

No. 18-55331

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

GREAT MINDS,

Plaintiff-Appellant,

v.

OFFICE DEPOT, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:17-cv-07435-JFW-E
Hon. John F. Walter

**REPLY IN SUPPORT OF MOTION OF
CREATIVE COMMONS CORPORATION FOR LEAVE TO FILE
BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND
AFFIRMANCE OF THE DISTRICT COURT**

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Creative Commons files this short reply to respond to two arguments in Great Minds' Opposition to Creative Commons' Motion for Leave to file an *amicus* brief (ECF No. 29):

First, Great Minds suggests that there is no proper role in appellate litigation for an *amicus* explaining that the plain language of a legal instrument favors the interpretation of one party rather than another. That contention is, fairly obviously, incorrect. Great Minds' own counsel, in fact, filed an *amicus* brief in another case two days before the opposition to this motion, arguing on behalf of the drafters of a statute that its plain language precluded the result urged by one of the parties. *See* Brief *Amici Curiae* of Members of Congress, *Mozilla Corp., et al. v. Federal Communications Commission et al.* at 8, No. 18-1051 (D.C. Cir. Aug. 27, 2018) (brief on behalf of "Members of Congress, some of whom were instrumental in the enactment of the [statute at issue]," contending that its "plain language" dictates the only result consistent with the "structure of the ... Act and the manner in which it was intended to operate," such that "amici are particularly well placed to provide the Court" with relevant guidance).¹ Courts routinely accept *amicus* briefs from well-informed third parties who seek to share a perspective on the plain meaning of a contract or statute. *See, e.g., CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 767-77

¹ For ease of reference, the brief is available at <https://www.cantwell.senate.gov/imo/media/doc/08282018%20Net%20Neutrality%20Amicus%20Brief.pdf>.

(2018) (granting leave for filing of *amicus* briefs to assist in contract interpretation of collective-bargaining agreement); *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759-61 (2018) (permitting *amicus* brief regarding pure question of statutory interpretation of phrase in Bankruptcy Code); *Sturgeon v. Masica*, 768 F.3d 1066, 1069 (9th Cir. 2014) (permitting *amicus* briefs regarding the correct interpretation of § 103(c) of the Alaska National Interest Lands Conservation Act), *vacated and remanded sub nom. Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (also permitting *amicus* briefs on same question).

Second, Great Minds contends that “[i]f the Court needs to rely on any of the arguments or assertions proffered by Creative Commons in its proposed *amicus* brief, the language is not unambiguous on its face, and the Court must reverse[.]” Opp. to Mot. for Leave, ECF No. 29 at 2. That suggestion reflects a mischaracterization of both what the brief says and how the prevailing interpretive rules work. The bulk of the brief does nothing more than explain, in ways that complement but differ from Office Depot’s arguments, how the plain text and structure of the license at issue operate in the circumstance presented. And regardless, California contract law (which the parties appear to agree governs their dispute) does not preclude consideration of the *effects* of different potential rulings, even on appeal of a dismissal on the pleadings. *See, e.g., Mountain Air Enters., LLC v. Sundowner Towers, LLC*, 3 Cal. 5th 744, 755 (2017) (construing the plain

language of an agreement regarding attorneys' fees to avoid categorizing an affirmative defense as an "action" or "proceeding" because such an interpretation could "theoretically authorize multiple fee awards in a single case"); *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 646 (2003) (construing the plain language of an insurance policy to call for the common, rather than dictionary, definition of "pollutant" because the dictionary definition "would have absurd or otherwise unacceptable results") (internal quotations and citation omitted). Great Minds' position is that negative consequences will result from an affirmance. Creative Commons respectfully disagrees, for the reasons articulated in the proposed brief. But those reasons are not "extrinsic evidence" that thwarts a finding that the legal instrument unambiguously means what one party urges, rather than the other. *Cf. Teva Pharm. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1318 (D.C. Cir. 2010) (concluding at "*Chevron* step one" that a statute could not properly be interpreted as appellant urged, *inter alia* because of the negative effects that would result). They are an analysis of the real-world implications of the competing perspectives offered by the parties—precisely what a qualified *amicus* can help the Court explore, regardless of the posture of the appeal.

Creative Commons regrets that what would normally be an utterly non-controversial effort to file an *amicus* brief has blown up into a contested motion because of Great Minds' refusal to extend the courtesy of consenting to a plainly

relevant submission.² But we respectfully request that the Court consider Creative Commons' views on the arguments Great Minds has made concerning the operation and effects of Creative Commons' own license.

September 5, 2018

Respectfully submitted,

s/ Andrew M. Gass

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² We note that Great Minds declined Creative Commons' invitation to publicly file the written correspondence concerning Creative Commons' request for consent to file an *amicus* brief. *See* Mot. for Leave, ECF No. 23-1 at 5 n.1.

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2018, I electronically filed the forgoing Reply in Support of Motion of Creative Commons Corporation for Leave to File Brief as *Amicus Curiae* in Support of Appellee and Affirmance of the District Court 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.

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