

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIELDS, et al.,

Plaintiffs-
Appellants,

v.

TWITTER, INC.,

Defendant-
Appellee.

**MOTION FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE
FLOOR64, INC. D/B/A THE COPIA
INSTITUTE IN SUPPORT OF
APPELLEE TWITTER, INC.**

9th Circuit Case No. 16-17165

On Appeal from the United States
District Court for the Northern District
of California

3:16-cv-00213-WHO

Honorable William H. Orrick

INTRODUCTION

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, *amicus* Floor64, Inc. d/b/a The Copia Institute requests leave to file the accompanying *amicus curiae* brief in support of Appellee Twitter. Pursuant to Ninth Circuit Rule 29-3, *amicus* Floor64 attempted to obtain the consent of all parties before moving for permission to file the proposed brief. Appellee consented to the filing of this brief, while Appellant took no position.

IDENTITY AND INTEREST OF AMICUS CURIAE

Floor64 is a business that regularly advises and educates innovative technology startups on a variety of issues, including those relating to intermediary liability and the important free speech interests associated with their protection.

Through the Copia Institute it works directly with innovators and entrepreneurs to better understand innovation and policy issues, while its online publication, Techdirt.com, has published over 60,000 posts commenting on these subjects. The site regularly receives more than two million views to its pages per month, and its posts have also attracted more than one million comments, third party speech that advances discovery and discussion around these topics. Floor64 depends on statutory protections for intermediary platforms, including that afforded by 47 U.S.C. § Section 230 (“Section 230”), to both enable this robust public discourse found on its pages and for its own speech to be shared and read throughout the Internet.

As an enterprise that relies on the statutory protection itself, and that advises others who depend on it as well, *amicus* Floor64’s interest here is to ensure that judicial interpretation of the important statutory protection at 47 U.S.C. § 230 lets it continue to protect the individuals, businesses, and all related speech interests that depend on it.

**THE AMICUS BRIEF WILL ASSIST THE COURT
AND IS RELEVANT TO THE DISPOSITION OF THE CASE**

Amicus Floor64 offers this brief to explain how the District Court’s interpretation of 47 U.S.C. § 230 was consistent with prior precedent, as well as consistent with Congressional intent, and how deviating from that interpretation will harm the speech interests Congress sought to protect when it enacted the law.

Resolution of this case has the potential stands to have significant legal impact, and *amicus* Floor64 hopes to provide useful background for the Court as it considers the matter.

CONCLUSION

For the reasons stated herein, *amicus* Floor64 requests that this Court accept the attached brief as filed.

Dated: June 7, 2017

RESPECTFULLY SUBMITTED,

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NO. 16-17165

IN THE UNITED STATES COURT OF APPEALS
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TAMARA FIELDS, et al.,

PLAINTIFFS-APPELLANTS,

v.

TWITTER, INC.,

DEFENDANT-APPELLEE,

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The Honorable Judge William H. Orrick

***BRIEF OF AMICUS CURIAE FLOOR64, INC. D/B/A THE COPIA
INSTITUTE IN SUPPORT OF DEFENDANT-APPELLEE***

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND
OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN
LITIGATION**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Floor64, Inc. d/b/a/ The Copia Institute states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of the stock of it.

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STATEMENT OF INTEREST

Floor64, Inc., d/b/a the Copia Institute, is a corporation that regularly advises and educates innovative technology startups on a variety of issues, including those relating to intermediary liability and the important free speech interests associated with their protection. Through the Copia Institute it works directly with innovators and entrepreneurs to better understand innovation and policy issues, while Floor64's online publication, Techdirt.com, has published over 60,000 posts commenting on these subjects. The site regularly receives more than two million views to its pages per month, and its posts have also attracted more than one million comments, third party speech that advances discovery and discussion around these topics. Floor64 depends on statutory protections for intermediaries, including that afforded by 47 U.S.C. Section 230 ("Section 230"), to both enable this robust public discourse found on its pages and for its own speech to be shared and read throughout the Internet.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for undersigned counsel, has authored the brief in whole or in part, or contributed money towards the preparation of this brief.

INTRODUCTION

A terrible thing happened to plaintiff-appellants' ("Appellants") loved ones. In urging this Court not to grant the relief they seek the undersigned *amicus* in no way intends to diminish their loss. But it is not the first time something terrible has happened, nor will it be the last. It is also not the first time a bad actor has availed themselves of a communications tool, nor will it be the last. But just as we resist compromising constitutional liberties because bad actors sometimes act badly in the shadow of the First Amendment, the urge to whittle away at the important protection Section 230 also provides speech must similarly be resisted.

The District Court correctly reasoned how Section 230 precludes Appellants' claims. It is a decision that must stand in order not to undermine the twin policy goals Congress sought to advance when it passed Section 230: encouraging the most beneficial speech to proliferate online, and minimizing the most harmful. Allowing a claim like Appellants' to proceed would frustrate both these goals because it would not simply be "marginally more expensive" for platforms to avoid such liability in the future. Rather, the potentially unlimited legal risk such a decision would effectively expose them to would impose a debilitating burden on platforms of all sizes, providing all sorts of services, whether commercially or otherwise, and consequently chill all the lawful, beneficial speech they facilitate. This Court should let the District Court ruling stand in order not to invite this harm.

ARGUMENT

I. Overturning the District Court would frustrate Congress’s twin goals to both encourage the most beneficial speech and limit the most harmful

A. Overturning the District Court would undermine the balanced approach Congress employed to address online speech when it passed Section 230

With its statutory language Congress intended to accomplish two things. *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). First, Congress wanted to insulate intermediary platforms from liability to encourage the unfettered and unregulated development of free speech on the Internet, as well as to promote the development of e-commerce. *Id.* At the same time, it similarly intended for Section 230 to protect the public by ensuring that these same platforms were in the position to help minimize the unwelcome consequences of the less beneficial uses of the Internet. *Id.* at 1028. *See also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009). (citing *Carafano v. Metrosplash.com, Inc.*, 339, F.3d 1119, 1122 (9th Cir. 2003)) (“The Statute is designed at once to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.”).

It did this with two complementary provisions: The first, at Subsection (c)(1), precludes holding a platform liable for content created by another. 47 U.S.C. § 230(c)(1). It is this provision that gets the most attention by the courts, and that defendant-appellee Twitter (“Twitter”) rests its defense on (Op. 5), because it is the

part that directly insulates platforms from liability for the speech of its users. But even though not directly applicable in this case, there is an equally important provision at Subsection (c)(2), a provision that informs how Subsection (c)(1) should be construed. While the first provision encourages platforms to play a critical role in promoting the most online speech, the second encourages platforms to help rid the Internet of the most undesirable. *See* 47 U.S.C. § 230(c)(2). As subparts of the same heading, the two provisions are designed to work in tandem. *See* 47 U.S.C. § 230(c) (“Protection for ‘Good Samaritan’ blocking and screening of offensive material.”). In other words, Appellants are not the first to lament the existence of odious speech online: Congress anticipated this concern and expressly designed Section 230 to address it.

What is notable about how Congress sought to achieve these twin goals is that, as part of this balanced approach, instead of threatening intermediary platforms with sanction, it put them in the best position to both promote online speech and take whatever steps they could to protect the public from the worst of it. The wisdom of structuring the statute with this “carrot” rather than “stick” approach is evidenced in several ways: For one thing, it encourages platforms to help police the Internet by ensuring that they will not be worse off than those that do not bother to. *Batzel*, 333 F.3d at 1029. Second, had Congress not structured Section 230 this way it would have discouraged platforms from doing all they could to protect users because they

would have needed to conserve resources to deal with the unanticipated liability that might arise should they not have done it in a way that satisfied *ex post* judicial review. *Ben Ezra Weinstein and Company, Inc. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) and 141 Cong. Rec. H8460-01, H8470 (1995) (statement of Rep. Barton) (“Congress enacted 230 to give interactive service providers ‘a reasonable way to ... help them self-regulate themselves without penalty of law.’”)).

As discussed further in Section I.B *infra* the ability of Section 230 to serve as a mechanism for promoting Internet hygiene is predicated on platforms not being depleted by an infinite number of specific policing demands. *See, e.g., Carafano*, 339 F.3d at 1124 (citing *Zeran*, 129 F.3d at 330-31) (“It would be impossible for service providers to screen each of their millions of postings for possible problems.”). Forcing platforms to mitigate their legal risk, even with respect to just this particular statutory obligation, will lead them to divert their resources away from policing activities that might be more valuable or effective. In addition, while Appellants might argue that the Anti-Terrorism Act, 18 U.S.C. § 2331 *et seq.*, is but one statute, if there can be one screening duty arising from one statute then there will soon be more such duties arising from more statutes, and these varied duties may apply to immeasurable amounts of material. In addition to diverting resources, these myriad other statutory obligations would similarly cause platforms to censor more

of the legitimate user speech they facilitate in order to minimize their potential liability exposure, or, worse, lead to decreased availability of platforms to host speech or other innovative services at all, if the specter of the liability they might face made it potentially too expensive to risk. *Batzel*, 333 F.3d at 1027-28. None of these outcomes are consistent with the policy goals Congress sought to vindicate with Section 230. *See* 47 U.S.C. § 230(a) and 47 U.S.C. § 230(b) (articulating these policy goals).

Not only would allowing Appellants' claim to go forward frustrate these policy goals generally, but it also would frustrate aspects of them specifically. For instance, as part of its statutory approach for achieving these twin goals, Congress sought to encourage the development of blocking tools. *See, e.g.*, 47 U.S.C. § 230(b)(4). Appellants' contention that Twitter's provision of a direct message ("DM") function in and of itself exposes it to liability runs afoul of that provision. While from a user perspective it may seem different to send a DM than to send a tweet, in reality there is little difference. Both are short messages; the only difference is that a DM is a short message with a block list that includes most of the world.

Appellants surmise that certain Twitter users use the DM function to express odious messages, and so they may. But Twitter has provided the faculty for ensuring that the world need not be exposed to it. This is exactly the sort of user-protective

innovation Congress sought to encourage, and Twitter is far from the only platform that architects its systems to provide different degrees of audience-limited messaging. *See, e.g., Article 245: phpBB3 Permissions*, phpBB3 Knowledge Base, <https://www.phpbb.com/support/docs/en/3.2/kb/article/phpbb3-permissions/> (describing various permissions settings for a certain type of open source forum software individual website owners can install on their own servers to run their own self-hosted online communities). This innovation should thus not become a source of liability. Were it to be, it would discourage platforms from developing further tools to improve users' online experiences and thus contravene Congress's legislative intent.

B. *Barnes v. Yahoo* and *Doe 14 v. Internet Brands* are cautionary tales for how limiting the statute's applicability frustrates Congressional intent

In their appeal Appellants principally rely on cases where this Court has allowed claims to proceed against Internet platforms. But as the District Court correctly found, Appellants misconstrue those cases in arguing that they permit courts to find limitations on the applicability of Section 230 generally (Op. 12-13). For instance, in *Barnes* Section 230 was in fact found to be a bar preventing her negligence claim against a platform hosting content created by a third party. *Barnes*, 570 F.3d at 1105-06. It was only because a separate promissory estoppel claim could be found in her pleading that her case against a platform was able to proceed. *Id.* at 1106. In *Doe 14 v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), the holding

there also expressly found that liability could only potentially attach to something the platform business did that was unrelated to its speech-intermediating function. *Id.* at 852.

Appellants rely on dicta from *Barnes*, which was cited in *Internet Brands* as well, suggesting that there is no “general immunity” from liability deriving from third-party content. *Internet Brands*, 824 F.3d. at 853. Given that even in *Barnes* Section 230 was found to apply to potential liability stemming from the expression itself, this passing suggestion had no bearing on the holding. *See Barnes*, 570 F.3d at 1105-1106. On the contrary, many other courts, and even this one, have found Section 230 to indeed be a fairly broad immunity. *Carafano*, 339 F.3d at 1123. *See also* Twitter Br. 20-21. But there is no argument being made in the instant case here that a platform, by virtue of being a platform, is entitled to an “all-purpose get out of jail free card,” *Internet Brands*, 824 F.3d at 853, for any and all liability that it might incur, simply because it functions as an Internet platform. If it cheated its suppliers it could of course be found liable in contract. If it failed to pay its employees it of course could be found liable under labor law as well. Both *Barnes* and *Internet Brands* instead stand for the limited proposition that Section 230 does not shield platforms from liability that is not manifest in intermediated expression itself (Op. 12-13). But as the District Court correctly found, Appellants’ cause of action is inherently connected to the expression that Twitter intermediates. *Id.* at 13.

At the same time, even though their holdings are more limited than Appellants would have it, both *Barnes* and *Internet Brands* nevertheless stand as cautionary tales for how narrowly construing Section 230's coverage frustrates the Congressional intent behind the statute as a whole. Although in *Barnes* this Court took pains to preclude a finding of liability based on Yahoo's Section 230-protected role as an intermediary, *Barnes*, 570 F.3d at 1102-1106, instead predicating potential liability on the fact that as a platform it had made a promise to delete undesirable content, because the case was allowed to go forward few well-advised platforms will ever now make similar promises. See, e.g., Eric Goldman, *47 USC 230 Retrospective Conference Recap*, Technology & Marketing Law Blog (Mar. 21, 2011), http://blog.ericgoldman.org/archives/2011/03/47_usc_230_retr.htm ("*Barnes v. Yahoo* prompted her to look at the company's processes. Linden Labs won't make any representations about what LL will do for a complaining user until LL has actually done the work, even though that approach frustrates users."). So rather than supporting Congress's objective to have platforms play a proactive, helpful role, the threat of liability outside what Section 230 could shield them from has instead deterred platforms from trying to go that extra mile to look out for the public, which is exactly the opposite result from what Congress had intended. See *Batzel*, 333 F.3d at 1029-30.

Internet Brands is a more recent case so it may be too soon to feel its full effects, but by rejecting the defense that “but for” it having been a platform intermediating the plaintiff’s speech there would have been no injury, and instead allowing for potential liability for an injury that would never have arisen had it not been acting as a platform, *Internet Brands*, 824 F.3d at 853, this Court may have chilled other innovative businesses that are now unsure what sorts of Internet platforms they can be without risking unforeseen liability.

This result frustrates the statute, whose language is service-agnostic: it can apply to all sorts of platform types supplying all sorts of innovative services, including those that could hardly even have been imagined when Section 230 was enacted. *See Batzel*, 333 F.3d at 1026 (describing its passage as part of the Telecommunications Act of 1996, Pub. L. No. 104-104). As Congress made clear in the statute itself, the point of Section 230 is simply to ensure that platforms can continue to be available. 47 U.S.C. § 230(b)(1) and 47 U.S.C. § 230(b)(2) (“It is the policy of the United States (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) 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.”). If courts continue to trim the statute’s reach, however, many other valuable ones will now never come to pass.

II. Overturning the District Court's decision would chill online speech by imposing a debilitating burden on anyone who intermediated online speech

For Appellants there may be little more important to them than their ability to hold Twitter responsible for what happened to their loved ones, and, given the heinousness of the crime, a tremendous temptation for a court to want to help blaze a clear path for them to achieve whatever may help them feel made whole again. But there is more at stake in this case than just their claim, and reversing the District Court's decision would do more harm to online speech than may necessarily be readily apparent.

If Appellants' claim is allowed to go forward it will not just be Twitter that will be affected by this precedent: any intermediary platform, large or small, will also be just as affected. For it is not just large companies that benefit from Section 230; individuals can also act in the role of intermediaries, and when they do they also rely on Section 230's protection. For example, any blogger that allows comments on his or her blog depends on this protection with respect to those comments. Every social media user that allows discussion on their updates similarly depends on it. Every person who forwards an email depends on it.

While it may be tempting to look at an Internet platforms and decide that a large, apparently well-capitalized business should be liable for whatever may result from the use of their platforms, by ignoring Section 230's bar against this sort of

assignment of liability it means that Section 230 will not be available to protect anyone at all, including ordinary individuals or any smaller platforms. In the case of the latter, these are platforms that will now not be able to afford to grow into bigger businesses potentially capable of being even better at meeting Congress's twin policy goals of intermediating more speech and proactively protecting the public than today's large platforms currently do.

Furthermore, in any situation involving one intermediary platform there may in fact be multiple nested intermediaries, with one depending on the services of another to support the same underlying intermediary act. Fortunately, rather than burdening intermediaries with costly litigation necessary to navigate which of these interconnected platforms should bear the burden of liability arising from an intermediating act, Section 230 avoids these perniciously unanswerable questions entirely by providing the immunity to all the intermediaries involved. *See Batzel*, 333 F.3d at 1031.

It is because these questions are such thorny knots to untangle that Section 230 exists to bar the exercise, because without that statutory bar intermediary platforms would be awash in incalculable, and perhaps also uncontrollable, legal risk. This burden that Appellants would have this Court place on all platforms would also not be "marginally more expensive." *Internet Brands*, 824 F.3d at 853. Appellants argue that Twitter should have done more, but it is not clear what more

it could have done at all, much less what it could have done that would not have required vast expenditure of resources or expertise far beyond what any platform could be expected to excel in, much less the small or individually-run ones. Defining who is a terrorist is a notoriously difficult task even for those qualified to make the assessment. *See, e.g.*, Conor Friedersdorf, *Is One Man's Terrorist Another Man's Freedom Fighter*, *The Atlantic* (May 16, 2012), <https://www.theatlantic.com/politics/archive/2012/05/is-one-mans-terrorist-another-mans-freedom-fighter/257245/> (describing several policy tensions affecting the decision for choosing whom to designate with the label). It is more than any platform could ever be expected to have sufficient expertise to do.

Deciding who should be considered a terrorist is also an inherently political decision, and one that can too easily be abused as a means of targeting dissidents. *See, e.g.*, Daren Butler, *Turkey officially designates Gulen religious group as terrorists*, *Reuters* (May 31, 2016), <http://www.reuters.com/article/us-turkey-gulen-idUSKCN0YM167> (“Erdogan accuses Gulen of conspiring to overthrow him by building a network of supporters in the media, judiciary and education.”). There is no assurance, even if were possible for a platform to check names of new users against a government-provided list, as Appellants now suggests (Fields Br. 17-18), that unconstitutional animus, political or otherwise, was not a factor in choosing what names to include on the list. *See International Refugee Assistance Project v.*

Trump, No. 17-1351, slip op at 58-59 (4th Cir. May 25, 2017). See also *State of Washington v. Trump*, No. 17-35105, slip op at 25-26 (9th Cir. Feb. 19, 2017).

In short, what Appellants propose is to turn platforms into unwilling accomplices for unconstitutional incursions on speech as a condition for them being able to avoid potentially unlimited liability. In fact, the more Appellants argue that requiring platforms to deny certain potential users the ability to speak on their platforms is unrelated to those potential users' speech (Fields Br. 17-18), the more unconstitutional this coercion becomes. It is anathema to the First Amendment to prevent someone from speaking solely because the government suspects that he might speak in a way that is actionable. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints ... bear[s] a heavy presumption against its constitutional validity."); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556-62 (1976) (collecting cases). It is similarly anathema to prohibit people from speaking anonymously, which any requirement to check new users against a list would amount to because it would prevent them from registering anonymously. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."). Many platforms choose to let speakers use their platforms anonymously because often it is only with that anonymity that users can feel

comfortable to speak with enough candor to contribute usefully to the platform's community of ideas. *Krinsky v. Doe*, 72 Cal. Rptr. 3d 231, 237 (2008) (“[B]y concealing speakers’ identities, the online forum allows individuals of any economic, political, or social status to be heard without suppression or other intervention by the media or more powerful figures in the field”). Preventing platforms from allowing users to speak anonymously will thus have a direct chilling effect on all of those potential users’ speech.

These sorts of attacks on free expression offend the First Amendment regardless of whether they implicate speech online or offline. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). The fact that these attacks may implicate national security interests also does not automatically remove them from the purview of the First Amendment and the free speech interests it protects. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (“[T]he Government’s authority and expertise in these matters do not automatically trump the Court’s own obligation to secure the protection that the Constitution grants to individuals.”). As this Court noted in *Internet Brands*, the purpose of Section 230 is to avoid the chilling effect upon Internet free speech that imposing liability on platforms intermediating speech would cause. *Internet Brands*, 824 F.3d at 852. This protection can therefore not be conditioned on attacking the very same speech interests Section 230 was designed to protect.

CONCLUSION

Because allowing the Appellants' case to go forward would undermine the statutory protection platforms depend on to foster online expression, as well as upend the policy balance Section 230 struck to promote speech while minimizing the least desirable, and thus chill legitimate speech, the District Court's decision should not be overturned.

Dated: June 7, 2017

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amicus Floor64, Inc. d/b/a The Copia Institute In Support Of Defendant-Appellee complies with the word limit of Fed. R. App. P. 29(c)(2) because this brief contains 3699 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: June 7, 2017

By: /s/ Catherine R. Gellis

Catherine R. Gellis

*Counsel for Amicus
Curiae*_____

CERTIFICATE OF SERVICE

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 June 7, 2017.

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.

Dated: June 7, 2017

By: /s/ Catherine R. Gellis

Catherine R. Gellis

Counsel for Amicus Curiae