

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

JOEL RUIZ)	
)	Case No. 09-15971
<i>Plaintiff-Appellant,</i>)	
)	REPLY TO APPELLANT’S
)	RESPONSE IN OPPOSITION TO
vs.)	MOTION FOR LEAVE TO
)	FILE BRIEF <i>AMICI CURIAE</i>
GAP, INC. and VANGENT, INC.)	IN SUPPORT OF
)	DEFENDANTS-APPELLEES
<i>Defendants-Appellees.</i>)	
_____)	

**REPLY TO APPELLANT’S RESPONSE IN OPPOSITION TO
MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLEES ON BEHALF OF
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AND RETAIL INDUSTRY LEADERS ASSOCIATION**

Pursuant to Federal Rule of Appellate Procedure 27(a)(4), the Chamber of Commerce of the United States of America (“the Chamber”) and the Retail Industry Leaders Association (“RILA”) respectfully offer this Reply to Appellant Joel Ruiz’s Response in Opposition to Motion for Leave to File Brief *Amici Curiae* in Support of Defendants-Appellees.¹ The Chamber and RILA state as follows:

¹ Because this Court is now determining whether to grant the Chamber and RILA the status of *amici*, this motion refers to them as “the proposed *amici*,” and refers to their submitted brief as “the proposed *amici* brief” or “the proposed brief.”

INTRODUCTION

Mr. Ruiz has filed an opposition that takes up 19 full pages. This is longer than the text runs in the brief whose filing he opposes. It seems that Mr. Ruiz has used his opposition here as an opportunity to reargue the merits of the underlying case. Despite the length of his filing, Mr. Ruiz's opposition has no merit. First, he has likely waived his initial opposition, because his reply brief on the merits contains a substantial number of citations to the proposed *amici* brief. Second, Mr. Ruiz's is wrong in suggesting that the proposed *amici* merely repeat the parties' arguments. And third, by citing to a study, the proposed brief follows the longstanding custom and practice of other *amicus* briefs that this Circuit has accepted. Therefore, this Court should grant the proposed *amici*'s motion for leave to file their brief.

ARGUMENT

First, Mr. Ruiz has most likely waived his right to oppose the proposed *amici* brief, because his own Reply Brief on the underlying merits contains a dozen references to the very brief he now wants to exclude.² His substantial reliance on the proposed *amici* brief seems to moot the question of Mr. Ruiz's opposition. That is, given that Mr. Ruiz's own brief weaves in so many references to the

² See Appellant's Reply Brief at 1-2; 5; 12 n.9; 21 nn.14, 16; 22 n.17; 28 n.22; 35 n.29; 37 n.31; 44; 45; 46 n.42.

proposed *amici* brief, this Court will likely need to take the proposed *amici* brief into account to fully understand and analyze Mr. Ruiz’s own arguments. Indeed, Mr. Ruiz even pointed to the *amici* brief as a reason for requesting permission to file an overlength reply brief on the merits.³ By relying so heavily on the proposed *amici* brief, Mr. Ruiz has in effect waived his ability to oppose its filing.

Second, the proposed *amici* follows this Circuit’s rule that discourages repetition of arguments already made by the parties. In the Ninth Circuit, “*amici* briefs should not repeat arguments or factual statements made by the parties.” Cir. Advisory Comm. Note to Rule 29-1.

As the *Interests of Amici Curiae* section of the proposed *amici* brief states, the Chamber and RILA desire to file the brief to offer this Court the perspective of their members. Those members on a routine basis obtain electronic personal information, appreciate the importance of electronic information in today’s complex commercial world, and take seriously their responsibility to safeguard personal identifying information. Proposed *Amici* Br. at 2.

From this perspective, the proposed *amici* make two arguments. Initially they argue that, if Mr. Ruiz prevails here, such a result will curtail the number of options available to individuals to make their own assessments of the risk of actual

³ See Motion to Exceed Type-Volume Limitation of Appellant Joel Ruiz’s Reply Brief Pursuant to Circuit Rule 32-2, at 4-7.

harm that might result from the loss of personal data. This is because if companies face litigation based on the equivalent of strict liability whenever a loss of data occurs, then companies will contact only those individuals that state laws clearly require to be notified. *Id.* at 3-4, 5-11. To highlight the basis for this concern, the proposed *amici* brief includes a chart to point out different requirements for notification that different states impose. *Id.* at 17-24. Further, the proposed *amici* argue that, because fear of data misuse does not constitute an actionable injury, allowing Mr. Ruiz to prevail will open the door to tremendous litigation burdens and liability for American businesses and retailers. *Id.* at 14-16.

The parties' briefs do not make these arguments. They do not provide a broad perspective from associations of companies that encounter personal electronic information on a regular basis. They do not express how the business and retail community may respond to future breaches of personally sensitive data if Mr. Ruiz prevails. They do not provide research on the differences among dozens of state laws. And they do not express the business community's serious concern over baseless litigation. If Mr. Ruiz is claiming that the parties addressed these topics, he is wrong.

Third, and finally, the proposed *amici* wish to address an argument that Mr. Ruiz makes in passing. In a footnote, Mr. Ruiz asserts that this Court should reject the proposed *amici* brief on the basis that it cites to a study, because the District

Court declined to take judicial notice of it. Opp. Motion at 1 n.1. This makes little sense. To begin, the District Court never “rejected” the report, as Mr. Ruiz claims. Reply Br. at 28 n.22. Given that this case never proceeded to trial, the time had not yet come for the parties to file motions regarding the exclusion of evidence. Rather, the District Court’s decision to decline to take judicial notice of the study merely had the effect of requiring any party that wanted to use the study to introduce it through more traditional methods. *See Borden’s Farm Prods. Co., Inc. v. Baldwin*, 293 U.S. 194, 209, 213 (1934) (remanding case to district court to determine facts where Supreme Court declined to take judicial notice). As Black’s Law Dictionary notes, judicial notice exists “for purposes of convenience.” BLACK’S LAW DICTIONARY 862 (8th ed. 2004). It follows that material bears no stigma on the basis that a court declines to take judicial notice of it. Further, the brief’s single citation—in a footnote—to the study at issue does not constitute “[t]he introduction of new evidence,” as Mr. Ruiz claims. Opp. Motion at 1 n.1. Rather, it is customary for *amici curiae* to cite to studies and similar research in their briefs, and this Court has praised *amici* for doing so.⁴ This is all that the proposed *amici* did here.

⁴ See, e.g., *Alaska Wilderness Recreation and Tourism Ass’n v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995) (“The parties and *amici* supply arguments, studies, and declarations in support of their positions”); *Compassion in Dying v. Washington*, 49 F.3d 586, 592 (9th Cir. 1995) (“[W]e take into account the legal

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It is likely that Mr. Ruiz has waived his ability to oppose the filing of the proposed *amici* brief here, given that he has made substantial use of it in his own prior filings. And if there is no waiver, it is still appropriate for this Court to accept the proposed brief. In it, the Chamber and RILA offer their perspective on the importance and potential impact of this case, as is customary for *amici*. They have done so without merely repeating the arguments of the parties, and without introducing new evidence. Thus, they have “fulfilled the classic rule of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that has escaped consideration.” *The Miller-Wohl Co., Inc. v. Comm’r of Labor and Ind.*, 694 F.2d 203, 204 (9th Cir. 1982). Therefore, it is appropriate for this Court to accept the proposed *amici* brief.

and medical articles cited by the parties and *amici*”); *Union Pac. R.R. Co. v. Pub. Util. Comm’n*, 899 F.2d 854, 857 (9th Cir. 1990) (discussing report cited in *amicus* brief, even where report was authored by *amicus*); *Richmond Welfare Rights Org. v. Snodgrass*, 525 F.2d 197, 207 n.17 (9th Cir. 1975) (“We are favored by *Amicus* with citation of numerous articles”).

CONCLUSION

This Court should grant the proposed *amici*'s motion for leave to file their brief.

Respectfully submitted,

/s/ Raymond C. Fay

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2009, 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.

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.

s/ Stephen Moore