CASE NOS. 18-55367, 18-55805, 18-55806

IN THE

United States Court of Appeals For the Ninth Circuit

HOMEAWAY.COM, INC. AND AIRBNB, INC.,

Plaintiffs-Appellants,

v.

CITY OF SANTA MONICA,

Defendant-Appellee.

On Appeal from the
United States District Court for the Central District of California
Nos. 2:16-cv-06641, 2:16-cv-06645
The Honorable Otis D. Wright II, United States District Judge

BRIEF OF ENGINE ADVOCACY AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

Phillip R. Malone, CA Bar No. 163969
JUELSGAARD INTELLECTUAL PROPERTY AND INNOVATION CLINIC
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
(650) 725-6369
jipic@law.stanford.edu

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel discloses that amicus, Engine Advocacy, is a nonprofit corporation organized under the laws of the state of California, that it does not have any parent company, and that no publicly held corporation owns 10% or more of its stock.

Dated: May 6, 2019

s/ Phillip R. Malone
Phillip R. Malone, CA Bar No. 163969

JUELSGAARD INTELLECTUAL PROPERTY AND INNOVATION CLINIC
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
(650) 725-6369
jipic@law.stanford.edu

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INTEREST OF AMICUS CURIAE[1]

Amicus Engine Advocacy ("Engine") is a non-profit technology policy, research, and advocacy organization that bridges the gap between policy makers and startups. Engine works with federal, state, and local government; international advocacy organizations; and a community of growth-oriented technology startups nationwide to support the development of technology entrepreneurship. Engine conducts research, organizes events, and spearheads campaigns to educate elected officials, entrepreneurs, and the general public on issues vital to fostering technological innovation, including the scope of the Communications Decency Act, 47 U.S.C. § 230 (2018) ("Section 230").

Engine seeks to bring to the Court's attention perspectives on the broader impact of this case that are not likely to be fully presented by the parties. In particular, Engine highlights the damage to small businesses and startups that will be caused by the panel's decision upholding the City of Santa Monica's ("City")

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[1] This brief is submitted pursuant to Rule 29(b)(2) of the Federal Rules of Appellate Procedure and Rule 29-2(a) of the Ninth Circuit Rules. Pursuant to Rules 29(a)(4)(E) and 29(b)(4) of the Federal Rules of Appellate Procedure, no part of this brief was authored by either party's counsel, neither party or their counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amicus and its counsel—contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

ordinance ("Ordinance"), as well as the importance of a Section 230 interpretation that is consistent with Ninth Circuit precedent.[2]

SUMMARY OF ARGUMENT

The Ninth Circuit should rehear this case because the panel's novel legal interpretation conflicts with both the language of Section 230 and established precedent in this Circuit. Review is exceptionally important to ensure that Section 230 continues to protect startups and promote robust competition online.

The Ninth Circuit has rejected similar attempts to circumvent Section 230 and has declined to hold platforms liable for users' misuse of neutral tools. The panel's decision will permit states, municipalities, and private plaintiffs to engage in creative pleading to skirt Section 230's vital protections. It will effectively force all platforms, large and small, to monitor content posted by third parties. This monitoring burden will disproportionately harm small internet companies that lack extensive resources for content moderation and hampers their ability to innovate and compete. The decision will also artificially push startups toward advertising-supported business models by increasing the risk and expense of operating platforms that facilitate transactions between users.

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[2] Amicus thanks Stanford Law School Juelsgaard Intellectual Property and Innovation Certified Law Students George Brown and Claire Santiago for their substantial assistance in drafting this brief.

Preserving the established scope of Section 230 will not prevent the City from achieving its goals. It will continue to have alternative means to enforce its housing laws without subjecting online platforms to the sort of costly, burdensome, and often impossible monitoring obligations that Section 230 was designed to prevent.

ARGUMENT

Section 230 prevents courts from treating internet intermediaries and platforms as publishers or speakers of third-party content, and the Ninth Circuit has consistently interpreted this protection broadly. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (en banc) ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under [S]ection 230."). Congress's language and purpose are clear, and other circuits have reached similar interpretations. *See, e.g., Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) ("Because the appellants' claims . . . necessarily treat Backpage as the publisher or speaker of content supplied by third parties, the district court did not err in dismissing those claims."); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) ("Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA.").

The panel's decision to impose a novel, proactive monitoring requirement on platforms creates a false distinction between "review[ing] the content" and

"processing transactions" by exempting "distinct, internal, and nonpublic" content from the protections of Section 230(c)(1). *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019). Requiring platforms to monitor this user-generated content narrows Section 230 and could subject platforms to liability for content such as private messages, geolocation information, transactions, and more. *But cf. Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) (declining to require a platform to monitor "internal communications").

This does not mean platforms are exempt from state and local laws unrelated to third-party content, such as employment and state income tax laws. But because the postings and transactions at issue in this case necessarily rely on user-generated content, Appellants should not face liability simply because the associated information may be distinct, internal, and nonpublic. Furthermore, nonpublic information is rarely entirely internal or distinct; here, a booking transaction necessarily involves a related, external, user-generated posting, even if some information, such as a credit card number, is not public. The panel's effort to draw a line between a transaction and content is incompatible with Section 230.

I. REHEARING IS EXCEPTIONALLY IMPORTANT BECAUSE THE PANEL'S DEPARTURE FROM PRECEDENT THWARTS SECTION 230'S GOAL OF PRESERVING THE INTERNET'S COMPETITIVE FREE MARKET.

Congress and the Ninth Circuit have affirmed the importance of promoting competition online. *See, e.g.*, 47 U.S.C. § 230(b)(2) (2018) (stating it is U.S. policy to "preserve the vibrant and competitive free market that . . . exists for the [i]nternet"); *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) ("Congress wanted to . . . promote the development of e-commerce."). Congress passed Section 230 so innovators could focus on new technology and business models, not litigation. *See* 47 U.S.C. § 230(b)(2) (2018). The panel's decision will be unduly burdensome for small startups that depend on Section 230's long-standing protections.

The decision will strengthen incumbents and stifle competition. Although the particular Ordinance at issue only applies to home-sharing businesses, the panel's novel exception to Section 230 imposes potential liability on any platform that allows transactions involving user-generated content. Municipalities can simply claim to be regulating transactions—or anything they deem "distinct, internal, and nonpublic"—rather than content. This is the opposite of what Congress intended when it sought to "promote the continued development of the [i]nternet" and preserve the competitive free market "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(1)-(2) (2018). While requiring monitoring will have negative consequences for large companies, it will significantly burden future startups, which

are critical for innovation, job creation, and robust competition online. *See, e.g.*, John Haltiwanger et al., *Who Creates Jobs? Small Versus Large Versus Young*, 95 Rev. Econ. & Stat. 347, 360 (2013) ("[S]tart-ups . . . account for only 3% of employment but almost 20% of gross job creation.").

A. The Panel's Decision Compels Platforms to Monitor Content.

Under the panel's broad reasoning, platforms in a variety of industries beyond home-sharing could be treated as publishers or speakers of information posted by third parties and forced to monitor content or face liability. Proactive monitoring is costly and burdensome. For example, in a case like this, startups must either hire moderators to review each transaction or hire engineers to build an application that checks the inconsistently formatted "registries" of each municipality. These costs reduce innovation and increase barriers to entry—exactly what Congress sought to prevent by keeping "government interference in the [internet] to a minimum." *Batzel*, 333 F.3d at 1027 (quoting *Zeran*, 129 F.3d at 330).

Congress passed Section 230 in part because of the vast scope of the internet and the resulting impossibility of monitoring huge amounts of user content. While this Ordinance applies only to Santa Monica's nine square mile territory, *HomeAway*, 918 F.3d at 679, online platforms are accessible anywhere by anyone with an internet connection, making them susceptible to local regulations and private lawsuits wherever users reside. Thousands of municipalities could rely on the

panel's reasoning about "booking transactions"—or similarly veiled publishing activities in other industries—to impose a patchwork of obligations on platforms for what is in reality third-party content.

B. Requiring Monitoring Contravenes Section 230, Disproportionately Burdens Startups, and Hampers Innovation.

All online platforms are at risk of increased monitoring costs and burdens under the panel's ruling. While established players may be able to absorb those costs, startups lack the necessary resources. In order for "the small, gutsy entrepreneur" to continue to have "a real shot at succeeding," Section 230 must be interpreted as Congress intended: to preempt statutes that require proactive monitoring of third-party content. 164 Cong. Rec. 1866 (2018) (Statement of Sen. Ron Wyden) ("[B]ecause of [S]ection 230 . . . small nonprofits have the ability to take their causes nationwide."); *see also id.* at 1867-68 ("[S]ection 230 was never about protecting the incumbents . . . [w]hen I wrote this policy, I . . . hope[d] it would give the little guy and his startup a chance to grow into something big."). Similarly, in *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009), this Court described Section 230's "express policy of relying on the market" for competition online. *Id.* at 1177.

Congress's goal of empowering online platforms requires giving startups the opportunity to create and test new technologies and business models. Section 230 furthers these goals, but the panel's decision permits ordinances and lawsuits that

could effectively compel startups to either avoid innovations that involve "distinct, internal, and nonpublic" information (like processing transactions) or monitor content. Applying Section 230 properly would protect innovative startups and avoid hamstringing their ability to compete with incumbents.

Unfortunately, the panel's decision will hurt small companies across the board, not just those in the home-sharing market. States and municipalities will be able to regulate third-party content, technologies, and data required by certain business models by claiming *some* information is distinct or nonpublic. This will limit innovation for many websites, including those that leverage technical developments, such as geolocation information. *See, e.g.*, *Herrick v. Grindr, LLC*, No. 18-396, 2019 WL 1384092, at *1 (2d Cir. Mar. 27, 2019) (upholding Section 230 protection for Grindr's nonpublic matching and geolocation features).

Examining how booking transactions work in practice also illustrates the consequences of the panel's decision for startups. When a guest books a home-share, she enters a variety of information, and the platform uses a third-party financial technology ("FinTech") service to process the payment. FinTech innovators have flourished over the past several years. *See* Dirk A. Zetzsche et al., *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation*, 23 Fordham J. Corp. & Fin. L. 31, 38 (2017) ("This new era of FinTech is marked by the speed of technological change and the range of new entrants in the financial sector.").

Under a literal reading of the Ordinance, however, these companies could be criminally liable for processing payments because they may unknowingly "participate[] in the home-sharing . . . business by collecting or receiving a fee, directly or indirectly . . . for conducting a booking transaction." S.M. Mun. Code § 6.20.010(c) (2017). The panel's decision permits the Ordinance and other impositions of liability based on "distinct, internal, and nonpublic" information to evade Section 230's protections. Contrary to Congress's intent, the decision allows a locality to impose this unpredictable successive liability, which undermines Section 230's core policy of promoting a "vibrant and competitive free market" online. 47 U.S.C. § 230(b)(2) (2018). If localities can work around Section 230's provisions to regulate platforms for what is really content created by third parties, innovation will be stunted, entrenching incumbents and decreasing investment across numerous industries.

C. The Panel's Decision Favors One Specific Business Model, Limiting Innovation and Efficiency.

Innovation and competition, not fear of liability for the actions of users, should determine which business models are most successful online. Yet the de facto monitoring requirement for third-party content may have the effect of pushing platforms and innovators—especially startups that cannot afford to moderate all content—away from any business model that relies on revenue generated by user

content and toward ad-supported or subscription-based business models to avoid liability for facilitating transactions involving third-party content.

For example, in the wake of the Cambridge Analytica scandal, ad-free social media platforms, like Vero and MeWe, entered the market. *See* Paul Sawers, *Is Building a Facebook Alternative Worth the Effort? MeWe Thinks So*, VentureBeat (July 5, 2018, 9:00 AM), https://perma.cc/WH23-8FUL. Under the panel's decision, however, platforms like MeWe and Vero could be forced to monitor content that accompanies transactions, compelling them to either abandon their ad-free model or cease operating. Thus, the panel's decision will reduce consumer choice, competition, and innovation.

D. Correctly Applying Ninth Circuit Precedent Does Not Prevent the City from Achieving Its Goals.

Adhering to the text of Section 230 and this Court's precedents would not thwart the city's stated objectives. *See* 47 U.S.C. § 230(b), (e)(3) (2018); *Batzel*, 333 F.3d at 1027. Section 230 reinforces the principle that the person or entity trying to assert its rights—here, Santa Monica—is in the best position to monitor and enforce.

In the context of an analogous regime protecting platforms from liability for user uploaded content, the Digital Millennium Copyright Act's notice and takedown regime for online copyright infringement recognizes the efficiency of placing the enforcement responsibility on content owners who fully understand their

copyrighted content and associated licenses. *See* 17 U.S.C. § 512 (2010). Similarly, it is more efficient for municipalities to enforce their housing laws against unlicensed hosts than to delegate enforcement to internet platforms. The City can still accomplish its goals by directly penalizing owners who fail to obtain home-sharing licenses; it has several alternatives for doing so that do not require diminishing Section 230's protections.

For example, to obtain information necessary to enforce the Ordinance, the City could enter into a data sharing agreement with key platforms. Appellants have signed similar agreements with other jurisdictions; these benefit both parties by making enforcement easier for local governments without deputizing platforms and forcing them to monitor content. Appellants' Reply Br. 19. Alternatively, the City could use administrative subpoenas to obtain the names and addresses of listings in Santa Monica. Lastly, the City can engage in routine investigation and enforcement. *Cf. Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008) (Easterbrook, C.J.) ("Using the remarkably candid postings on craigslist, the Lawyers' Committee can identify many targets to investigate. It can dispatch testers and collect damages from any landlord . . . . It can assemble a list of names."). All of these methods would give the City the information it needs without undermining Section 230's important protections and hindering innovation by neutral platforms.

II. THE PANEL'S DECISION CONFLICTS WITH BOTH NINTH CIRCUIT PRECEDENT AND THE LANGUAGE OF SECTION 230.

The Ninth Circuit has recognized that "there is little doubt that [Section 230] sought to further First Amendment and e-commerce interests on the [i]nternet." *Batzel*, 333 F.3d at 1028. In *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), this Court noted that "the language of [Section 230] does not limit its application to defamation cases." *Id.* at 1101. Instead, a court "must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker. If it does, [S]ection 230(c)(1) precludes liability." *Id.* at 1102.

A. The Panel's Decision Conflicts with Circuit Precedent That Bars "Creative Pleading" Around Section 230.

This Court's precedents do not permit a party to "work around § 230 . . . to advance the same basic argument that the statute plainly bars." *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1265-66 (9th Cir. 2016), and courts should not "open the door to such artful skirting of [Section 230's] safe harbor provision." *Id.* at 1266 (holding that "Kimzey's effort to circumvent [Section 230's] protections through 'creative' pleading fails").[3] Contradicting this precedent, the panel's decision opens the door

[3] In a different context, the Supreme Court has discouraged "creative" statute writing at odds with a federal statute's intended effect. *See Wos v. E.M.A.*, 568 U.S. 627,

to artful skirting of Section 230's safe harbor that would undermine its critical protections for innovation, efficient online commerce, and free speech. The panel's decision creates a false distinction by permitting the City to hold platforms liable for transactions, based on user-generated content, that are inextricably linked to the publication Section 230 protects.

District courts in the Ninth Circuit and courts elsewhere have "rejected plaintiffs' attempts to plead around [Section 230] immunity by basing liability on a website's tools." *Dyroff v. Ultimate Software Grp., Inc.*, No. 17-CV-05359-LB, 2017 WL 5665670 (N.D. Cal. Nov. 26, 2017); *see also Jane Doe No. 1*, 817 F.3d at 20-21 (denying liability for advertisements soliciting illegal activity); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116 (N.D. Cal. 2016), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018) (rejecting liability for providing an account).

In *Fields*, for example, plaintiffs attempted to skirt Section 230 by arguing that their claims were rooted solely in Twitter allowing ISIS members to sign up for user accounts and not in Twitter's publication of third-party content. *Id.* at 1121-22. The district court rejected this creative pleading and recognized that the claims were "inherently tied up with [a third party's] objectionable use of Twitter, not its mere

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628 (2013) ("A State may not evade pre-emption through creative statutory interpretation or description, 'framing' its law in a way that is at odds with the statute's intended operation and effect.") (citing *National Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012)).

acquisition of accounts." *Id.* at 1125. In this case, Santa Monica's entire claim is similarly tied up with third parties' objectionable use of the platforms to advertise and rent homes in violation of the Ordinance. When a statute or plaintiff targets user-generated content by creatively pleading facts about another feature of the platform—whether it is user sign-up, a "booking transaction," or another neutral tool—Section 230's protections must remain in place. *See Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012) (enjoining state statute that conflicted with Section 230(c)(1)).

The panel's decision also ignores the fact that "[t]he [i]nternet [serves as] a forum for . . . myriad avenues for intellectual activity" and "ha[s] flourished . . . with a minimum of government regulation." 47 U.S.C. § 230(a)(3)-(4) (2018). This emphasis on minimal regulation and an unwillingness to allow "creative pleading" to circumvent Section 230 led this Court to uphold the district court's dismissal in *Kimzey*. 836 F.3d at 1266.

B. The Exception in *Roommates.com* Does Not Apply in This Case.

The panel's decision represents a dramatic expansion of the holding in *Roommates.com*, asserting an overly broad definition of the term "develop" that "would defeat the purposes of [S]ection 230 by swallowing up every bit of the immunity that the section otherwise provides." 521 F.3d at 1167. This Court recognized a limited and precise exception to Section 230: "[A] website helps to

develop unlawful content, and thus falls within the exception to Section 230, if it *contributes materially to the alleged illegality of the conduct*." *Id.* at 1168 (emphasis added). Platforms are liable for tools they develop only when those tools specifically facilitate illegal activity. *Id.* at 1167 (explaining that, while "ordinary search engines do not use unlawful criteria to limit the scope of searches conducted on them, nor are they designed to achieve illegal ends," Roommate's search function was designed "to steer users based on discriminatory criteria").

Conversely, a "website does not create or develop content when it merely provides a neutral means by which third parties can post information." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014). Consequently, a website is not liable for creating a neutral tool even if some users employ it for an illegal end.

In this case, the platforms created exactly that: a neutral tool—payment processing functionality—that neither steered users based on illegal criteria nor was designed to achieve illegal ends. The transaction and booking processes were not in any way designed specifically to facilitate individuals' violations of the Ordinance, as required by *Roommates.com*.

On a similar basis, the Second Circuit recently held that Section 230 bars state law claims against Grindr, a "web-based 'hook-up' application." *Herrick*, 2019 WL 1384092, at *1. As that court explained:

> To the extent that [the claims] are premised on Grindr's matching and geolocation features, they are likewise barred, because under § 230 an

> [interactive computer service] "will not be held responsible unless it assisted in the development of what made the content unlawful" and cannot be held liable for providing "neutral assistance" in the form of tools and functionality available equally to bad actors and the app's intended users.

Id. at *3 (internal citations omitted). Even though Grindr implemented geolocation functionality and processes transactions, it was protected by Section 230's "broad federal immunity to any cause of action that would make service providers liable for information *originating* with a third-party user of the service." *Id.* (emphasis added) (quoting *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006)).

The neutral nature of the booking process in this case is further demonstrated by the contrast between it and the tool at issue in the Department of Housing and Urban Development's ("HUD") recent enforcement action against Facebook. Facebook, Inc., F.H.E.O. No. 01-18-0323-8 (Mar. 28, 2019), https://perma.cc/ZVC6-4UR4. There, HUD alleged that Facebook created tools that allow advertisers of rental properties to illegally discriminate, including by permitting Facebook advertisers to "redline" around areas on a map that they wanted to exclude from advertisements. *Id.* While Facebook may have created a tool designed to achieve illegal ends that falls within the *Roommates.com* exception, that is not this case. The panel's decision incorrectly applied the limited *Roommates.com* exception to what is instead a neutral tool that, like the open text box in *Roommates.com*, could be misused by a user seeking to achieve illegal means.

C. The Panel's Decision Conflicts with Precedent That Recognizes the Importance of Section 230 to Innovators.

The panel's unwarranted expansion of the *Roommates.com* exception is especially damaging to startups because it makes it difficult for them to prevail against frivolous claims early in litigation. Section 230 has been crucial for innovators by protecting them from costly lawsuits each time a user posts something that may be illegal. Engine Advocacy, *Section 230: Cost Report*, https://perma.cc/9KT5-AB9Z (last accessed Apr. 24, 2019). Even when platforms are sued, Section 230 "allows startups to end such lawsuits at an early stage, avoiding ruinous legal costs." *Id.*; *see* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 440 (2010) (finding courts granted over 50% of motions to dismiss in Section 230 cases). This is not inexpensive: Litigating even to the motion to dismiss stage can cost a startup $15,000 to $40,000. Engine Advocacy, *Section 230: Cost Report*. But it is far less costly and ruinous than litigating a claim in its entirety, which can cost $100,000 to more than $500,000. *Id.*

The ability to obtain early dismissal of a case because of clear Section 230 protection is undermined by the panel's decision, which may enable a mere assertion that a claim is based on "distinct, internal, and nonpublic" information, like processing transactions, to thwart an early dismissal based on Section 230. At a

minimum, such cases may require full discovery to prove that the claim is in fact grounded on user posts and that Section 230 applies.

Without Section 230 protection, websites would face, as this Court has recognized, "death by ten thousand duck-bites" fighting off lawsuits without Section 230 protection. *Roommates.com*, 521 F.3d at 1174. Small startups might be forced to fold rather than innovate because they, unlike established businesses, cannot survive as many "duck bites." *See id*.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Dated: May 6, 2019

Respectfully submitted,

s/ Phillip R. Malone

Phillip R. Malone, CA Bar No. 163969

JUELSGAARD INTELLECTUAL PROPERTY AND INNOVATION CLINIC
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
(650) 725-6369
jipic@law.stanford.edu

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This **Brief of Engine Advocacy as Amicus Curiae in Support of Petition for Rehearing and Rehearing En Banc** complies with the type volume limitation contained in Ninth Circuit Rule 29-2(c)(2), because it contains 4,016 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

By: s/ Phillip R. Malone
Phillip R. Malone,
CA Bar No. 163969
Counsel for Amicus Curiae

Dated: May 6, 2019

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Brief of Engine Advocacy as Amicus Curiae in Support of Petition for Rehearing and Rehearing En Banc** with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 6, 2019.

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.

By: s/ Phillip R. Malone
Phillip R. Malone,
CA Bar No. 163969
Counsel for Amicus Curiae

Dated: May 6, 2019