

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 (Hon. Yvonne Gonzalez Rogers)
No. 4:20-cv-05640-YGR

RESPONSE TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

Theodore J. Boutrous, Jr.
Daniel G. Swanson
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Ave.
Los Angeles, CA 90071

Rachel S. Brass
Julian W. Kleinbrodt
GIBSON, DUNN & CRUTCHER LLP
555 Mission St., Suite 3000
San Francisco, CA 94105

[#]
Mark A. Perry
Cynthia Richman
Joshua M. Wesneski
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave, NW
Washington, DC 20036
(202) 887-3667
mperry@gibsondunn.com

Attorneys for Apple Inc.

The Coalition for App Fairness (“CAF”) and four of its members have moved for leave to file an amicus brief opposing Apple’s motion to stay the permanent injunction pending resolution of these appeals. Apple frequently consents to amicus filings but is compelled to respond here because CAF has failed to inform the Court that it is *not* an independent non-party. CAF was created by Epic, is controlled by Epic, and answers to Epic, as the district court recognized and the trial evidence confirms. CAF’s motion is nothing more than an attempt by Epic to file two responses rather than one to Apple’s stay motion.

Under Rule 29(a), only *non-parties* may submit briefs as amicus curiae. *See* Fed. R. App. P. 29(a); *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (“An amicus curiae is not a party to litigation”). This rule makes good sense: An amicus curiae “does not represent the parties, but participates only for the benefit of the court,” and thus must present a perspective *different* from that of the litigants. 4 Am. Jur. 2d Amicus Curiae §§ 1, 6 (2021).

CAF is not independent of Epic. As the district court found, Epic “creat[ed] the Coalition for App Fairness” in 2020 as part of a broader scheme Epic dubbed “Project Liberty.” Ex. A, at 22–23. Epic was then in control of CAF, “charg[ing] [it] with generating continuous media and campaign tactic pressure on Apple,” even hiring and paying for “a consultant to help to establish a reason for [CAF] to exist (either organic or manufactured).” *Id.* (quotation marks omitted). Evidence

admitted at trial likewise confirms Epic’s control of CAF: A July 27, 2020 presentation to Epic’s Board of Directors laid out the Project Liberty plan in detail, explaining that Epic would “[f]orm [a] coalition” in July and “lead [that] coalition of other leading tech companies in a PR and policy campaign against [Apple’s] 30% [commission].” Ex. B, at .003, .008. CAF is the product of Epic’s litigation strategy.

In light of these adjudicated facts, the statement in the proposed brief that CAF “is an *independent* nonprofit organization” (at 2 (emphasis added)) is false. CAF is not independent of Epic. Yet CAF chose not to disclose to this Court even that Epic is a member, much less that Epic created and controls CAF.

According to CAF’s motion (at 3), the proposed amicus brief “explains how Apple’s anti-steering provisions impact the multi-billion-dollar online application industry, not limited to Epic alone.” Yet the four identified CAF members—Tile, Match Group, Basecamp, and Knitrino—all offer *subscription* apps, which “are not part of this case.” Ex. A, at 33 n.198; *see id.* at 123 n.571. Indeed, subscription apps are subject to a different anti-steering provision that is unaffected by the injunction. *See id.* at 32 n.194. It does not appear that the four identified CAF members stand to benefit from the injunction any more than Epic itself does.

Moreover, the proposed amicus brief is largely devoted to the purported benefits of alternative “in-app payment systems.” Br. 6. The district court clearly explained in its order on Apple’s stay motion, however, that Apple’s “Developer

Agreement prohibits third party in-app payment systems other than Apple's IAP. *The Court did not enjoin that provision* but rather enjoined the prohibition to communicate external payment alternatives and to allow links to those external sites.” Ex. C, at 4 (emphasis added). Nor did the court preclude Apple from charging a commission on purchases of digital content, as CAF appears to assume. *Compare* Br. 6 (“Without being forced into Apple's [IAP] system and paying the required up to 30% fee ...”), *with* Ex. A, at 150 (“Even in the absence of IAP, Apple could still charge a commission on developers. It would simply be more difficult for Apple to collect that commission.”).

For the foregoing reasons, Apple opposes CAF's motion for leave to file an amicus brief in support of its founding member, Epic.

Dated: November 30, 2021

Respectfully submitted,

/s/ Mark A. Perry

Theodore J. Boutrous, Jr.
Daniel G. Swanson
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Ave.
Los Angeles, CA 90071

Rachel S. Brass
Julian W. Kleinbrodt
GIBSON, DUNN & CRUTCHER LLP
555 Mission St., Suite 3000
San Francisco, CA 94105

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Cynthia Richman
Joshua M. Wesneski
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave, NW
Washington, DC 20036
(202) 887-3667
mperry@gibsondunn.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Circuit Court Rule 27-1(1)(d) and Circuit Rule 32-3 because it contains 662 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(a)(2)(B).

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 27(d) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2016.

Dated: November 30, 2021

/s/ Mark A. Perry
Mark A. Perry

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Opposition to Motion for Leave to File Amicus Brief** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 30, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 30, 2021

/s/ Mark A. Perry
Mark A. Perry