litigation risk. In a case brought in the name of competition, that is a perverse result. A remedy meant to free the market will instead teach it to flinch. A textualist standard, by contrast, costs the plaintiff only what equity has always demanded of it—a motion, on notice, carrying the burden of justifying a new command and showing that it fits the wrong adjudicated—and it is the only regime under which both sides know their obligations at the time of decision rather than at the moment of condemnation.

*   *   *

The Court should reverse, and in doing so it need not break any new ground. *Taggart* already supplies the rule: no civil contempt where the order's explicit terms leave a fair ground of doubt—and silence about the offending conduct itself always leaves one. Nor should the Court fear that reversal would disarm district courts. The judge who faces an evasive party holds four tools, every one of them textual: construe the ambiguous term, draft the broad one, bind the confederate, and modify the decree for tomorrow. On remand, the district court remains free to frame explicit, prospective commands within the limits of the violation it actually adjudicated—and to enforce them to the letter.

This Court should not revive the chancellor's foot. Much like the Ninth Circuit's fear of evasion, Selden's complaint has been answered for centuries. The answer for both is a decree that means what it says and says what it means. This Court should require no less of injunctions—and permit no more of contempt.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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