

No. 23-15992

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

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

v.

MICROSOFT CORP. and ACTIVISION BLIZZARD, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California,
Case No. 3:23-cv-02880-JSC

**BRIEF FOR INDEPENDENT GAME PUBLISHERS AND DEVELOPERS
AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES**

Melissa Arbus Sherry
Jonathan C. Su
Brent T. Murphy
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

*Counsel for Amici Curiae Curve Games, Finji, iam8bit,
Strange Scaffold, and Studio Wildcard*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae state the following:

Curve Games has the following parent companies: Catalis Group; Project Sword Topco Ltd. No publicly held corporation owns 10% or more of its stock.

Finji has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

iam8bit has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Strange Scaffold has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Studio Wildcard is a wholly owned subsidiary of Snail, Inc., which has no parent company, and no publicly held corporation owns 10% or more of its stock.

Dated: September 13, 2023

s/ Melissa Arbus Sherry

Melissa Arbus Sherry

Jonathan C. Su

Brent T. Murphy

LATHAM & WATKINS LLP

555 Eleventh Street, NW

Suite 1000

Washington, DC 20004

(202) 637-2200

Counsel for Amici Curiae

Curve Games, Finji, iam8bit, Strange

Scaffold, and Studio Wildcard

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	5
CONCLUSION.....	11

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

J. Clement, *Number of games released on Steam 2004-2022*,
STATISTA (Feb. 20, 2023), [https://www.statista.com/
statistics/552623/number-games-released-steam](https://www.statista.com/statistics/552623/number-games-released-steam)6

INTEREST OF AMICI CURIAE¹

Amici curiae are five independent video game publishers and developers whose products are currently offered on Defendant-Appellee Microsoft Corp.’s Xbox subscription gaming service, Game Pass.

Curve Games is an independent game publisher based in the United Kingdom. Curve Games is a pioneer of developer-focused publishing, and works with some of the finest talent in the industry with a clear mission to create, shape, and amplify incredible games to players all around the world. Curve Games’ award-winning games include *The Ascent*, *For the King*, and *Human: Fall Flat*, among others. These games are played by millions of people around the world.

Finji is an independent development studio and small indie publisher based in Grand Rapids, Michigan. The early and continuing mission statement and studio foundational culture includes working toward sustainable development across teams—which includes active work to avoid crunch, active work to provide comfortable salaries and access to health care, and active design processes to include

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici curiae state that this brief was not authored in whole or in part by counsel for any party, and no person other than amici curiae and their counsel made a monetary contribution that was intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

more creatives in the development of our games. Finji works on award-winning games that change the way future game developers build and tell their own stories.

iam8bit is a creative production emporium based in Los Angeles, California, whose collaborative works have taken a variety of forms, including community events and immersive art experiences. iam8bit is also the industry leader in the production of premium physical editions of top-tier games. Through its iam8bit Presents imprint, iam8bit independently finances and publishes games, including the smash hit *Escape Academy*, as well as *Garbage Pail Kids: Mad Mike and the Quest for Stale Gum* and the upcoming *Simpler Times*.

Strange Scaffold is an independent video game development label whose founder is responsible for critically acclaimed projects including *An Airport for Aliens Currently Run by Dogs*, *Space Warlord Organ Trading Simulator*, *El Paso, Elsewhere*, and dozens more. Strange Scaffold's games have been lauded by critics and players alike for their direction, narrative design, and writing, and have been enjoyed by players around the world.

Studio Wildcard is an independent video game developer based in Redmond, Washington. Studio Wildcard developed the best-selling *ARK: Survival Evolved*, which has been played by millions of people since its release in 2015, as well as the upcoming *ARK II*.

Amici have a strong interest in the outcome of this case. As independent publishers and developers who have used Microsoft’s Game Pass service, amici are uniquely positioned to describe the real-world market effects of Microsoft’s services on independent game developers and the players of indie games, as well as the potential effects for competition in the gaming market from the merger of Microsoft and Activision.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Appellees’ brief explains, the FTC’s arguments on appeal suffer a multitude of flaws. In this brief, amici focus on one especially flawed argument that the FTC has highlighted for the first time on appeal—that the merger between Microsoft and Activision will stifle competition in the “market” of subscription services. Even assuming that subscription gaming services are their own product market, the FTC’s arguments are inconsistent with amici’s real-world experiences.

Amici are five independent companies, of all shapes and sizes, that publish or develop video games for a range of game-streaming platforms, including Microsoft’s Game Pass service on Xbox. Amici thus have first-hand experience with Microsoft’s Game Pass subscription service and its effects on the market for independently published and developed games. And while the FTC argues that the merger will stifle competition, amici have had precisely the opposite experience with Microsoft’s Game Pass service.

Subscription services like Game Pass are crucial to the success of indie games. They increase the odds that players will discover indie games, and lower the cost for players to try them when they do, since players would otherwise have to buy indie games outright. By lowering the barrier to trying new games, subscription services like Game Pass increase the odds that indie games can break through into a viable, revenue-generating level of players and viewership. Moreover, visibility for an indie game on one platform—like appearing among the most popular games on Game Pass—frequently translates to greater visibility and awareness (and therefore more players, and more revenue) for that game on other platforms where it is available, like Steam or PlayStation. In these ways, Game Pass is actually an important mechanism for *increasing* competition in gaming, because it promotes a market where indie games can achieve and increase financial viability for their current and future games, across all platforms where they appear.

Those benefits for indie games are only likely to grow from the addition of *Call of Duty* to Game Pass. *Call of Duty* is an enormously popular franchise that will undoubtedly draw subscribers to Game Pass if it is available there. That rising tide will lift all boats. The more subscribers to Game Pass there are, the more opportunities for those subscribers to try indie games that they otherwise might not have played. And the more those indie games are played on Game Pass, the more likely they are to be played elsewhere too.

In short, the FTC's arguments simply do not reflect the reality amici have experienced on the ground.

ARGUMENT

On appeal, the FTC has turned its attention from competition in the console market (the primary focus of its case in the district court) to the potential effects on other purported "markets," including for subscription services. The FTC's arguments rest on theories that bear no resemblance to the market experienced by game developers and publishers in the real world.

At one end of the market for video games are so-called "big budget" games, which are developed and published by companies or studios with access to large amounts of capital. Big budget games regularly cost tens or hundreds of millions of dollars to develop and publish, benefit from extensive marketing budgets, and command a premium price from players. On the other end are amici: independent or "indie" game developers and publishers. Indie games are frequently developed by individuals or small teams, and are published by independent game publishers, without the financial resources of the largest game publishers. Because of their relative independence compared with the commercial incentives inherent in big-budget game development, indie games are renowned for their creativity, artistry, and innovation, and are prized by players for their originality in narrative and gameplay, as well as for their risk-taking. At the same time, indie games by

definition lack the marketing budgets and commercial promotion of the highest budget games, meaning discoverability often can be a significant threshold barrier to commercial success.

For amici, subscription services like Microsoft's Xbox Game Pass are a crucial way for players to discover and try indie games and, in turn, for indie games to find commercial success and viability. When a player subscribes to Game Pass, she gains access to a library of games that are available to play—included with her subscription at no extra cost—for as little as \$9.99 per month. *See* Resp. Br. 10. In other words, once a player has subscribed to Game Pass, the financial barriers to trying an indie game available through the service are essentially zero. By contrast, without Game Pass, a player interested in trying an indie game would have to purchase the game outright, at a comparatively substantial cost. A rational economic actor is, of course, more likely to play a previously unknown and untested game if it is already covered by a monthly subscription than if the player has to pay for the game up front.

And the latter scenario—purchasing outright—assumes that the player has discovered the game in the first place. That is no small assumption, in a gaming market that has no shortage of new games released each year. *Cf.* J. Clement, *Number of games released on Steam 2004-2022*, STATISTA (Feb. 20, 2023), <https://www.statista.com/statistics/552623/number-games-released-steam> (noting

that in 2022 more than 10,000 games were released on the online gaming platform Steam alone). On this front too, subscription services like Game Pass are critical for indie games, because they increase the odds that players will discover the games in the Game Pass library and try them. Discovery and visibility for a game on one platform, like Game Pass, also frequently increases visibility on other platforms, like Steam or PlayStation, leading to greater exposure for an indie game across platforms. That increased visibility leads to more players, and more players translate into more revenue. And that cycle promotes competition by helping to make the publication of more indie games financially viable.

Each of amici have experienced this first-hand. For example, amicus Studio Wildcard's inclusion of *Ark: Survival Evolved* on Game Pass both increased player engagement and brought an influx of new players. Indeed, since joining Game Pass, the highest concurrent player count for *Ark: Survival Evolved* has been on Xbox, with more than 100,000 players online at any given moment. That not only boosts the overall player community, but also provides a steady revenue stream for Studio Wildcard. Many Game Pass subscribers have gone on to purchase new downloadable content packs for *Ark: Survival Evolved*—purchases that players otherwise may not have made if the game were not included in players' Game Pass subscriptions. That ongoing revenue stream is critical to games like *Ark: Survival Evolved*, whose business model depends not only on sales of the game, but also sales

of new expansions and refinements for the game. A steady revenue stream makes it possible for Studio Wildcard to continue to develop, expand, and refine the game, resulting in a more immersive and exciting game experience for players.

Likewise, amicus iam8bit's title *Escape Academy* achieved unparalleled success on Game Pass for a game from an unknown, first-time developer at a time when iam8bit Presents was a relatively new publisher. At the time of writing, *Escape Academy* has eclipsed over 1.5 million players on Game Pass—a number that continues growing every day. *Escape Academy*'s model similarly relies on sales of additional downloadable content, like expansions to the story of the base game. Because subscribers are able to “sample” the base game on Game Pass, iam8bit has found that including *Escape Academy* on Game Pass has increased the likelihood that subscribers will purchase additional downloadable content, providing additional revenue streams to support iam8bit's development of future content. And that is true even on other platforms—iam8bit has frequently heard from players that discovered *Escape Academy* on Game Pass, but later purchased the game or additional content outright on Steam or PlayStation.

Amicus Curve Games' experience has been similar. For example, Curve's game *Human Fall Flat* has been included on Game Pass for 7 years. In that time, Curve has recorded over 22.9 million units sold across all platforms. Game Pass has been a key part of that sustained success, with over 14.2 million unique users of

Human Fall Flat coming through that service. As another example, *The Ascent*, which launched in 2021, was a key partnership title with Game Pass. That partnership meant *The Ascent* was included in high-profile marketing activity with the Game Pass program, which resulted in increased exposure on other platforms too. For example, Curve saw an increase in exposure on Steam and an increase in Steam wishlists of 55 percent.

The same is true for amicus Strange Scaffold. Strange Scaffold's title *Space Warlord Organ Trading Simulator* is a sci-fi body horror market tycoon—an obscure genre. But thanks to its inclusion in Game Pass with a day-one appearance, the game ultimately generated more than \$300,000 in gross revenue across *all* platforms. This exemplifies the larger benefits of Game Pass. Game Pass increases the odds that players will try new games in different genres—even obscure ones—that they otherwise would not consider, because it lowers the barriers to entry and provides important visibility for indie games.

That is borne out by amicus Finji's experience as well. Finji's game *Tunic* is built on a design caveat that requires a player to reach an "ah-ha!" moment to be successful, which might not occur until 30 to 90 minutes into gameplay. But players might be wary of paying a premium price for a game like *Tunic* if they are unsure whether they will successfully unlock its secrets. That risk was mitigated for subscribers to Game Pass, though, by including *Tunic* as part of the Game Pass

library. Indeed, Finji incorporated the fact that players could take a chance and try *Tunic* for free on Game Pass into its marketing. And because Game Pass players were willing to take a risk on *Tunic* and successfully discover its charms, *Tunic* broke through into one of the top games played on Game Pass, with more than a million Game Pass players. That resulted in media scores for *Tunic* that were higher even than big budget games, which in turn translated into increased sales on Nintendo and PlayStation too.

As all of these examples demonstrate, Game Pass creates an ecosystem for indie games that amplifies the adoption rate by first-time players, provides increased visibility and rapid positive feedback loops when active players adopt a new game, and multiplies the likelihood that players will purchase additional content that boosts revenue streams for independent developers and publishers. All of this is a net positive for content creators and players across the gaming market—including on other platforms like Steam and PlayStation.

Contrary to the FTC's arguments, those benefits for indie games are only likely to grow if *Call of Duty* is added to Game Pass. *Call of Duty* is an enormously popular and well-known gaming franchise. And it has never before been available on the day of release on a subscription service. Thus, if Microsoft adds *Call of Duty* to Game Pass, that would be a valuable draw for potential new subscribers. And if there are more subscribers with access to the full library of Game Pass games, that

means more subscribers who could potentially discover and play indie games like amici's. That result is a net positive not only for consumers, but also for independent developers and publishers, because it means additional visibility and revenue for indie games. And more visibility and revenue for indie games means more future indie games.

CONCLUSION

The Court should affirm the district court's order denying the FTC's motion for a preliminary injunction.

Dated: September 13, 2023

Respectfully submitted,

s/ Melissa Arbus Sherry

Melissa Arbus Sherry

Jonathan C. Su

Brent T. Murphy

LATHAM & WATKINS LLP

555 Eleventh Street, NW

Suite 1000

Washington, DC 20004

(202) 637-2200

Counsel for Amici Curiae

Curve Games, Finji, iam8bit, Strange

Scaffold, and Studio Wildcard

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a), and Ninth Circuit Rule 32-1, this brief complies with the type-face and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman; and it complies with the length requirement of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,445 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

Dated: September 13, 2023

By s/ *Melissa Arbus Sherry*
Melissa Arbus Sherry