No. 07-16151

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COALITION FOR ICANN TRANSPARENCY, INC.,
Plaintiff-Appellant,

v.

VERISIGN, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, Case No. CV 05-04826-RMW
Ronald M. Whyte, District Judge

BRIEF OF AMICUS CURIAE THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS IN SUPPORT OF PETITION FOR REHEARING AND REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus The Internet Corporation for Assigned Names and Numbers states that it is a California non-profit public-benefit corporation and has no parent corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

RULES

I. INTRODUCTION

Amicus The Internet Corporation for Assigned Names and Numbers ("ICANN"), a not-for-profit public-benefit corporation, has a unique role in administering certain features of the Internet's naming system to ensure its stability and security. ICANN initially was a named defendant in this lawsuit, but the district court twice dismissed Plaintiff's complaints against ICANN. Plaintiff then elected to drop ICANN from the litigation, and thus the district court had no occasion to address whether there were specific defenses unique to ICANN that would foreclose the possibility that ICANN could conspire to violate section 1 of the Sherman Act. On the appeal of the section 1 claim, the panel was presented only with the question whether the grounds that the district court articulated for dismissal as to defendant VeriSign were correct. Nonetheless, as written, the panel's decision appears to accept that ICANN's decisions to enter into contracts with entities to operate the Internet's Top Level Domains ("TLDs") could potentially violate section 1. Because that inference is wrong as a matter of law, ICANN files this amicus brief, pursuant to Local Rule 29-2, requesting a rehearing.

Special facts about ICANN preclude application of section 1 to ICANN with respect to agreements to operate TLDs. ICANN is a unique, noncommercial, not-for-profit organization created to oversee the Internet's Domain Name System ("DNS"). ICANN's authority and influence depend uniquely upon the voluntary

acceptance of its decisions and recommendations by numerous independent actors who participate in implementing the DNS. This includes the United States Department of Commerce ("DOC"), which receives (and, if it so chooses, approves) ICANN's recommendations regarding selection of entities to operate TLDs.

For several novel reasons that were never briefed to, or addressed by, the panel — because they formed no part of the decision under review — ICANN's unusual role and activities preclude section 1 liability in this context:

First, ICANN's recommendation of entities to operate TLDs, and the contractual terms ICANN imposes on those entities, is unilateral conduct, immune from section 1 scrutiny.

Second, ICANN's conduct involves public-service, noncommercial activities. Such activities are exempt from section 1, which requires commercial conduct.

Third, because ICANN's challenged activities become effective only if approved by DOC, those activities advocating DOC (*i.e.*, government) approval are immune from antitrust attack under the *Noerr-Pennington* doctrine.

Fourth, ICANN's mere recommendations that DOC approve some action cannot, by themselves, have the anticompetitive effect necessary for a section 1 claim.

Fifth, ICANN's recommendation of a registry operator is an exercise of authority subject to DOC's approval, and numerous cases hold that a private entity acting pursuant to governmental authorization specifically addressing the conduct in question cannot be subjected to antitrust liability.

Sixth, ICANN enters into contracts with presumptive-renewal provisions — provisions that created concern on the part of the panel — for reasons that are reasonable as a matter of law in light of the contractual subject matter.

These issues demonstrate significant shortcomings in this section 1 case, wholly apart from the grounds for dismissal stated by the district court. Even if the panel correctly rejected the district court's rulings, the panel had no occasion to address these other infirmities with the section 1 claims.

Indeed, the panel's decision appears to go beyond the limited issue of rejecting the district court's reasons for dismissing the case, and presupposes that ICANN's conduct is susceptible to section 1 liability. In doing so, the decision inadvertently contravenes settled law from the Supreme Court as well as this Circuit and others, none of which the panel addressed.

Rehearing should be granted to make clear that the panel did not decide ICANN's section 1 liability on grounds separate from those before the panel and articulated by the district court. Alternatively, the Court should direct briefing on

these grounds, or should remand to the district court to consider them in the first instance.

II. ICANN'S IDENTITY AND INTEREST

ICANN is a noncommercial, not-for-profit, public-benefit corporation organized under California law. *See* http://www.icann.org/en/general/articles.htm. Its mission is to protect the stability, integrity, security, and utility of the DNS on behalf of the global Internet community. *See id.*; http://www.icann.org/en/general/bylaws.htm#I. ICANN's role in the DNS resulted from a series of agreements with DOC, beginning with a Memorandum of Understanding signed in 1998 and succeeded and supplemented by subsequent agreements. *See* http://www.icann.org/en/general/agreements.htm (posting, as relevant here, the DOC-ICANN "Memorandum of Understanding/Joint Project Agreement with U.S. Department of Commerce" originally entered into in 1998 and most recently amended in 2006, and the DOC-ICANN "IANA [Internet Assigned Numbers Authority] Function Contracts" originally entered into in 2000 and most recently issued in 2006).

To reach another person on the Internet, one types an address into one's computer — a unique name or number. ICANN coordinates these unique identifiers across the world; the system is known as the DNS. *See*

http://www.icann.org/en/general/bylaws.htm#I. Without that coordination, we would not have one global Internet.

ICANN's role regarding DNS effectiveness includes both purely technical issues and policy matters. *See id.* These include creating principles and rules to determine which entities can participate in the operation of TLDs, and under what circumstances. *See* http://www.icann.org/en/registries/.

One of ICANN's principal functions is to decide on recommendations for the creation of, and the operators for, generic TLDs ("gTLDs"). *See* http://www.icann.org/en/general/agreements.htm, *supra*, at 4. gTLDs include the well-known (.COM, .NET, .ORG) and less well-known (.INFO, .MUSEUM) subdivisions of the DNS that organize specific Internet addresses and are not associated with a particular country. *See* http://www.icann.org/en/registries/. Under the regime established by DOC's agreements with ICANN, ICANN proposes the foundational decisions about which TLDs will be created, who will operate them, and under what conditions they will be operated. *See* www.icann.org/en/general/agreements.htm, *supra*, at 4.

ICANN sets out the terms pursuant to which it permits operation of TLDs by entering into contracts with the prospective operators of TLD "registries" stating the manner in which the individual registries must be operated. *See* http://www.icann.org/en/registries/. "Registries" are, in effect, databases that

maintain the authoritative address files for what are known as "second-level domain names" registered in each gTLD (*e.g.*, "cnn.com" or "google.com" in the .COM registry). *See* http://www.icann.org/en/tlds/. Those unique addresses enable the DNS to operate as the Internet's address book, and thus allow an Internet user seeking a particular Internet address to access the correct site by typing a unique string of characters.

ICANN has entered into contracts with a number of registry operators, including VeriSign, which operates the .COM and .NET registries. *See* http://www.icann.org/en/registries/agreements.htm. Registry contracts, including the agreements at issue here, typically contain presumptive-renewal provisions. *See id.* As shown below in § III(F), ICANN has determined that these provisions are important to the Internet's stable and secure operation. Moreover, because of the large costs associated with starting and updating a registry, ICANN has concluded that presumptive-renewal provisions provide an appropriate incentive for registries to make the investments necessary for efficient and effective operation, thus helping to ensure the Internet's stability and security that is essential to ICANN's mission.

ICANN unilaterally recommends registry operators, subject to DOC's approval of those decisions. ICANN forwards its recommendations regarding new registry operators to DOC, which must approve them before they can be

implemented. *See* http://www.icann.org/en/general/agreements.htm, *supra*, at 4. DOC retains ultimate authority over all additions or changes to the DNS and maintains continuing oversight of ICANN's activities. *See id.* Thus, only DOC, not ICANN, can actually approve additions or changes to TLDs that are recommended by ICANN. With respect to VeriSign and the challenged agreements here, DOC (with the participation and advice of the United States Department of Justice) entered into a Cooperative Agreement with VeriSign approving it as a registry operator. *See* http://www.ntia.doc.gov/ntiahome/domainname/nsi.htm.

Even with DOC's approval, the willingness of others to accept changes to the DNS as authoritative is what gives those changes real meaning. Thirteen root zone servers across the world maintain the authoritative directory of the DNS in the aggregate. It is the voluntary recognition of the root zone servers as authoritative that makes them so. Thus, while DOC has considerable influence, in the end, even its own "authority" depends on the acquiescence of the many other independent actors who, in the aggregate, participate in implementing the DNS.

In making decisions about TLDs, ICANN operates within the framework of a unique governing structure. ICANN has an international board of directors, selected through a variety of means. *See* http://www.icann.org/en/general/bylaws.htm#VI. The board's varied selection and

international scope reflect the different interests of global Internet users. ICANN solicits input from all Internet stakeholders on the broad range of technical and policy issues that concern the DNS.

III. REHEARING SHOULD BE GRANTED TO ELIMINATE LANGUAGE ARGUABLY PRESUPPOSING THAT ICANN CAN BE SUBJECTED TO SECTION 1 LIABILITY IN THE CIRCUMSTANCES OF THIS CASE.

Although the panel had before it only whether the district court's reasons for dismissing the complaint were meritorious,[1] the panel's decision would permit a section 1 claim against VeriSign with respect to VeriSign's entry of the .COM and .NET agreements with ICANN. *See, e.g.*, Op. 6752-55. This disregards a variety of grounds wholly outside the district court's decision and the parties' briefs that should be briefed and addressed before the Court could properly reach a decision on section 1 liability in the circumstances of this case. Thus, rehearing should be granted to eliminate any inadvertent decision in that regard. At the very least, the Court should direct further briefing on these new issues here or remand to the district court.

[1] Indeed, in dismissing CFIT's complaint against VeriSign, the district court focused almost entirely on issues with respect to CFIT's section 2 claims, not its section 1 claims. On appeal, the parties, in their briefing to the panel, also focused almost exclusively on section 2 issues, and did not present any free-standing section 1 analysis, much less address ICANN's susceptibility to section 1 liability in conjunction with this matter.

A. ICANN's Decisions (Including Decisions To Enter Into The Agreements At Issue Here) Are Unilateral, Not Bi-Lateral, And Therefore Not Within The Purview Of Section 1.

For a claim to be actionable under section 1, the plaintiff must identify a "conspiracy" or other concerted activity — section 1 claims may not be predicated on wholly unilateral conduct. 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); *accord Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767-69 (1984). Unilateral conduct is actionable only under section 2 of the Sherman Act. *See D.A. Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1453 (9th Cir. 1983); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 619 (6th Cir. 1998) ("In order to have a § 1 violation, there must be an agreement, as § 1 does not encompass unilateral conduct, no matter how anticompetitive.").

Here, CFIT challenges as a section 1 violation ICANN's recommendation of a registry operator and ICANN's imposition of operating terms pursuant to registry contracts. ICANN's conduct vis-à-vis registries in these respects, however, is unilateral and thus cannot form the basis for section 1 liability. ICANN

unilaterally recommends registry operators.[2] The contracts between ICANN and registry operators are simply the enforceable legal mechanisms that ICANN chooses to use to set the operating terms for the TLDs that ICANN has decided to award to particular applicants. Under such circumstances, these contracts are unilateral actions and not attackable as illegal agreements under section 1. *See, e.g.*, *D.A. Rickards*, 704 F.2d at 1453 (affirming dismissal of section 1 claim against non-profit organization on ground that challenged decision of accepting only certain kinds of examination information from veterinarians was "unilaterally made," despite plaintiff's allegations of contacts with independent entities).

Courts routinely deem comparable conduct to be unilateral and hence exempt from section 1. *See, e.g.*, *Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986) ("The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy" for section 1 purposes.); *Suzuki of W. Mass., Inc. v. Outdoor Sports Expo, Inc.*, 126 F. Supp. 2d 40, 45-48 (D. Mass. 2001) (deeming unilateral the implementation of priority dealer rule through entering contracts with individual boat dealers); *Chase v. Northwest Airlines Corp.*, 49 F. Supp. 2d 553, 560-65 (E.D. Mich. 1999) (deeming unilateral the implementation of ticket-sale

[2] The panel noted this authority, although apparently did not understand that it was entirely unilateral. *See* Op. 6747-48 ("ICANN is charged by the Department of Commerce with selecting and entering into agreements with registry operators . . . .").

policy through agreements with travel agents). ICANN's implementation of its exclusive power to recommend registry operators and the terms of their operations through entering individual registry contracts is plainly unilateral under these precedents.

B. ICANN's Conduct In This Matter Is Noncommercial, And Exempt From Section 1 Liability.

An actionable section 1 claim must allege restraint of "trade or commerce," "not noncommercial behavior." *Va. Vermiculite, Ltd. v. W.R. Grace & Co. Conn.*, 156 F.3d 535, 540 (4th Cir. 1998). "The drafters [of section 1] never intended to condemn properly defined noncommercial activities." IA Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 262, at 269 (1997).

Thus, this Court has explained that, while "a non-profit organization, it is true, may engage in commercial activity, and this activity will then be subject to the Sherman Act," when non-profit entities engage in wholly *non*-commercial activities, such conduct "do[es] not constitute trade in the sense of the common law," and is consequently exempt from section 1 liability. *Dedication & Everlasting Love to Animals v. Humane Soc'y of United States*, 50 F.3d 710, 713 (9th Cir. 1995); *see also id.* at 712-13 (affirming dismissal of section 1 claim against non-profit organization that did not engage in commerce in any relevant market). Numerous other courts have recognized this "'exemption' for nonprofit

organizations engaged in noncommercial behavior" in section 1 cases. *Va. Vermiculite*, 156 F.3d at 540-41 (collecting cases).[3]

The challenged ICANN agreements fall squarely within this exemption for non-profit organizations engaged in noncommercial conduct. ICANN is not engaged in commerce in any relevant market, and ICANN's bylaws prohibit it from operating registries or engaging in commercial activities. *See* www.icann.org/en/general/bylaws.htm. Instead, ICANN oversees and coordinates the DNS, which, while critical to the functioning of the Internet, is not commercial conduct. This serves ICANN's public-service purposes of "operat[ing] for the benefit of the Internet community as a whole" and "lessening the burdens of government and promoting the global public interest in the operational stability of the Internet." http://www.icann.org/en/general/articles.htm.

ICANN's receipt of fees from registry operators does not alter the exemption's applicability in this context, because the fees are intended only to cover ICANN's costs of operation and are not received in exchange for any commercial services. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975) (exchange of money must be for a service to constitute "commerce' in the most common usage of that word"); *United States v. Brown Univ.*, 5 F.3d 658, 666

[3] *See, e.g., Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 63 (2d Cir. 1997); *United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993); *Marjorie Webster Jr. Coll., Inc. v. Middle States Ass'n of Colls. & Secondary Schs., Inc.*, 432 F.2d 650, 654-55 (D.C. Cir. 1970).

(3d Cir. 1993). Thus, ICANN's noncommercial activities cannot, as a matter of law, be subject to section 1 liability.

C. ICANN's Conduct In This Matter Is Proposed To, And Approved By, DOC, And Is Thus Protected Under The *Noerr-Pennington* Doctrine.

The *Noerr-Pennington* doctrine derives from the First Amendment's Petition Clause and provides that those who petition any government department for redress are generally immune from statutory liability for their petitioning conduct. *Kearney v. Foley & Lardner, LLP*, 566 F.3d 826, 832 (9th Cir. 2009). Because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives," *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961), this Court has held that "the *Noerr-Pennington* doctrine sweeps broadly and is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government." *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir. 1998); *accord Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (doctrine covers speech that is "'incidental' to a valid effort to influence government[] action").

Under these standards, ICANN's conduct in recommending the grant of registry operation rights is core petitioning activity. ICANN's conduct in these

decisions is not self-executing, but rather is implemented only by proposing conduct to DOC, which, in turn, decides whether to adopt ICANN's proposals. ICANN's conduct thus constitutes an "effort to influence government[] action," *Allied Tube*, 486 U.S. at 499, and is consequently exempt from antitrust scrutiny. *See, e.g.*, *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 124-27 (3d Cir. 1999) (immunizing petition to DOC under *Noerr-Pennington* doctrine).

While the panel considered VeriSign's wholly unrelated *Noerr-Pennington* argument regarding CFIT's section 2 claims, the panel was not presented with, and did not consider, application of the *Noerr-Pennington* doctrine to ICANN's conduct.

D. As Mere Recommendations To DOC, ICANN's Conduct In This Matter Cannot Have An Anticompetitive Effect.

A section 1 claim requires, in addition to an agreement or conspiracy, an actual anticompetitive effect on commerce stemming from an unreasonable restraint on trade. *See William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 561 F.3d 1004, 1009 (9th Cir. 2009).

ICANN's determinations are not self-executing. ICANN's selections of registry operators are, in fact, only recommendations to DOC, and to be effective must be accepted by DOC and ultimately by many other independent actors. Therefore, the challenged conduct of ICANN, by itself, has no effect on commerce

at all, let alone the effect of an unreasonable restraint on trade. As such, that conduct cannot violate section 1.

E. ICANN's Conduct In This Matter Is Exempt From Antitrust Liability Because It Is Taken In Compliance With A Specific Regulatory Regime.

Because ICANN's conduct in question is specifically reviewed and approved by DOC, antitrust liability is foreclosed by numerous decisions that the panel had no opportunity to consider, and did not address, making clear that antitrust liability cannot be predicated on actions taken by a private entity in conformity with a more specific regulatory regime governing the conduct in question. This basic principle follows from the well-established rule that courts may not upset a specifically established regulatory regime under the rubric of a general statute like section 1. *See Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 387 (1973); *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981).

Thus, in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963), the Supreme Court rejected the government's Sherman Act challenge to conduct that was already governed by a regulatory scheme administered by the Civil Aeronautics Board. The Court reasoned that "[i]t would be strange, indeed, if [conduct] which met the requirements of the [specific Civil Aeronautics Act] would be held to be antitrust violations." *Id.* at 309. If "courts were to intrude

independently with their conception of the antitrust laws, two regimes might collide." *Id.* at 310. Similarly, in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), the Supreme Court held that the antitrust laws could not be used to challenge certain underwriting practices subject to SEC regulation in light of "the existence of regulatory authority" and the "exercise [of] that authority," resulting in a danger of "conflicting guidance, requirements, duties, privileges, or standards of conduct." *Id.* at 275-76. This was true even though the "SEC has *disapproved* . . . the conduct that the antitrust complaints attack," because there was "a serious line-drawing problem" differentiating permitted and precluded conduct, rendering it "difficult" for "different courts to reach consistent results." *Id.* at 279-281.

DOC reviews and approves ICANN's recommendations regarding registry operation rights. Because the challenged conduct is integral to a regulatory regime directly applying to the conduct, permitting section 1 liability for the same conduct would plainly allow "two regimes [to] collide." *Pan Am.*, 371 U.S. at 310. Indeed, the situation is far clearer here than in *Credit Suisse* because the conduct here, instead of being *disapproved* by the relevant government entity, is specifically reviewed and approved by DOC.

F. The Court's Distinction Between Presumptively Renewed Contracts And Those That Are Competitively Bid Neglects The Unique Character Of The Underlying Contracts.

The panel acknowledged that the claims as pled were insufficient with respect to the .NET contract because that contract was competitively bid. Op. 6752-53. Yet, the panel was not presented with the essential rationales for presumptive-renewal provisions in registry contracts, which show that the provision as implemented for the .COM contract (and the .NET contract as well[4]) has no legal significance for purposes of section 1 liability. *See Austin v. McNamara*, 979 F.2d 728, 738 (9th Cir. 1992); *All Star Carts & Vehicles, Inc. v. BFI Canada Income Fund*, 596 F. Supp. 2d 630, 640 (E.D.N.Y. 2009) (section 1 claim based on presumptive-renewal provision did not state claim).

Presumptive-renewal provisions are reasonable as a matter of law in light of the substantial investment required to initiate and maintain a registry. As a general matter, of course, "[t]he Sherman Act does not require competitive bidding." *Nat'l Soc. of Prof'l Eng'rs. v. United States*, 435 U.S. 679, 694-95 (1978). ICANN's presumptive-renewal provisions provide incentives to registry operators to continue to make investments in their operations, particularly in the final years of

[4] Indeed, ICANN intended that the .NET registry agreement that would be executed following the competitive bidding would have a presumptive-renewal provision, and the contract that VeriSign signed after it prevailed in the competitive bidding process in fact has such a provision. *See* www.icann.org/en/tlds/agreements/net/net-registry-agreement-01jul05.pdf (§ 4.2).

the contract period. Such continuing investment ensures the stability and security of the Internet that is critical to the Internet's global functioning. Without presumptive-renewal provisions, some registry operators may not make such investments — with significant detrimental costs to Internet users. ICANN has thus reasonably determined that "there is little public benefit, and some significant potential for disruption, in regular changes of a registry operator." http://www.icann.org/en/announcements/icann-pr01mar01-1.htm. Permitting registry operators to lose registries quickly would create "adverse incentives to favor short term gain over long term investment." *Id.*

Indeed, ICANN could have elected to confer a perpetual authority to operate the .COM registry. It chose instead to grant a lesser term-limited contract with a presumptive right of renewal. The fact that ICANN chose to confer a more limited grant of authority than it could have conferred cannot, as a matter of law, violate the antitrust laws. Just as a patent holder cannot violate antitrust laws by granting an exclusive license, the patent holder similarly cannot violate antitrust laws through the lesser grant of a *non*-exclusive license. *Cook v. Boston Scientific Corp.*, 333 F.3d 737, 740-41 (7th Cir. 2003) (Posner, J.); *Genentech v. Eli Lilly & Co.*, 998 F.2d 931, 949 (Fed. Cir. 1993). Likewise, ICANN's decision to grant a lesser delegation of a presumptively renewed contract cannot be anticompetitive in light of its undisputed right to make unrestricted delegations. The same rationale

applies to provisions imposing price caps on what registry operators can charge for second-level domain names — another aspect of the registry contracts CFIT challenged — because ICANN lawfully could have imposed no price caps at all.

ICANN is currently considering authorizing a large number of new gTLDs, http://www.icann.org/en/topics/new-gtld-program.htm, and contemplates that registry agreements for these new gTLDs would include presumptive-renewal provisions. If the panel's decision were read to assume that such provisions conceivably could violate the Sherman Act, this could have a serious detrimental effect on ICANN's attempts to introduce significant new competition in the gTLD space, harming consumers and impairing the Internet's ability to function effectively. This Court should make clear that it was not reaching out to decide these issues on which it had not been briefed.

IV. CONCLUSION

ICANN urges this Court to grant the petition for rehearing and provide that the panel's decision does not reach ICANN's antitrust liability because of facts and circumstances in this case unique to ICANN and not before the panel. Alternatively, the Court should direct briefing on these new issues, or remand to the district court to consider first.

Respectfully submitted,

Dated: July 13, 2009

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limitation of Local Rule 29-2(c)(3) because it contains 4,075 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 SP2 in Times New Roman 14 point font.

Dated: July 13, 2009

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CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

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 13, 2009.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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