

Nos. 21-16506 & 21-16695

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EPIC GAMES, INC.,

*Plaintiff/counter-defendant,
Appellant/cross-appellee,*

v.

APPLE INC.,

*Defendant/counter-claimant,
Appellee/cross-appellant.*

On Appeal from the United States District Court for the
Northern District of California
No. 4:20-cv-05640-YGR (Hon. Yvonne Gonzalez Rogers)

**BRIEF OF AMICI CURIAE TILE, MATCH GROUP, INC., BASECAMP,
KNITRINO, AND THE COALITION FOR APP FAIRNESS IN SUPPORT
OF EPIC GAMES, INC.'S OPPOSITION TO DEFENDANT-APPELLEE'S
MOTION FOR ADMINISTRATIVE STAY AND TO STAY INJUNCTION
PENDING APPEAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *amici curiae* state that they have no parent corporation and no publicly held corporation owns 10% or more of their stock.

Dated: November 29, 2021

/s/ Peter D. St. Phillip, Jr.

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SOURCE OF AUTHORITY TO FILE

This Court has granted *amici curiae*'s motion for leave to file this brief. *See* FED. R. APP. P. 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Pursuant to FED. R. APP. P. 29(a)(4)(E), *amici curiae* declare that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (3) no person—other than the *amici curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Tile is a San Mateo, California-based consumer electronics company which manufactures tracking devices that users attach to everyday belongings such as keys and bags. Tile's mobile apps allow consumers to track and locate lost items through Bluetooth.

Amicus Curiae Match Group, Inc. ("Match") is a Dallas, Texas-based online dating service which operates dating web sites in over 50 countries. Originally founded in 1993, Match operates www.match.com and mobile apps.

Amicus Curiae Basecamp is a Chicago, Illinois-based web software company. Founded in 1999, Basecamp provides project management web application services online and through its mobile apps.

Amicus Curiae Knitrino is a Seattle, Washington-based company that hosts online interactive knitting communities. Cue Knitrino is a mobile app that Knitrino operates.

Amici Curiae Tile, Match, Basecamp and Knitrino all sponsor mobile apps that are available for consumers to download and operate in Apple's App Store.

Amicus Curiae The Coalition for App Fairness ("CAF") is an independent nonprofit organization that advocates for freedom of choice and fair competition across Appellee/Cross-Appellant Apple Inc.'s App Store. The additional amici curiae are all members of CAF.

ARGUMENT

As a group of app developers large and small, *amici curiae* view the district court’s injunction against Apple’s anti-steering provisions as a vital cure for an extremely harmful and anticompetitive practice in a mammoth sector of the United States economy.¹ Granting a stay of the district court’s injunction would deny the amici here and other developers like them the relief they badly need during the (potentially lengthy) pendency of this appeal. This Court has previously considered harms to third parties in denying motions to stay injunctions pending appeal. *See, e.g., Doe #1 v. Trump*, 957 F.3d 1050, 1068 (9th Cir. 2020) (denying motion to stay preliminary injunction pending appeal preventing enforcement of presidential proclamation in part due to potential harm to governments of third-party states). It should not hesitate to do the same here, where many developers are relying on the relief the district court’s injunction provides.

Apple’s anti-steering “gag” provision prohibited developers from using buttons, external links, or other calls to action to direct consumers to other ways of purchasing digital goods beyond Apple’s own in-app payment system. In enjoining Apple from enforcing this provision, the district court properly weighed and considered evidence from app developers beyond Epic alone, including *amicus*

¹ Apple’s iOS application revenue in 2020 was approximately \$72.3 billion, representing approximately 65% of the sales of the total revenue from the 2 main app stores—Android and Apple. www.businessofapps.com/data/app-revenues (last visited Nov. 29, 2021).

curiae Match. Match testified at trial that it had requested permission from Apple to send emails or push notifications to users directing them to Match’s website for lower prices, which Apple refused. (Ex. Depo. 1 at 24:23-25:5, 158:4-159:14 (Ong).) This evidence supported the district court’s finding that “Apple’s anti-steering restrictions artificially increase Apple’s market power by preventing developers from communicating about lower prices on other platforms.” A-A at 93.² The district court correctly noted that push notifications and email outreach to consumers are two of the top three most effective marketing activities. *Id.* at 163. Without such direct communication from app developers, consumers are unlikely even to know that alternate payment options exist, let alone to use them. *Id.* at 165 (Apple “enforced silence to control information and actively impede[d] users from obtaining the knowledge to obtain digital goods on other platforms.”). Stripped of the most powerful tools in their toolbox, even large developers cannot hope to compete effectively. They are caught between two bad choices: swallowing the supracompetitive commission as high as 30% which Apple extracts through its in-app payment system, or losing access to the entire, massive universe of iOS app users altogether. *Id.* at 163 (“The costs to developer[s] are higher because competition is not driving the commission rate.”); *id.* at 93; E-A at 363:4-364:17 (CEO of app developer Down Dog testifying that average subscription price for

² Citations to “A-[letter]” refer to Apple’s Exhibits. Citations to “E-[letter]” refer to Epic’s Exhibits.

iOS users is roughly 15% higher than on Android due to Apple’s prohibition on telling users about discounted purchase options on the web); *id.* at 366:6-367:10 (inability to steer users to cheaper subscription on the web resulted in a 28% reduction in the number of [Down Dog] subscribers).)

Further, Apple’s stranglehold on the app market as a whole means that its anticompetitive practices have limited the ways that developers can operate their businesses. *Amicus curiae* Knitrino, for example, was forced to jettison its desired strategy of offering both digital and physical goods to consumers through its app, because Apple insisted that digital goods could *only* be sold through Apple’s payment system, and that physical goods could *only* be sold outside of it. Both businesses and consumers suffer when businesses cannot offer their goods and services in the way that they want. And as the district court also correctly pointed out, this type of harm (not just increased cost, but also decreased freedom) is continuing, irreparable, and “not easily remedied with money damages.” A-A at 166. The district court’s injunction finally lifted this burden, under which developers have been struggling for more than a decade. *See id.* at 119. Apple must not be permitted to return to reaping windfalls at developers’, consumers’, and the public’s expense.

In the wake of the district court’s injunction, *amici curiae* and other developers like them have finally begun to witness the benefits that a modern,

digital marketplace freed from Apple's anticompetitive muzzle provides their products, services, and customers. Companies have already announced their own in-app payment systems at a cost of one-third of that charged by Apple through their in-app payment system.³ Without being forced into Apple's in-app payment system and paying the required up to 30% fee, app developers such as amicus Match announced their plans to offer reduced subscriptions to customers who pay directly.⁴ In addition, some plan to use "any potential savings from the payment changes to invest in new products or hire more people."⁵ Developers have only just begun to open doors previously locked to them, behind which we find greater competition, innovation, and choice. All of this progress will be undone by the stay Apple seeks.

CONCLUSION

During the pendency of this appeal, *amici curiae* mobile application sponsors will suffer concrete and irreparable harm should the Court stay the enforcement of the District Court's anti-steering injunction. Antitrust law and policy demand that market participants be free to offer competitive prices to their

³ Mitchell Clark, *After Epic v. Apple, a small developer is challenging Apple's in-app payment system*, THE VERGE (Oct. 7, 2021, 2:39 PM EDT) <https://www.theverge.com/2021/10/7/22714677/apple-in-app-payment-competitor-paddle-epic-ruling>.

⁴ Kristin Broughton, *Match Group Hopes for Savings From Looser App-Store Payment Rules*, THE WALL STREET JOURNAL (Sept. 16, 2021, 8:00 AM ET) (<https://www.wsj.com/articles/match-group-hopes-for-savings-from-looser-app-store-payment-rules-11631793601>).

⁵ *Id.*

customers. Because Apple's contracts so overtly stifle price competition, there is no reason for this Court to stay the injunction while this appeal pends.

Dated: November 29, 2021

Respectfully submitted,

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Fairness

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7), I certify that:

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 1,155 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: November 29, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 29, 2021

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