

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 U.S. Court of
Appeals for the Ninth Circuit**

**BRIEF OF *AMICI CURIAE* PROFESSOR
MICHAEL T. MORLEY AND DEAN F. ANDREW
HESSICK IN SUPPORT OF NEITHER PARTY**

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INTEREST OF *AMICI CURIAE*¹

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¹ Pursuant to Sup. Ct. R. 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A federal court faces two main issues when enforcing an injunction. *First*, it must decide whether the injunction has been violated. A court should generally apply textualism when interpreting the terms of an injunction to ensure enjoined parties have adequate notice of the proscribed conduct, reduce the potential for abuse, and comply with Federal Rule of Civil Procedure 65. F. Andrew Hessick & Michael T. Morley, *Interpreting Injunctions*, 107 VA. L. REV. 1059, 1063, 1082-91 (2021). Under a textualist approach, a court should construe an injunction based on how a reasonable person would understand the ordinary meaning of its text, read in context. *Id.* at 1082.

The one exception to this textualist approach arises when an injunction incorporates an extrinsic legal authority such as a statute, regulation, or contract. The court should interpret the relevant language of the injunction using whatever interpretive method it would ordinarily apply when directly construing the incorporated legal authority. *Id.* at 1096-99. This caveat prevents inconsistent interpretations of the legal instrument that has been incorporated.

A textualist approach to interpreting an injunction may make it easier for an enjoined party to circumvent the injunction's restrictions and engage in activity the injunction was meant to prevent. A court may remedy that situation, however, by modifying an injunction that has proven underinclusive or

otherwise insufficient to achieve the court's goals. *Id.* at 1092-93.

Second, after determining that an enjoined party has violated an injunction's terms, the court must decide whether to impose a sanction. It would be appropriate at this stage for the court to take purposivist considerations into account. In determining whether to hold a violator in contempt, a court may consider whether—and to what extent—the violation of the injunction's terms actually risked undermining the injunction's goals. *Id.* at 1104-06.

Thus, to the extent a court enforces the “spirit” of an injunction, it should do so only at the sanction stage. Such purposivist considerations can act as a hedge, preventing needlessly harsh enforcement against parties who have violated potentially overbroad injunctions or whose violations were harmless, technical, or irrelevant to the injunction's goals. The “spirit” of an injunction does not license a court to override an injunction's text, thereby circumventing protections against the imposition of unwritten obligations or restrictions.

ARGUMENT

For at least a century, this Court's precedents concerning the proper approach to interpreting injunctions have conflicted. At various points over the years, this Court has applied textualism, purposivism, and intentionalism. F. Andrew Hessick & Michael T. Morley, *Interpreting Injunctions*, 107 VA. L. REV. 1059, 1074-82 (2021). This Court should take this opportunity to resolve this tension by adopting a single, consistent approach to the interpretation and enforcement of federal preliminary injunctions, permanent injunctions, and consent decrees. *Id.* at 1100-04.

A federal court should generally apply textualism to determine whether an enjoined party has violated an injunction. *Id.* at 1082. The question should be how a reasonable person would understand the text of the injunction. The one notable exception is when a particular provision of an injunction quotes from, prohibits violation of, or otherwise incorporates some extrinsic legal authority such as a statute, regulation, or contract. The court should construe the relevant language from that provision based on whatever interpretive approach it would ordinarily apply to the authority or instrument being referenced. *Id.* at 1096-99.

In contrast, a court should take purposivist considerations into account—the “spirit” of an injunction—when deciding whether to impose contempt sanctions against a party which has violated an injunction's text. *Id.* at 1104-06. To the extent an injunction's text does not fully achieve a court's goals,

a court should modify the injunction rather than overriding the ordinary meaning of its text. *Id.* at 1092-93.

I. A FEDERAL COURT SHOULD GENERALLY APPLY TEXTUALISM TO DETERMINE WHETHER AN INJUNCTION HAS BEEN VIOLATED

A court should generally apply textualism when interpreting an injunction and determining whether an enjoined party has violated it. “The central question under a textual approach is how a reasonable person would understand” the “ordinary meaning of [an injunction’s] text, read in context.” Hessick & Morley, *supra* at 1074 (citing John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434 (2005), and John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006)).

1. There are three main reasons why this Court should generally apply a textualist approach when interpreting injunctions. **First**, textualism is the most effective method of interpretation for ensuring that individuals have adequate notice of the conduct that an injunction proscribes or requires.” Hessick & Morley, *supra* at 1084. This Court has recognized that “[b]asic fairness require[es] that those enjoined receive explicit notice’ of ‘what conduct is outlawed’ before being held in civil contempt,” much less criminal contempt. *Taggart v. Lorenzen*, 587 U.S. 554, 561 (2019) (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam)). This principle has ancient roots. *Skip v. Harwood* (1747) 26 Eng. Rep. 1125,

1125; 3 Atk. 564, 565 (discussing the importance of notice in an injunction); see *Marquis of Downshire v. Lady Sandys* (1801) 31 Eng. Rep. 962, 963; 6 Ves. Jun. 108, 109 (observing the duty of the courts to define an injunction's terms "with precision and accuracy" so that it "might be clearly understood by the parties").

Textualism best achieves this goal because it "requires the court to determine how an ordinary person would understand the scope of the injunction from reading it." Hessick & Morley, *supra* at 1087. The "ordinary meaning" of an injunction's language will generally be "more accessible to enjoined parties" than "the judge's personal beliefs, preferences, and expectations." *Id.* at 1088. A textualist approach thus protects enjoined parties from the difficult task of speculating about "the motivation or intent behind an injunction and how those considerations might affect its interpretation." *Id.* at 1087.

Second, textualist interpretations of injunctions protect enjoined parties from arbitrary and wrongful exercises of judicial authority. Injunctions are a notable exception to traditional notions of separation of powers. "That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 840 (1994) (Scalia, J., concurring). A restrictive interpretive approach is necessary to reduce the potential for "arbitrary control" which arises from combining all of these powers in a single person. CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 174 (Thomas Nugent trans., 1873) (1748).

That risk is particular high because “the judge who enters an injunction may treat an alleged violation of it as a personal affront to the judge’s authority.” Hessick & Morley, *supra* at 1089-90. At the same time, the constraints that lead courts to avoid overly expansive interpretations of legislation are inapplicable to injunctions. For example, while statutes typically affect “large classes of people are the general public,” injunctions are “aimed against particular litigants.” *Id.* at 1090. A court may be unwilling to adopt an aggressive interpretation of a statute against disfavored parties “because the same interpretation would typically extend to others, as well.” *Id.* No such protection applies to injunctions.

By providing an objective method for interpreting an injunction, textualism reduces the risk of overbroad, unexpected, or even abusive interpretations.

Third, textualism is more consistent than other interpretive approaches with Federal Rule of Civil Procedure 65. Rule 65 provides that an 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). Under this rule, an “ordinary person reading the court’s order should be able to ascertain from the document itself exactly what conduct is proscribed.” 11A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE – CIVIL § 2955 (3d ed. 2013); *see also* 13 WILLIAM MOORE, FEDERAL PRACTICE – CIVIL, § 65.60[3] (“A court must frame its injunctions or restraining orders so that those who must obey them will know precisely what the court intends to forbid or

require.). An order must provide “explicit notice of precisely what conduct is outlawed,” both to “avoid the possible founding of a contempt citation on a decree too vague to be understood” and to facilitate appellate review.” *Schmidt*, 414 U.S. at 476-77; *see, e.g., Int’l Longshoreman’s Ass’n v. Phila. Marine Trade Ass’n*, 389 U.S. 64, 76 (1976) (overturning “unintelligible” injunction). “Rule 65 . . . would be toothless if courts could expand injunctions beyond their text to cover additional acts.” Hessick & Morley, *supra* at 1091.

For these reasons, a court should interpret an injunction to prohibit or require only those acts which fall within the ordinary meaning of its text as a reasonable person would understand it.²

2. Adopting a textualist approach would be consistent with this Court’s decision in *United States v. Armour & Co.*, 402 U.S. 673 (1971). That case involved a consent decree which prohibited Armour, a meatpacking company, from distributing certain food items or owning any interest in a business that dealt in those products. *Id.* at 676.

Greyhound Corp., a motor carrier that distributed goods identified in the order, wished to acquire a controlling interest in Armour. *Id.* at 674, 676. The Government opposed the acquisition on the grounds it would circumvent the decree’s “purported purpose of separating the meatpackers from the retail food business.” *Id.* at 677.

² This Court should apply this approach equally to both contested injunctions and consent decrees. *See* Hessick & Morley, *supra* at 1101-04.

This Court concluded the injunction did not prohibit the acquisition. *Id.* at 683. It acknowledged that the Government had obtained the decree to achieve a “structural separation” between meatpackers like Armour and transportation companies like Greyhound that distributed food. *Id.* at 677. Rather than imposing “a complete separation” between meatpacking and distribution, however, the decree prohibited only “particular actions and relationships not including the one here in question.” *Id.* at 677-78. The order lacked “language that would have established the sort of prohibition that the Government now seeks.” *Id.* at 679; *see also id.* at 680 (reiterating “language that would have been apt either to create a complete separation or to bar with particularity the sort of transaction involved here was not used”).

This Court acknowledged that permitting Greyhound to acquire Armour “would allow the same kinds of anticompetitive evils” that the Government had originally sought to prevent. *Id.* at 680. Such purposivist arguments were immaterial, however. The order’s scope had to be “discerned within its four corners.” *Id.* at 682; *see also Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150-51 (2009) (“[A] court should enforce a court order, a public governmental act, according to its unambiguous terms.”); *United States v. Atl. Ref. Co.*, 360 U.S. 19, 23-24 (1959) (interpreting language in a consent decree based on its “normal meaning,” rather than adopting “another reading” which “might seem more consistent with the Government’s reasons for entering into the agreement in the first place”).

3. Textualism should give way, however, when a court interprets a particular provision of an injunction that quotes, prohibits violation of, or otherwise incorporates some extrinsic legal authority such as a statute, regulation, or contract. In such cases, the court should construe that part of the injunction using whatever approach it would ordinarily apply when interpreting the incorporated legal authority directly. *See Hessick & Morley, supra* at 1096. This caveat is necessary to ensure that “[t]he meaning of a legal provision does not change when it is incorporated into an injunction.” *Id.* at 1097.

For example, if this Court has adopted a purposivist interpretation of a particular statute, then a court should use purposivism to interpret injunction provisions that quote or cite that statute. *Id.* at 1098. That exception is narrow, however. Textualism should apply when a court paraphrases an extrinsic legal authority, imposes prophylactic restrictions that go beyond that extrinsic authority, or otherwise states a party’s legal obligations in the court’s own words. *Id.* Textualism is appropriate in such cases because, rather than merely incorporating a pre-existing extrinsic source of legal obligations, the issuing court chose to craft its own standards. *Id.*

This approach may require a court to apply different interpretive methodologies to different provisions within an injunction. *Cf. Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006) (requiring a court to afford deference under *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997), to a federal agency’s interpretation of its own regulations under certain circumstances, except for regulatory provisions which reiterate or

quote the underlying statutory provisions). Because this Court has not imposed methodological stare decisis by adopting textualism as the sole permissible standard for construing all legal instruments, however, *see Kisor v. Wilkie*, 588 U.S. 558, 624 (2019) (Gorsuch, J., concurring), this hybrid approach toward construing injunctions best secures textualism’s benefits while preserving coherence in the law and minimizing interpretive anomalies.

4. A textualist approach creates the possibility that an enjoined party might undermine a decree’s goals by circumventing its restrictions. Hessick & Morley, *supra* at 1092. A party may, for example, circumnavigate an injunction prohibiting the ringing of bells by playing a recording of the ringing bells.

But this risk does not warrant rejecting textualism. Instead, a court should modify the text of an injunction that is proving ineffective. *United States v. U.S. Mach. Corp.*, 391 U.S. 244, 249, 252 (1968) (holding a court “should modify [a] decree so as to achieve the required result” when the order has failed to do so); *see also Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383-84 (1992) (specifying Rule 60(b)(5) permits modification of a decree when “a significant change in circumstances warrants revision”); *see, e.g., Chrysler Corp. v. United States*, 316 U.S. 556, 560 (1942). The availability of modification grants courts the flexibility needed to ensure an injunction’s ongoing efficacy without sacrificing the benefits of textualism.

* * *

Here, the Ninth Circuit declared that “parties may be held in contempt for violating the spirit of an injunction.” *Epic Games, Inc. v. Apple, Inc.*, 161 F.4th 1162, 1176-77 (9th Cir. 2025) (citing *Inst. of Cetacean Res. v. Sea Shepherd Conserv. Soc’y*, 774 F.3d 925, 949 (9th Cir. 2014)). Such a vague standard provides enjoined parties with insufficient notice of the conduct proscribed, fails to protect against potential judicial abuse of the contempt power, and is inconsistent with Rule 65(d). Accordingly, this Court should vacate and remand for reconsideration under the correct legal standard.³

II. AFTER DETERMINING THAT AN ENJOINED PARTY HAS VIOLATED AN INJUNCTION’S TERMS, THE COURT SHOULD APPLY PURPOSIVISM TO DECIDE WHETHER TO HOLD THAT PARTY IN CONTEMPT

While purposivist considerations may not expand an enjoined party’s liability beyond an injunction’s

³ If this Court adopts a textualist approach to interpreting injunctions, then appellate courts should review such interpretations *de novo*. *De novo* review promotes textualism’s goals by empowering an appellate court to “look[] at [an] injunction with fresh eyes, free of the possible biases, implicit assumptions, and personal knowledge of authorial intent with which a document’s author reads it.” Hessick & Morley, *supra* at 1107. Such review also “ensures that an injunction is reasonably clear to third parties other than its author.” *Id.* In contrast, either deferring to the issuing court’s interpretation or reviewing its interpretation only for abuse of discretion can require appellate courts “to uphold interpretations that do not reflect the best reading of an injunction’s text.” *Id.* at 1109.

text, a court may take them into account when deciding whether to hold a party which has violated an injunction in contempt. Courts have broad equitable discretion over the imposition of contempt sanctions. “A court need not hold a violator in contempt if it concludes that contempt would not advance the policies underlying the injunction or would be inconsistent with the judge’s purposes or intent when she entered it.” Hessick & Morley, *supra* at 1104-05; see *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303 (1947).

Applied in this manner, purposivism provides additional protection against overbroad injunctions. “Once a contempt motion has passed through a textualist sieve, applying purposivism would only work to a respondent’s advantage, shielding it from liability for engaging in acts that, while contrary to the injunction, do not actually further its purposes or threaten the values underlying it.” Hessick & Morley, *supra* at 1105.

CONCLUSION

For these reasons, this Court should vacate the judgment below and remand for further consideration pursuant to the appropriate standard.

Respectfully submitted,

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