Case No. S240649

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FLO & EDDIE, INC.,

Plaintiff - Respondent,
v.

PANDORA MEDIA, INC.,

Defendant -Appellant,

QUESTIONS CERTIFIED FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, CASE NO. 15-55287

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA, CASE NO. CV14-7648-PSG
THE HONORABLE PHILIP S. GUTIERREZ
MAGISTRATE JUDGE RALPH ZAREFSKY

APPLICATION OF THE ELECTRONIC FRONTIER FOUNDATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS* BRIEF IN SUPPORT OF DEFENDANT - APPELLANT PANDORA MEDIA, INC.

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APPLICATION OF THE ELECTORNIC FRONTIER FOUNDATION, FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF[1]

Pursuant to California Rule of Court 8.520(f), the Electronic Frontier Foundation ("EFF") respectfully requests leave to file the attached brief as *amicus curiae* in support of Defendant-Appellant Pandora Media, Inc.

EFF is a nonprofit civil liberties organization that has worked for over 27 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 44,000 dues-paying members have a strong interest in promoting balanced copyright law that protects freedom of expression and technological innovation against the chilling effects of legal uncertainty, and from outcomes that entrench incumbent businesses. Unlike the parties to this case, EFF represents the interests of smaller innovators, who often lack the resources to litigate in federal court.

EFF has served as amicus in many key copyright cases, including related cases in two state high courts, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. CTQ-2016-00001 (New York Court of Appeals, filed Aug. 18, 2016), and *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. SC16-1161 (Supreme Court of Florida, filed November 28, 2016), as well as *Oracle America, Inc. v. Google Inc*, Nos. 2017-1181, -1202 (Federal Circuit, filed

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[1] No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than amicus EFF contributed money intended to fund preparing or submitting this brief.

May 30, 2017); *BWP Media, Inc. v. Polyvore Inc*., No. 16-2992 (Second Circuit, filed February 21, 2017); *BMG Rights Management, Inc. v. Cox Communications, Inc*., No. 16-1972 (Fourth Circuit, filed Nov. 15, 2016); *American Broadcasting Companies, Inc. v. Aereo, Inc*., No. 13-461 (U.S. Supreme Court, filed Apr. 2, 2014).

This certified question is of vital importance to thousands of businesses and individuals who are not before the Court, as it threatens to upend decades of settled law governing their use of recorded music. This amicus brief will assist the Court in understanding the broad impact a ruling in Flo & Eddie's favor could have on creators, innovators, and consumers.

For the foregoing reasons, *amicus curiae* respectfully requests that the Court accept the accompanying brief for filing in this case.

DATED: January 10, 2018 Respectfully submitted,

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INTRODUCTION

Copyright law has historically been characterized by expansions in ownership rights coupled with limitations on those rights. Answering the certified questions in the affirmative would contradict decades of California statutory and common law by advancing new ownership rights practically without limit. Plaintiff-Respondent Flo & Eddie argues that this Court should, despite a lack of any support in California law, grant owners of sound recordings made before 1972 exclusive rights of public performance. Alternatively, Flo & Eddie argues that the California common law of property or tort grants holders of copyright in pre-1972 sound recordings an exclusive right to make public performances. Both of these requests have no basis in California law, nor in broader U.S. federal and state copyright law precedents.

Section 980(a)(2) does not create an exclusive right of public performance. Flo & Eddie's position is premised on a logical fallacy: that the presence of a single statutory exemption in § 980(a)(2) makes the scope of such copyrights otherwise infinite, covering "any use of a recording" to which a copyright holder might lay claim. This is incorrect, because the presence or absence of enumerated exceptions from "exclusive ownership" does not illuminate what "exclusive ownership" of a sound recording means in the first instance. Unbroken common law and industry practice show that "exclusive ownership" does not include an exclusive

right of public performance.

Nor does California common law provide an exclusive right of public performance of pre-1972 sound recordings for rightsholders. The flawed logic proposed by the plaintiff could be interpreted to repeal even the most basic limitations on the scope of a copyright, such as fair use, the first sale doctrine, and the exemption of purely *private* performances—limitations that arise from the common law and the U.S. Constitution. The common law of property or tort cannot be construed so as to violate the First Amendment's guarantees of free speech, and any construction of the law that did so would be suspect.

Flo & Eddie's position is inconsistent with the well-established trajectory of copyright law in California and the United States: that expansions of rights are always coupled with carefully considered limitations. Although judicial expansions of copyright were occasionally done in the early days of sound recording technology, when the means of broadcasting and other mass performances were in the hands of a few large, sophisticated entities, the regulation of performances of sound recordings today touches the legitimate activities of millions, in California and beyond. Expansions of copyright have broad ramifications for industry and the public, and are properly the domain of the Legislature. This was the conclusion of the high courts of New York and Florida in two related cases. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc*. (N.Y. Ct. App. 2016) 28 N.Y.3d

583, 70 N.E.3d 936; *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* (Fla. 2017) 229 So. 3d 305.

There is simply no support for creating a new exclusive performance right for owners of pre-1972 sound recordings. Copyright law developed to create a limited monopoly for authors of creative works. Flo & Eddie proposes to make its monopoly practically unlimited. At the federal level, where most copyright law resides today, no general public performance right in sound recordings has ever been created. This Court should follow the considered, well-established example of federal law by refusing to create a new and unbounded public performance right, and should leave any such expansions to the Legislature.

ARGUMENT

I. FLO & EDDIE'S POSITION WOULD CREATE A NEW COMMON-LAW RIGHT WITH FAR-REACHING EFFECT.

The first certified question asks whether Section 980(a)(d) of the California Civil Code creates a right of public performance for owners of pre-1972 sound recordings. An affirmative answer would effectively create a new right under California copyright law: a general, exclusive right of public performance in all sound recordings that are subject to state law. This right has not previously been recognized under California or federal

law. *See* 17 U.S.C. § 106 (granting a public performance right in sound recordings, but only for performance via digital audio transmission).[2]

The public performances that may require permission or payment for the first time if the Court rules in favor of Flo & Eddie would include the broadcasts of hundreds of AM and FM radio stations including high school, college, and religious broadcasters, thousands of Internet radio stations, and tens of thousands of restaurants, cafes, fairs, charitable events, music venues, and others who use recorded music. And given that this case concerns Defendant-Petitioner Pandora's *past* conduct, the right would likely be retroactive.

Judicial recognition of a public performance right would be unprecedented. Today's landscape of music production and distribution, including technologies to transmit high-quality sound over numerous communications media to many kinds of devices, evolved in a world where sound recordings were understood by all *not* to carry a general right of public performance.

This case concerns uses of sound recordings that are made every day and for decades by many thousands of businesses and individuals. This

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[2] The district court observed in its *Sirius XM* decision that "the breadth and specificity of cases acknowledging that exclusive ownership of a sound recording includes the right to publicly perform the recording are slight." *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, (C.D. Cal. Sep. 22, 2014, No. CV 13-5693 PSG) [2014 WL 4725382], at *8. This is inaccurate, as no California case, explicitly recognizes any such right.

Court can and must consider the negative impacts of announcing a general public performance right for state-law-protected recordings for the first time.

II. THE PRESENCE OF A STATUTORY EXEMPTION FOR COVER RECORDINGS DOES NOT IMPLY THAT STATE COPYRIGHT INCLUDES A PUBLIC PERFORMANCE RIGHT.

Flo & Eddie's position is premised on a logical fallacy. The question the district court was asked was whether "exclusive ownership," as defined by California Civil Code § 980(a)(2), includes a right of public performance. In other words: what is the set of rights that is encompassed by ownership of a sound recording under § 980(a)(2)? The district court adopted Flo & Eddie's position and held that because the statute contains an explicit exception for certain uses, specifically "cover" recordings, all other conceivable uses must be part of the "exclusive ownership" rights. But this begs the question. Knowing what is not encompassed within "exclusive ownership" tells us little, if anything, about what is.

Consider a statute that applies by its terms in "all states except California" and a court that must decide whether the statute applies in Puerto Rico. Knowing that the statute excludes California tells us nothing about whether it includes Puerto Rico. Indeed, a court would be incorrect if it asserted that because California is excluded, Puerto Rico must be included.

So too with § 980(a)(2). Knowing that the right to make cover recordings is explicitly excluded says nothing about whether public performance is a right in the first instance. As copyright is an intangible right that potentially attaches to any number of physical reproductions that are themselves chattels, there is no universal definition of "absolute ownership" of a copyright for a court to presume. Thus, the presence of an explicit exception for cover recordings does not establish that the overall scope of copyright is otherwise infinite.

Indeed, Flo & Eddie's logic proves too much. The exception for cover recordings is—at most—evidence that "exclusive ownership" includes the reproduction right, as a cover recording is a form of reproduction. Yet Flo & Eddie concludes that the California Legislature intended all possible rights to be given to owners of sound recordings except those carved out by an exception, even rights never before recognized or even conceived of. This would apparently include such "rights" as a royalty on the resale of each copy or the right to prevent lawful purchasers from disposing of their copies. *Cf.* Cal. Civ. Code § 986 (granting the author of a work of fine art the right to collect a fee on resale); § 987 (granting the author of a work of fine art the right to prevent the destruction of the work). Like a general public performance right, these are rights that have never been attached to musical works in theory or practice.

Under Flo & Eddie's flawed reasoning, the lawful owner of a copy of a sound recording—such as one embodied in a compact disc—has no rights whatsoever to use and enjoy that copy but for the grace of the sound recording author. A Beatles fan could one day find Paul McCartney on her doorstep demanding the return of a lawfully purchased CD, under a claim that the artist owns "all rights" in the work. It would be unthinkable for the California Legislature to have created such a rule sub silentio, without any debate.

Flo & Eddie's position that § 980(a)(2) grants sound recording owners an "exclusive right to any use of a recording" also implies that it can prevent fair uses of their recordings. *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, 2014 WL 4725382, at *8. Indeed, Flo & Eddie recently argued to the Eleventh Circuit in a related case that fair use does not "limit the common law rights of the owners of pre-1972 recordings." Plaintiff-Appellant Flo & Eddie, Inc. Opening Brief at 34, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* (11th Cir. Sep. 1, 2015, No. 15-13100-AA) . This cannot be. Because the fair use limitation brings copyright law into compliance with the First Amendment's guarantee of free speech, any copyright that does not allow for fair use would be constitutionally suspect. *See Eldred v. Ashcroft* (2003) 537 U.S. 186, 219 (noting that "copyright law contains built-in First Amendment accommodations" including fair use). As a copyright that covers "any use of a recording" would constitute a violation

of the First Amendment, a court cannot construe § 980(a)(2) to be free of all implicit boundaries.

Finally, Flo & Eddie's position raises uncertainties for all users of pre-1972 recordings. Construing § 980(a)(2) to include "all rights that can attach to intellectual property" gives no guidance as to which rights are included. *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, 2014 WL 4725382, at *5. Would newly created rights in other jurisdictions automatically come into force in California? Would rights never before recognized in any jurisdiction, such as a right to control purely private listening, become enforceable at a rightsholder's request? This interpretation would undoubtedly invite years of litigation. Such uncertainty would suppress access to older recordings, accelerating their fade into obscurity.

Given these deleterious effects, the California Legislature could not have intended to create an absolute, unbounded copyright lacking only a right to control reproductions in cover recordings.

III. EXPANSIONS OF COPYRIGHT MUST BE BASED ON THE DEMONSTRATED NEED FOR INCENTIVES; UNJUSTIFIED EXPANSIONS HARM INNOVATION AND ACCESS.

A. Copyright is an Incentive Scheme, Not an Absolute Property Right.

Flo & Eddie's interpretation of § 980(a)(2) is inconsistent with copyright's historical purpose. Copyright, in U.S. law and the broader Anglo-American common law tradition, is intended to foster the spread of

knowledge and culture by creating incentives for artistic production while avoiding, as much as possible, state-granted monopolies over those products. Thus, the first modern copyright statute, the Statute of Anne, was prefaced as "An Act for the Encouragement of Learning." 8 Ann., c. 19 (1710); *see also* Thomas Babington Macaulay, First Speech to the House of Commons on Copyright (Feb. 5, 1841) (*available at* http://www.thepublicdomain.org/2014/07/24/macaulay-on-copyright/) ("[M]onopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good."). This purpose was reflected in the constitutional language granting Congress the power to make copyright law "to Promote the Progress of Science and useful Arts." U.S. Const. art. 1, § 8, cl. 8.

Consistent with that principle, courts and legislatures have generally declined to expand copyright absent some showing that further incentives are required, and then only to the extent needed to create such incentives. For example, federal law recognized a copyright in sound recordings only after the sale of recorded music had become a primary source of income for musicians, and those copyrights did not include a right of public performance (or were not understood by anyone to include such a right). *See* H.R. Rep. 92-487, at 2-3 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1567 (purpose of 1971 grant of copyright in sound recordings was to

provide a remedy against "widespread unauthorized reproduction of phonograph records and tapes").

Expanding the scope of copyright in recordings made before February 15, 1972 does not create incentives for the production of new works, as new recordings are subject to federal law exclusively. To the extent that copyright is intended to create incentives to "disseminate" creative work, *Eldred v. Ashcroft* (2003) 537 U.S. 186, 205-06, no such incentives are needed here. Pandora, other Internet and satellite radio services, and traditional radio stations have a long history of disseminating pre-1972 recordings, a function that will likely be hindered if this Court adopts Flo & Eddie's position.

B. Expansions of Copyright Are Coupled With Limitations; A Lack of Statutory Limitations on Performance Rights Suggests an Absence of Intent to Create Such Rights.

Flo & Eddie's position would make the scope of copyright in sound recordings far broader than any that Congress or the California Legislature have created, applying without distinction to all forms of broadcasting. This conflicts with historical practice, further suggesting that it was not the Legislature's intent.

Historically, the bundle of rights comprising copyright has been limited to particular categories. For example, when Congress enacted the first federal copyright statute in 1790, it limited protection to narrow categories of works and granted narrow exclusive rights over those works.

See Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831) (granting copyright only to books, maps, and charts, and only for a set of four exclusive rights conditioned on compliance with formalities). Through the years, the scope of what is considered copyrightable has expanded, but concurrently with that expansion, courts and legislatures have recognized limits on those rights in order to preserve the public benefits of the law. *See, e.g.*, Act of Feb. 3, 1831, ch. 16 § 1, 4 Stat. 436, 436 (repealed 1870) (granting a copyright in musical compositions, but not granting a right of public performance of those compositions).

Such expansions involve balancing the rights of recording artists, broadcasters, and the public, taking into account the broader impacts of new technologies. *See Sony Corp. of Am. v. Universal City Studios, Inc.* (1984) 464 U.S. 417, 429 ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product."); *Authors Guild v. Google, Inc.* (S.D.N.Y. 2011) 770 F. Supp. 2d 666, 680 (Chin, J) ("The Supreme Court has recognized that courts should encroach only reluctantly on Congress's legislative prerogative to address copyright issues presented by technological developments.").

Thus, for example, expansion of copyright to cover secondary transmissions of TV signals was coupled with a statutory license, as was

expansion of federal copyrights in sound recordings to cover performances by digital transmission. Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (Oct. 19, 1976); Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995). In 1980, with the emerging consensus that copyright applied to computer software, Congress created an exemption for certain reproductions that are necessary to the ordinary operation of software. Computer Software Copyright Act, Pub. L. No. 96-517, 94 Stat. 3015 (Dec. 12, 1980). As early as 1909, Congress coupled an expansion of copyright to mechanical reproductions of music with a statutory mechanism for obtaining such rights. Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (Mar. 4, 1909).

Consistent with this position, courts and legislatures—including Congress when it enacted the 1976 Copyright Act—have been unified in the understanding that sound recording copyrights did not include a right of public performance, except where explicitly granted by statute. *See* U.S. Copyright Office, Federal Copyright Protection for Pre-1972 Sound Recordings, 20-49 (2011) (discussing how state law generally provides causes of action against unauthorized reproductions and distributions of sound recordings, but not public performances). Thus, when Congress passed copyright statutes through the years, including the 1996 Act which created a public performance right in federally protected sound recordings for digital transmissions only, it did not consider placing limitations on any

other rights of public performance in sound recordings. It didn't need to: the rights did not exist.

When it enacted § 980(a)(2), the California Legislature was aware of this history: grants of rights under copyright are enacted concurrently (or nearly so) with explicit limitations on those rights, and no general right of public performance in sound recordings had ever been recognized. That the statute makes no mention of any limitations on a supposed right of public performance is thus an indicator, contrary to Flo & Eddie's position, that the Legislature did not intend to create such a right.

IV. AN UNFETTERED PUBLIC PERFORMANCE RIGHT WOULD CHILL INNOVATION AND COMPETITION IN MUSIC DISTRIBUTION

A. A New, Never-Before-Recognized Right of Public Performance in All Pre-1972 Sound Recordings Would Harm Innovation.

In order to engage in public performance of music, Pandora needs licenses for the rights in the underlying musical compositions, which it typically obtains through performance rights organizations (ASCAP, BMI, and SESAC). In addition, Pandora must obtain licenses for the public performance of post-1972 sound recordings, typically through a statutory license. 17 U.S.C. §§ 112, 114. Licenses would be needed by any party,

whether a new startup or an established player, if it wants to operate a music service that makes public performances.[3]

Both of these licensing mechanisms arose over the course of decades to address problems of scale and transaction costs for both rightsholders and users. For example,

> ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed . . . the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, and it was in that milieu that the blanket license arose.

Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (1979) 441 U.S. 1, 20 (internal citation omitted). But the formation of ASCAP and BMI resulted in "disproportionate power over the market for music rights." *United States v. Broad. Music, Inc.* (2d Cir. 2005) 426 F.3d 91, 93. Consequently, since the 1950s, ASCAP and BMI have operated under antitrust consent decrees in order to realize the benefits of collective licensing while minimizing consumer harm from anticompetitive behavior. *See United States v. Broad.*

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[3] To be sure, a party could also directly license from rightsholders. However, for those engaging in the public performance of large collections of music, for example a radio station or restaurant, direct licensing is impractical to the point of being an illusory option.

Music, Inc. (2d Cir. Dec. 19, 2017, No. 16-3830-CV) ___ Fed. App'x. ___, [2017 WL 6463063], at *4.

Comparably, when Congress created public performance rights for digital audio transmissions of post-1972 recordings, it recognized the practical difficulties licensees would face in needing to contract with myriad diverse (and often unknown) rightsholders as well as the risk of collusive, anticompetitive behavior. To address these issues, Congress simultaneously provided a mechanism that would minimize licensing difficulties and limit collusive behavior by authorizing SoundExchange[4] to collect and distribute royalties at a statutory rate set by an administrative tribunal. *See* 17 U.S.C. §§ 114(e), (f); Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995) (creating both the limited right of public performance in digital sound recordings and a statutory licensing scheme).

Flo & Eddie does not address the collusive behavior and licensing difficulties that will likely result from the creation of a new public performance right. Yet these difficulties are precisely *why* this Court should not recognize a public performance right.

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[4] SoundExchange "collects and distributes digital performance royalties on behalf of more than 155,000 recording artists and master rights owners accounts and administers direct agreements on behalf of rights owners and licensees." *See* SoundExchange, http://www.soundexchange.com/about/ (last visited Jan. 9, 2018).

Significantly, the uncertainty posed by Flo & Eddie's position as to how users of sound recordings can obtain public performance rights will chill the introduction of new innovations in music broadcasting and distribution. New businesses, digital or otherwise, will face massive transaction costs and uncertainty from the creation of a general public performance right, given that there will be no processes or organizations in place to license pre-1972 recordings.

The risk of litigation will also chill innovation. Without a statutory license and accompanying antitrust supervision, the only cost-effective way to collectively license the new rights will likely be additional class action litigation. But the risk and cost of such litigation will prevent new digital music businesses from entering the market, as the specter of uncertain damages and legal costs will loom.

In order to prevent this chilling of innovation, if any public performance right is to be recognized, it should only be done through careful consideration in the Legislature.

B. Adoption of Flo & Eddie's Position Would Privilege Established Businesses Like Pandora and Shut Out Competitors.

Radio stations, restaurants, live music venues, and online performers of music have long thought themselves able to publicly perform pre-1972 music without needing any sort of license from the performers of that music. While Pandora, along with Sirius XM Satellite Radio, have begun

paying royalties to pre-1972 sound recording copyright holders, including Flo & Eddie, under private settlements, smaller entities do not.

Recognizing a right of public performance in these recordings would place Pandora and Sirius XM in a privileged position. These companies, and others with significant resources for litigation, will become the sole entities able to publicly perform older recordings under the newly-created right without serious legal risk. Many others, including college or religious broadcasters and small retail businesses, may have to cease performing pre-1972 recordings completely. They will have neither a collective license available to them nor the resources to establish one through litigation.

Recognizing a new public performance right would thus risk the consolidation of any market for performances of pre-1972 recordings to a privileged few. That outcome should give the Court pause, and counsel against creating a sweeping new right as Flo & Eddie suggests.

This risk to competition has generated concern in the courts in analogous situations. In *Authors Guild v. Google, Inc.*, for example, the court refused to approve a proposed class action settlement involving a private licensing administrator that would have given substantial market power to the defendant. (S.D.N.Y. 2011) 770 F. Supp. 2d 666, 682-683. Judge Chin noted that "[t]he seller of an incomplete database . . . cannot compete effectively with the seller of a comprehensive product." *Id.* at 682

(quoting the Department of Justice Statement of Interest 24, Sept. 18, 2009, ECF No. 720).

The same concern applies here. Because of litigation risk and transaction costs, small broadcasters could be forced to remove pre-1972 works from their repertoires. They would be unable to compete with those who have the financial and business clout to endure extensive litigation or establish a collective license. That would harm small broadcasters and deny the public the benefits of robust competition.

CONCLUSION

For the foregoing reasons, this Court should follow the considered judgment of the high courts of New York and Florida by answering the certified questions in the negative.

Dated: January 10, 2018

Respectfully submitted,

/s/ Mitchell L. Stoltz
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CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this Amicus Brief is proportionally spaced, has a typeface of 13 points or more, contains 3,996 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: January 10, 2018

/s/ Mitchell L. Stoltz
Mitchell L. Stoltz

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I, Madeleine Mulkern, do hereby affirm I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action. My business address is 815 Eddy Street, San Francisco, California 94109. I am employed in the office of a member of the bar of this court at whose direction the service was made.

On January 10, 2018, I served the foregoing document:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF IN SUPPORT OF DEFENDANT - APPELLANT PANDORA MEDIA, INC.

on the parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope on the persons below as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 10, 2018 at San Francisco, California.

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Madeleine Mulkern