IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| JANE DOE No. 14,<br><br>Plaintiff-<br>Appellant,<br><br>v.<br><br>INTERNET BRANDS, INC.,<br><br>Defendant-<br>Appellee. | **REPLY TO OPPOSITION OF MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE FLOOR64, INC. D/B/A THE COPIA INSTITUTE IN SUPPORT OF APPELLEE INTERNET BRANDS, INC. PETITION FOR REHEARING AND REHEARING EN BANC**<br><br>9th Circuit Case No. 12-56638<br><br>On Appeal from the United States District Court for the Central District of California<br>3:14-cv-00764-PK<br>Honorable J. Walter |

## INTRODUCTION

Appellant Jane Doe 14 opposes both the motion to renew the previous amicus brief filed by a group of Internet platforms and organizations representing Internet platforms (hereinafter "CCIA") and the motion filed by Floor64, Inc. d/b/a The Copia Institute (hereinafter "Copia") for leave to file its new amicus brief on two grounds: one, that the two briefs are redundant, and two, that they "will not be helpful to the court." Both grounds for opposition are without merit.

For reasons Appellant herself cites, the pending Petition for Rehearing and Rehearing En Banc ("Petition") presents precisely the sort of situation where amicus briefs are valuable. Furthermore, the fact that the two briefs support the

same ultimate conclusion – that the Petition should be granted to correct the Panel's error in interpreting the scope of 47 U.S.C. § 230 ("Section 230") – does not inherently make either one superfluous. On the contrary, in a situation such as this one, where the consequences of the Panel's decision stand to be so significant and broad in their reach, it is particularly valuable for the Court to have access to the varied perspectives of the varied interests who will be affected in order to understand the decision's full effect as will be felt far beyond this case.

## THE PENDING PETITION PRESENTS PRECISELY THE SORT OF SITUATION WHERE AMICUS BRIEFS ARE VALUABLE

In her opposition Appellant, perhaps inadvertently, supplies the basis for why these amicus briefs should be allowed. The opposition complains that, "Amici … attempt to attribute far greater implications from the panel's Opinion than are warranted by Jane Doe's allegations and the panel's holding." Opposition at 4. It further protests that their arguments "lose sight of the particular facts upon which the panel made its decision." *Id.* These objections set forth exactly why the briefs are appropriate here.

Amici indeed argue that the implications of the Panel's decision will be great and damaging on their ability to act as platforms facilitating the exchange of information and ideas. As platforms themselves they are best positioned to understand the full extent of the legal risk the Panel decision invites, and as non-parties they are best positioned to present this insight to the court. *See*

*Neonatology Assoc., P.A. v. Commissioner of Internal Revenue*, 293 F.3d 128, 132 (3rd Cir. 2002) (observing that amici are able to provide input that a party intent on winning the case may not be). It is also because this decision stands to reverberate so extensively, affecting so many other situations including those arising from entirely different sets of facts, that amicus briefs are warranted in order to inform the Court the full extent of those implications. These are implications that the Court would otherwise not have the occasion to become aware of, or the opportunity to consider, as it considers the Petition in the absence of these briefs. *See id.* (describing the important assistance an amicus brief may provide to a court, particularly in situations where a decision will have an impact on an industry or group).

In fact it is because of the extent to which the Panel decision deviates from both prior precedent and Congress's intent that the issues raised by the Petition exhibit the requisite novelty and complexity warranted for amicus briefs at this stage. The novelty stems from the Panel decision setting forth a completely new interpretation of Section 230's applicability, and the complexity is evidenced by the difficulty the Panel had in recognizing how it should have applied. While the defendant and amici would argue that it should have easily applied, because the particular facts of a particular case can tempt a court to reaching an alternative conclusion, it is important for this Court to have the benefit of the additional

analyses amici are offering in order to help it recognize and respond to the larger issues at stake outside the specific bounds of this case.

## THE BRIEFS ARE NOT REDUNDANT

Multiple amicus briefs are warranted when, as here, the Panel's decision stands to affect platforms of all sizes and stripes and not just those embodied by the defendant or represented by any single brief. In addition to these two briefs not being similarly situated – one had earlier been submitted for the Court's consideration, and the second newly submitted in light of the amended Panel decision – they differ in several other important ways that make it appropriate for both to be considered.

First, although the signatories of the CCIA brief represent a variety of intermediary platforms who will be affected, the Copia brief represents an additional voice: that of a privately-held small business entity dependent on the statutory protection for the survival of its business, a business that also happens to be one with significant experience, through its online publication Techdirt.com, chronicling the innumerable instances where Section 230 has been crucial to ensuring the viability and vitality of other Internet businesses and the public

discourse and economic benefit they enable.[1]

This unique perspective runs throughout its brief. It is evidenced in particular in Section III, which stresses the chilling implications the Panel's decision will have, if allowed to stand, on individuals and other small entities that run their own platforms. Those so affected include Copia, which, in addition to publishing its own commentary on innovation and policy topics, including those relating to Section 230, also pointedly hosts complementary discussion through its online comment section in order to build community and encourage further

[1] A search for the term "Section 230" in the archives of Techdirt.com returns thousands of articles pertaining to all sorts of platforms, including those like Internet Brands that enable people to offer goods and services, and those that have specifically been protected by Section 230's pre-emption of state-based claims of liability (or both). See https://www.techdirt.com/search-g.php?num=20&q=Section+230&search=Search (showing the depth of Copia's coverage on the topic).

discourse and discovery.[2]

But Copia would not be able to host these online forums, and no one would be able to benefit from the discourse and discovery they enable, were it not for Section 230 clearly and unequivocally protecting it from crippling legal risk, as it has done up until now.[3] Although the Panel decision does not directly speak to liability that might arise by hosting user comments, by introducing ambiguity to whether and when Section 230 might apply generally, it undermines the legal

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[2] *See*, *e.g.*, Karl Bode, *Motherboard's Version Of 'Valuing Discussion' Involves No Longer Letting You Comment*, Techdirt (Oct. 5, 2015), https://www.techdirt.com/articles/20151005/11135532439/motherboards-version-valuing-discussion-involves-no-longer-letting-you-comment.shtml ("[C]omments foster community, [and] also provide transparency, accountability, and crowdsourced fact checking."); Karl Bode, *The Trend Of Killing News Comment Sections Because You 'Just Really Value Conversation' Stupidly Continues*, Techdirt (Sept. 23, 2015), https://www.techdirt.com/articles/20150917/09222332282/trend-killing-news-comment-sections-because-you-just-really-value-conversation-stupidly-continues.shtml ("[Comments are] a legitimate and transparent avenue for readers to publicly correct your errors right below the original article. […] [G]ood commenters almost always offer insights the writer or website may have missed, could have been wrong on, or never even thought of."). *See also* Scott Greenfield, *Cross: Mike Masnick, Digging up dirt on more than tech*, Mimesis Law (Feb. 3, 2016), http://mimesislaw.com/fault-lines/cross-mike-masnick-digging-up-dirt-on-more-than-tech/6516 ("I actually learn a ton from our comments as well, and they've absolutely made me a much better and more thoughtful commentator on the issues we cover.").

[3] The risk is not hypothetical: only because it has been protected by Section 230 has Techdirt been able to continue to supply and host the commentary and criticism Section 230, and the First Amendment, exist to enable it to do. *See*, *e.g.*, Mike Masnick, *Legal Threat Demands We Shut Down Techdirt*, Techdirt (Aug. 26, 2010), https://www.techdirt.com/articles/20100825/02002110771.shtml.

certainty that smaller platforms, like that of Copia, depend on to host the exchange of information and ideas they do. The particular vulnerability of their position is not one that was so directly communicated by the earlier CCIA brief, however, nor is it one that the Panel decision addresses. But because the decision, if left to stand, would so severely affect these platforms, and with them the speech they enable, the Copia brief should be permitted in order to make the Court so aware.

The Copia brief also should be permitted because the other substantive arguments contained within it, although consistent with those in the CCIA brief and in complete agreement with its conclusion,[4] add to the discussion by focusing on Congressional intent and statutory construction to a much greater degree than the CCIA brief did, arguing first, in the three subparts of Section I, how the decision undermined Congress's intent to foster the growth of the Internet and then, in Section II, how the decision also contravened how Congress intended the statute to operate to best protect the public. These arguments were also not arguments directly addressed by the Panel, and as such the Copia brief should be

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[4] Even to the extent that the briefs may overlap, fellow courts have nevertheless found it appropriate to liberally permit both to be filed. *See Neonatology Associates*, 293 F.3d at 133 ("Those favoring the practice of restricting the filing of amicus briefs suggest that such briefs often merely duplicate the arguments of the parties and thus waste the court's time […] However, a restrictive practice regarding motions for leave to file seems to be an unpromising strategy for lightening a court's work load. […] I think that our court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted.").

allowed in order to introduce them to the Court as it considers the Petition.

## CONCLUSION

Because the Panel decision raises issues that are novel and complex, and because the perspectives and analyses provided by the two briefs are fundamentally different, both should be allowed.

Dated: July 28, 2016

RESPECTFULLY SUBMITTED,

By: *<u>/s/ Catherine R. Gellis</u>*

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## CERTIFICATE OF SERVICE

I hereby certify that 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 on July 28, 2016.

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: July 28, 2016

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