

WILMERHALE

August 12, 2016

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The Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

AUG 12 2016

CLERK SUPREME COURT

Re: **Petition for Review of *Hassell v. Bird*, No. A143233 (Cal. 1st App. Dist. June 7, 2016) (S235968)**

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

This is an amicus letter submitted pursuant to Rule 8.500(g) of the California Rules of Court supporting Appellant Yelp Inc.'s ("Yelp") request for discretionary review of the final decision and opinion rendered by the Court of Appeal for the First District in the case of *Hassell v. Bird* (June 7, 2016, A143233) __ Cal. App. 4th __ (the slip opinion is attached to Yelp's petition and is cited herein as "Opn."). This letter is submitted, through the undersigned counsel, by three companies that occupy the cutting edge in the development and provision of communications services and tools that use the Internet: Facebook, Inc., Microsoft, Inc., and Twitter, Inc. (collectively "amici").

Each day, billions of individuals use amici's platforms to speak on every conceivable topic—from the presidential election in America, to an attempted coup in Turkey; from rumors about who the biggest celebrities are dating, to accusations that a captain of industry has engaged in sexual harassment; from the latest statistical analysis of the finest athletes, to a raging debate over whether a star football player cheated; and from the announcement of the birth of a child, to an obituary about the passing of a loved one. Posts on these and so many other topics excite, inform, inspire, entertain, educate—and also offend, enrage, and provoke.

Amici's platforms and tools are instrumental in how modern society communicates, and unsurprisingly amici receive thousands of requests every day seeking review or removal of content on their platforms. Requesters seek to block speech because they disagree with or do not like it or because they believe it is threatening, obscene, fraudulent, or in the present case, defamatory. To preserve the richness and diversity of speech on their platforms, amici carefully avoid removing content without first determining that it violates the community standards they have adopted.

Although amici are not parties to this case, each has a vital stake in the proper resolution of two key questions of federal law that the Court of Appeal decided, and which directly impact both the platform, tools, and information provided by amici to its users, and such users' speech on amici's platforms: (1) whether 47 U.S.C. § 230 ("Section 230") permits a plaintiff to bypass Section 230's safe harbors by choosing to sue only the speaker while obtaining a broad nonparty injunction against the interactive computer service provider; and (2) whether the Due Process Clause and the First Amendment guarantee an interactive

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computer service provider the right to notice and an opportunity to be heard before being ordered to remove content from its platform.

The Court of Appeal's opinion in *Hassell* should be reversed because it erroneously applies a narrow construction of Section 230 immunity that conflicts with the plain meaning of the statute and radically departs from a large, unanimous, and settled body of federal and state court precedent, including published decisions from other California Courts of Appeal and from the Ninth Circuit. Specifically, the court blithely dismissed several appellate court decisions that Congress itself, in the course of enacting two related statutes, had embraced as having broadly and correctly construed the reach of Section 230's protections. Departing from this well-settled precedent, the *Hassell* court entered an injunctive order against Yelp that imposed obligations on the interactive computer service provider that are entirely inconsistent with Section 230.

The *Hassell* decision also should be reversed because it allows courts to deprive interactive computer service providers of their First Amendment rights and applicable immunities without the minimal procedural protections long required by the United States Supreme Court under the Due Process Clause. Long-settled U.S. Supreme Court precedent prohibits this kind of deprivation without notice and an opportunity to be heard, without having made any finding of liability against the service provider, and solely on the basis of factual determinations made in a non-adversarial, default judgment proceeding.

The Court of Appeal's decision provides a dangerous roadmap for plaintiffs to evade Section 230 to silence valuable and protected speech on the Internet without meaningful procedural protections. Given the importance of this issue, amici urge this Court to grant review and to reverse the Court of Appeal's misguided opinion.

BACKGROUND

Overview of Section 230. Twenty years ago, as the Internet and related online media were expanding and beginning to revolutionize communication, Congress enacted Section 230 to resolve looming uncertainty over whether interactive computer service providers could be held liable for the speech of third parties who used their platforms. Congress recognized that compelling such providers to supervise their users' communications would stunt their growth and chill online expression. Congress therefore enacted Section 230 to grant interactive computer service providers immunity from litigation over harms arising from their users' speech. Under the robust protection of Section 230, these interactive computer service providers have grown and flourished. Nevertheless, the continued vitality of Section 230's protection is essential to their sustained operation and growth.

Section 230 states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). The statute further provides: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).

From the first definitive interpretations of these provisions in *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, and *Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, (10th Cir. 2000) 206 F.3d 980, through this Court’s decision in *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, and virtually every other opinion since, courts throughout the country have consistently agreed about Section 230’s broad scope. Most relevant here, because Section 230 prohibits “treat[ing]” providers of interactive computer services as the “publisher” of third-party-created content, the statute preempts any state law that requires a service provider to perform (or not perform) a traditional editorial function with respect to such content, including “efforts ... to *edit*, monitor, or *remove* user generated content.” *Doe No. 14 v. Internet Brands, Inc.* (9th Cir. May 31, 2016, No. 12-56638) 2016 WL 3067995, at *5 (emphasis added). In other words, the immunity provided by Section 230 applies to “any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.” *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) (en banc) 521 F.3d 1157, 1170-1171 (en banc); *see also Doe II v. MySpace, Inc.*, (2009) 175 Cal.App.4th 561, 572-573 (“appellants want MySpace to regulate what appears on its Web site” but “[t]hat type of activity—to restrict or make available certain material—is expressly covered by section 230”).

Congress has endorsed these interpretations of Section 230 more than once. In 2002, when Congress extended Section 230’s protections to a new context, *see* 47 U.S.C. § 941(e)(1), the accompanying committee report recognized that the Fourth Circuit in *Zeran* and the Tenth Circuit in *Ben Ezra* had “correctly interpreted section 230(c),” and stated that “[t]he Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by [the new statute],” H.R. Rep. No. 107-449, 2d Sess., p. 13 (2002); *see also Barrett, supra*, 40 Cal.4th at p. 54 & fn.17 (“deem[ing] th[is] Committee Report instructive”). More recently, in the 2010 SPEECH Act, Congress again expanded the application of Section 230 immunity, this time announcing that United States courts “shall not recognize or enforce a foreign judgment for defamation” unless the judgment “would be consistent with section 230.” 28 U.S.C. § 4102(c)(1).

The Facts and Proceedings in *Hassell*. The injunction at issue in this case arises from a dispute between Plaintiff Dawn Hassell, an attorney, and her former client, Defendant Ava Bird. After Hassell ended the attorney-client relationship, a user with the screen name “Birdzeye B.” posted a negative review of Hassell’s firm on Yelp’s online platform. Later, a

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second negative review was posted under the screen name “J.D.” Claiming that Bird was responsible for both reviews, Hassell sued Bird for defamation, seeking compensatory and punitive damages and injunctive relief. Hassell did not name Yelp as a defendant because she knew that Section 230 barred such defamation claims against Yelp. *See* A00837.

After Bird failed to appear, Hassell applied for a default judgment. Hassell’s application added another allegedly defamatory statement to her claim and, for the first time, demanded an injunction not only against Bird but also against *nonparty* Yelp. Hassell intentionally did not serve Yelp with her application for default judgment or otherwise inform Yelp that she was seeking an injunction against it. Following an *ex parte* proceeding at which neither Bird nor Yelp appeared, the trial court granted the requested injunction and ordered Yelp to remove the reviews at issue.

Wielding the court’s injunction, Hassell demanded that Yelp remove the three reviews or else face contempt proceedings. Yelp responded by asserting that as a nonparty to the litigation, and having not received notice or an opportunity to be heard, it was not bound by the terms of the injunction. Yelp then moved to vacate the judgement. As relevant here, Yelp argued that both Section 230 and the First Amendment barred the trial court from issuing an injunction ordering Yelp to remove user-generated reviews from its online platform and that the Due Process Clause entitled Yelp to notice and an opportunity to be heard before any injunction could issue. The trial court denied Yelp’s motion and the Court of Appeal affirmed that decision.

ARGUMENT

Prudential factors overwhelmingly favor review of the Court of Appeal’s decision. Review is especially appropriate where, as in this case, a published opinion conflicts with a substantial body of well-reasoned precedent, is wrong on the merits, and could have an untoward impact extending far beyond the narrow facts at issue in the case.

I. THE COURT OF APPEAL’S INTERPRETATION OF SECTION 230 IS PLAINLY WRONG AND CONFLICTS WITH THE UNIFORM DECISIONS OF OTHER COURTS IN CALIFORNIA AND THROUGHOUT THE NATION

Until the Court of Appeal’s decision in this case, courts in California and across the country uniformly had held that Section 230 prohibits enjoining interactive computer service providers to remove third-party content from their platforms. In *Kathleen R. v. City of Livermore* (2001) 87 Cal. App.4th 684, for example, the court recognized that plaintiff’s request for injunctive relief “contravene[d] section 230’s stated purpose of promoting unfettered development of the Internet no less than her damages claims.” *Id.* at pp. 692, 697-

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698. Likewise in *Ben Ezra*—a decision that Congress has expressly endorsed—the Tenth Circuit upheld dismissal of plaintiff’s demand for injunctive relief on Section 230 grounds. *See Ben Ezra, supra*, 206 F.3d at pp. 983-986. And in *Noah*, the court explained: “[G]iven that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief.” *Noah v. AOL Time Warner, Inc.* (E.D. Va. 2003) 261 F. Supp. 2d 532, 540, *affd.* (4th Cir. Mar. 24, 2004) 2004 WL 602711.

The Court of Appeal nonetheless upheld an award of “injunctive relief” against Yelp requiring it to remove three user-generated reviews. *Opn. 6*. The Court of Appeal distinguished precedent rejecting analogous requests for injunctions on the ground that the “removal order” in this case “does not impose any liability on Yelp.” *Id.* at p. 28. “In this defamation action,” the court reasoned, “Hassell filed their complaint against Bird, not Yelp; obtained a default judgment against Bird, not Yelp; and was awarded damages and injunctive relief against Bird, not Yelp.” *Ibid.*

The Court of Appeal’s decision is deeply flawed. *First*, the court erroneously concluded that Section 230 protects only persons or entities explicitly named as “defendants,” and not nominal “nonparties” as well, because it read subsection 230(e)(3)’s reference to “liability” as limiting the scope of the statute’s immunity to the party against whom judgment is entered. *See* 47 U.S.C. § 230(e)(3) (providing, in part, that “no *liability* may be imposed under any State or local law that is inconsistent with this section” (emphasis added)). Section 230’s immunity, however, derives not only from subsection 230(e)(3), but also from subsection 230(c)(1), which independently prohibits “treat[ing]” interactive computer service providers as the “publisher” of third-party content.

The Court of Appeal’s disregard for subsection 230(c)(1) conflicts with the decisions of numerous other courts. To take but one prominent example: If subsection 230(e)(3) were the sole source of immunity under the statute, then Section 230 would provide no protection against *federal* civil claims, for subsection 230(e)(3) refers only to “State or local law.” Every court to consider the question, however, has applied Section 230 to both state *and* federal claims. *E.g., Roommates.com, supra*, 521 F.3d at pp. 1170-1171 (applying Section 230 to claims under the federal Fair Housing Act); *Jane Doe No. 1 v. Backpage.com, LLC* (1st Cir. 2016) 817 F.3d 12, 21 (applying Section 230 to the federal Trafficking Victims Protection Reauthorization Act); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.* (7th Cir. 2008) 519 F.3d 666 (applying Section 230 to claims under the federal Fair Housing Act). The opinion below offers no reason to diverge from the holdings of these other courts.

Second, even if the sole source of immunity under Section 230 were subsection 230(e)(3), the Court of Appeal's decision would still be wrong. Subsection 230(e)(3) not only prohibits imposition of "liability"; it also mandates that "[n]o *cause of action* may be brought ... under any State or local law that is inconsistent with this section." (emphasis added). Because subsection 230(e)(3) bars *both* "liability" and any "cause of action" that is "inconsistent" with Section 230's other provisions, Section 230 protects Internet service providers "not merely from ultimate liability, but [also] from having to fight costly and protracted legal battles." *Roommates.com, supra*, 521 F.3d at pp. 1174-1175. Beyond adverse final judgments, in other words, the statute shields Internet service providers "*from the burdens of litigation*." *Ben Ezra, Weinstein, & Co. v. America Online, Inc.* (D.N.M. July 16, 1998, No. 97-485) 1998 WL 896459, at *2 (italics added); *see also Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.* (4th Cir. 2009) 591 F.3d 250, 254-255 (Section 230 provides an "*immunity from suit*," not solely a "defense to liability"). The Court of Appeal thus also erred because enjoining Yelp and exposing it to the threat of a contempt proceeding saddle Yelp with the very burdens of litigation that Section 230 was designed to eliminate.

Finally, the Court of Appeal's decision conflicts with the statute's fundamental design. In enacting Section 230, Congress weighed the costs and benefits of allowing government to press online intermediaries into service to remove harmful content from their platforms. Congress determined that the Internet had "flourished" and become an incredibly valuable "forum" for a diverse array of expression because of a "*a minimum of government regulation*." 47 U.S.C. § 230(a)(3), (4) (emphasis added); *see also id.* § 230(b)(2) ("It is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." (italics added)). Wary of squelching online expression, Congress barred States from forcibly enlisting online intermediaries to root out content that the government deems harmful, and instead steered plaintiffs and policymakers to focus their efforts exclusively on the individuals who originally created that content. *See Barrett, supra*, 40 Cal.4th at p. 40 ("[P]laintiffs who contend they were defamed in an in Internet posting may *only seek recovery from the original source of the statement*" (italics added)); *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, (E.D. Mo. 2011) 809 F. Supp. 2d 1041, 1055 ("Congress has decided that the parties to be punished and deterred are not the [I]nternet service providers but rather are those who created and posted the illegal material[.]"). The trial court's attempt to deputize Yelp to carry out its judgment thus conflicts with Congress's considered policy judgment that commandeering Internet service providers in this way would impose too great a cost to free speech.

II. THE COURT OF APPEAL VIOLATED YELP'S RIGHTS UNDER THE DUE PROCESS CLAUSE AND THE FIRST AMENDMENT

The Court of Appeal also committed a second grievous error by authorizing the trial court to strip Yelp of its First Amendment rights without due process of law. Much like a bookseller or a movie theater, Yelp and the amici responsible for this letter have their own First Amendment rights to distribute content through their platforms that is independent of the First Amendment rights of the original content-creators. *See Heller v. New York* (1973) 413 U.S. 483, 489-490; *Marcus v. Search Warrants of Property* (1961) 367 U.S. 717, 731-732. Recognizing the importance of such rights, in *Marcus* and *Heller*, the U.S. Supreme Court held that a distributor cannot be permanently deprived of its right to distribute speech without notice and an opportunity to be heard.

Far from protecting Yelp's First Amendment rights, the proceeding upheld below was a procedural travesty. Yelp was purposefully given *no advance notice* that the trial court was even considering entering an injunction against it. Indeed, Hassell went out of her way to deprive Yelp of notice, intentionally choosing not to inform Yelp about her application for default judgment. *See* Yelp Petition 10 (July 18, 2016) (cited herein as "Petn."). And to this day Yelp has received *no hearing* to challenge the default judgment's treatment of the speech as defamatory. Instead, Yelp was silenced based entirely on the result of an *uncontested, ex parte* hearing, held after Bird failed to appear. The procedural short-cuts endorsed by the Court of Appeal flatly contradict *Heller*, which held that "because only a judicial determination *in an adversary proceeding* ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Supra*, 413 U.S. at p. 489 (italics added, internal quotation marks omitted).

The Court of Appeal brushed off Yelp's due process argument based on supposed "settled principles" of law that permit an injunction to "run to classes of persons with or through whom the enjoined party may act." Opn. 19. This exception to the ordinary requirements of due process cannot justify restraining speech without affording an intermediary advance notice or *any* opportunity to challenge factual determinations made in an *uncontested* hearing. At a minimum, however, such an exception must be narrowly constrained in order to reduce the extraordinary due process and First Amendment costs of this procedure. Until now, that exception has been applied only where there is actual evidence and a determination that the enjoined party and nonparty acted together to evade the injunction, or where the enjoined party and nonparty have a particularly close relationship, such as that between a union and a union member. *See* Petn. 19-26. The Court of Appeal's astonishing expansion of what had previously been an exceedingly narrow exception to due process creates a grave threat to freedom of speech on the Internet.

III. THE COURT OF APPEAL CREATED A DANGEROUS ROADMAP FOR EVADING CRITICAL PROTECTIONS FOR FREE SPEECH ON THE INTERNET

The Court of Appeal's decision creates a dangerous roadmap empowering those who object to online speech to accomplish indirectly, through a "heckler's veto," what Section 230 and the U.S. Supreme Court's Due Process and First Amendment case law prevents objectors from accomplishing directly.

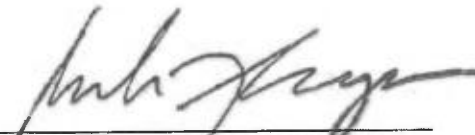
- Step one: Sue the content-creator for defamation in California state court. Do not name the interactive computer service provider hosting the content since that entity is immune from suit under Section 230.
- Step two: When the content-creator fails to appear—as they so often do—apply for entry of a default judgment. Do not notify the host about the application for default judgment, as the host might actually contest the underlying facts.
- Step three: Obtain a default judgment based on a wholly one-sided presentation about why the objected-to speech is defamatory or otherwise unprotected.
- Step four: Obtain an injunction ordering removal of the objected-to speech that names not only the content-creator, but also the host. Serve the injunction on the host who is now powerless to contest whether the objected-to speech is in fact defamatory.

If the Court of Appeal's decision were allowed to stand, this roadmap could be used to silence a vast quantity of protected and important speech. Moreover, the threat to online expression is all the more acute because of the prevalence of anonymous and pseudonymous speech on the Internet. The Court of Appeal thought it acceptable to enjoin a platform, like Yelp, because at least the original speaker would be given an opportunity to defend the speech as non-defamatory. But when dealing with speech posted anonymously, the one-sided procedure approved by the Court of Appeal provides far too little assurance that the individual supposedly given that opportunity is even the relevant speaker. There is thus a serious risk that online expression will be blocked without *anyone* having been given an opportunity to defend it.

The Court of Appeal's decision threatens to impose immense costs to freedom of expression on the Internet. Given the importance of this issue, amici urge this Court to grant review and to reverse the Court of Appeal's misguided opinion.

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Respectfully submitted,



Mark D. Flanagan (SBN 130303)
WILMER CUTLER PICKERING
HALE AND DORR LLP
950 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 858-6000
Facsimile: (650) 858-6100
Email: mark.flanagan@wilmerhale.com

Patrick J. Carome
Ari Holtzblatt
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue
Washington, D.C. 20006
Telephone: (202) 663-6800
Facsimile: (202) 663-6363
Email: patrick.carome@wilmerhale.com
Email: ari.holtzblatt@wilmerhale.com

Counsel for Facebook, Inc., Microsoft, Inc., and Twitter, Inc.

PROOF OF SERVICE

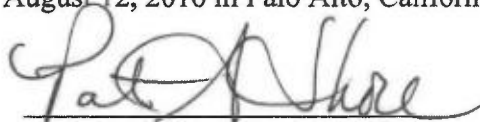
STATE OF CALIFORNIA)
) ss
COUNTY OF SANTA CLARA)

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and am not a party to this action. My business address is Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale"), 950 Page Mill Road, Palo Alto, California 94304.

On August 12, 2012, I served the foregoing **Amicus Curiae Letter of Facebook, Inc., Microsoft, Inc., and Twitter, Inc.** in *Hassell v. Bird*, No. S235968 before the Supreme Court of California, on each person in the enclosed Service List.

I served the foregoing document by U.S. Mail, as follows: I placed true copies of the document in a sealed envelope addressed to each interested person in the Service List. I placed each such envelope with postage thereon fully prepaid, for collection and mailing at WilmerHale's offices in Palo Alto, California. I am readily familiar with WilmerHale's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 12, 2016 in Palo Alto, California.


Patricia Shore

SERVICE LIST

Monique Olivier
Duckworth Peters Lebowitz LLP
100 Bush Street, Suite 1800
San Francisco, California 94104

Counsel for Plaintiffs Dawn Hassell, et al.

Harmeet Kaur Dhillon
Nitoj Paul Singh
Dhillon Law Group, Inc.
177 Post Street, Suite 700
San Francisco, California 94108

Counsel for Appellant Yelp Inc.

Thomas Rohlf's Burke
Rochelle Lyn Wilcox
Davis, Wright, Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111

Aaron Samuel Schur
Yelp Inc.
140 New Montgomery Street, 9th Floor
San Francisco, California 94105

Court of Appeal
First Appellate District, Division Four
350 McCallister Street
San Francisco, California 94102

Case No. A143233

Hon. Ernest Goldsmith
Department 302
San Francisco Superior Court
Civic Center Courthouse
400 McCallister Street
San Francisco, California 94102

Case No. CGC-13-530525