No. S235968

IN THE SUPREME COURT OF CALIFORNIA

DAWN HASSELL, *ET AL.*
Plaintiffs-Respondents,

v.

AVA BIRD,
Defendant,

YELP, INC.,
Appellant.

Appeal from a Decision by the Court of Appeal
First Appellate District, Division Four, Case No. A143233
Superior Court of the County of San Francisco
Case No. CGC-13-530525, The Honorable Ernest H. Goldsmith

APPLICATION OF AIRBNB, INC., AUTOMATTIC INC., CRAIGSLIST, INC., FACEBOOK, INC., IAC/INTERACTIVECORP, REDDIT, INC., SNAP INC., PINTEREST, INC., THUMBTACK, INC., TWITTER, INC., AND YAHOO! INC. FOR LEAVE TO FILE AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANT

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April 14, 2017

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APPLICATION FOR LEAVE TO FILE AS AMICI CURIAE

Pursuant to California Rule of Court 8.520(f), Airbnb, Inc., Automattic Inc., craigslist, Inc., Facebook, Inc., IAC/InterActiveCorp, Pinterest, Inc., Reddit Inc., Snap Inc., Thumbtack, Inc., Twitter, Inc., and Yahoo! Inc. (collectively "Amici") request leave to file the attached brief as amici curiae urging reversal.

Airbnb, Inc. ("Airbnb") provides an Internet platform through which persons desiring to book accommodations, and persons listing unique accommodations available for rental, can locate each other and enter into direct agreements with each other to reserve and book travel accommodations on a short- and long-term basis. Airbnb's North American headquarters are located in San Francisco, CA.

Automattic Inc. ("Automattic") is a company with a singular mission: make the web a better place. All of Automattic's products and services are designed to democratize online publishing so that anyone with a story can tell it. Automattic is best known for WordPress.com. WordPress.com allows anyone, from bloggers, to photographers, plumbers, doctors and restaurant owners, to easily create a website on the web platform that powers more thoughts,

musings and businesses than any other in the world. Automattic's headquarters are in San Francisco, CA.

craigslist, Inc. ("craigslist") provides online classifieds worldwide, where hundreds of millions of people have found jobs, housing, goods, services, personal connections, and local community information. craigslist is headquartered in San Francisco, CA.

Facebook, Inc. ("Facebook") provides a free Internet-based social media service that enables more than 1.8 billion people to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what is going on in the world, and to express what matters to them. Facebook's headquarters are located in Menlo Park, CA.

IAC/InterActiveCorp ("IAC") is a diversified online media company with more than 150 brands and products. IAC's businesses are leaders in numerous sectors of the Internet economy. Many of these businesses, including Match.com, OkCupid, Ask.com, The Daily Beast, and Vimeo, provide users with the ability to post, search for, and/or view a wide variety of user-generated content. IAC's family of websites receive more than 2.5 billion visits each month from users in over 200 countries.

Pinterest, Inc. ("Pinterest") is an online platform that allows users to discover, save, and share ideas that they love. Pinterest's 175 million global users save images, articles, recipes, and other ideas (each known as a "Pin") from across the Internet and organize them in themed collections called "boards." A board may relate to an infinite variety of topics based on a given user's interests. As users browse the Internet, including the more than 100 billion Pins available on Pinterest, they can add the content they find to their own boards, and they can follow the Pinterest users and boards they find most interesting, useful, or inspiring. Pinterest thus provides a way for people to express themselves, engage with others who share their interests, and discover new ideas. Pinterest's headquarters are located in San Francisco, CA.

Reddit, Inc. ("Reddit") operates the reddit.com platform, which is a collection of thousands of online communities attracting over 270 million monthly unique visitors that create, read, join, discuss, and vote on conversations across a myriad of topics. Reddit is based in San Francisco, California.

Snap Inc. ("Snap") is a camera company whose products empower people to express themselves, live in the moment, learn

about the world, and have fun together. Snap's first product, Snapchat, is one of the world's leading camera applications. More than 150 million people use Snapchat each day to capture images and send messages. Snap is based in Venice, CA.

Thumbtack, Inc. ("Thumbtack") is a local services marketplace platform where customers can find service professionals in more than 1,000 categories, and professionals can find customers whose project matches their skills. Thumbtack has more than 250,000 active service professional users in the U.S. and helps facilitate millions of projects per year. Customer reviews of service professionals are a critical part of trust on the platform. Thumbtack's headquarters are in San Francisco, CA.

Twitter, Inc. ("Twitter") operates a global platform for self-expression and communication, with the mission of giving everyone the power to create and share ideas and information instantly. Twitter's more than 300 million active monthly users use the platform to connect with others, express ideas, and discover new information. Hundreds of millions of short messages (known as "Tweets") are posted on Twitter every day. Twitter has headquarters in San Francisco, California.

Yahoo! Inc. ("Yahoo") is a guide to digital information discovery, focused on informing, connecting, and entertaining users through its search, communications, and digital content products. By creating highly personalized experiences, Yahoo helps users discover the information that matters most to them around the world—on mobile or desktop. Yahoo connects advertisers with target audiences through a streamlined advertising technology stack that combines the power of Yahoo's data, content, and technology. Yahoo is headquartered in Sunnyvale, California.

Amici have a substantial interest in the legal rules governing whether providers of interactive computer services may be enjoined from hosting third-party content on their platforms without notice or right to be heard. Since they serve as platforms for communication among billions of users, amici have been and will continue to be immune from the burdens of litigation under Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"). The success of amici's businesses—and the vitality of online free speech that these businesses support—depends on their being able to host myriad types of content, including content that others may find objectionable, while being shielded from the risks, burdens, and

uncertainty of lawsuits that seek to hold them responsible for content originated by their users or other third parties. Amici, as distributors of speech, also have an interest in defending the missions of their platforms and the integrity of their editorial processes against alteration by a court order issued without the benefit of an adversarial proceeding.

In particular, amici rely on the settled interpretation of Section 230 granting broad immunity to online intermediaries from litigation concerning from third-party content. The breadth and robustness of this immunity has been recognized for more than twenty years by courts across the country, including this one, and the Court of Appeal's decision threatens to erode this settled interpretation. If allowed to stand, the decision would contravene Congress's policy choices and undermine a law that has been crucial to the growth and success of the Internet, and has become a prerequisite for the provision of services upon which the public has come to rely.[1]

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[1] Pursuant to California Rule of Court 8.520(f)(4), counsel certify that this brief was authored solely by attorneys for amici curiae; no party contributed either to the authorship or the financing of the time spent on the brief or the out-of-pocket expenses connected with the filing.

Respectfully submitted,

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BRIEF FOR AMICI CURIAE SUPPORTING APPELLANT

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 snapshots from a picture-perfect vacation, to sharply critical reviews of hotels and restaurants; 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 sometimes offend, enrage, and provoke.

Amici's platforms and tools enable modern communication. Unsurprisingly, amici receive thousands of requests every day seeking removal of content on their platforms. Requesters seek to block speech because they disagree with or do not like it or because they contend it is threatening, obscene, fraudulent, or, as in the present case, defamatory. To preserve the richness and diversity of speech on their platforms, amici typically avoid removing content without first determining 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 amici's platforms and users' speech on those platforms: (1) whether Section 230 permits a plaintiff to circumvent the protections that the statute provides by electing to sue only the speaker while obtaining a broad nonparty injunction against the interactive computer service provider hosting the speech; and (2) whether the Due Process Clause and the First Amendment guarantee an interactive 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 this Court, the California Courts of Appeal, and the Ninth Circuit. Disregarding the many appellate court decisions that have broadly and correctly construed the reach of Section 230's protections, the court

below entered an injunctive order against Yelp that imposed obligations entirely inconsistent with Section 230.

The *Hassell* decision should be reversed also because it purports to allow 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 such deprivation without notice and an opportunity to be heard, without a court 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.

If left standing, the Court of Appeal's decision would provide a dangerous roadmap for plaintiffs to evade Section 230 and silence valuable and protected speech on the Internet without meaningful procedural protections. The misguided opinion should be reversed in its entirety.

SUMMARY OF ARGUMENT

Amici urge this Court to reverse the Court of Appeal's decision on Section 230 as well as due process grounds. The Section 230

holding alone, if not reversed, would threaten to eviscerate the protections of Section 230.

Section 230(c)(1) commands that interactive computer service providers like amici should not be treated as the publisher or speaker of any content created by third parties that is transmitted through their services, subject to a few narrow exceptions not applicable here. Every court to address Section 230 has concluded that its mandate precludes courts from issuing an injunction ordering a service provider to remove defamatory third-party content. The Court of Appeal nonetheless upheld an injunction doing exactly that: ordering Yelp to remove reviews created by two users from its website that a trial court had found defamatory following a default proceeding. The Court of Appeal's decision was premised on the erroneous conclusion that Section 230 bars such an injunction only when the platforms are named as defendants in the suit. That conclusion deviates from the text of the statute and well-established federal and state precedent holding that Section 230 broadly prohibits Internet service providers from being treated as the publishers of third-party content and shields them from the burdens of litigation over that content. And it grossly contravenes Section 230's framework—which requires parties to seek

relief from the users who create allegedly tortious content, rather than from the online platforms that host that content.

The Court of Appeal further erred by upholding an injunction against Yelp that was issued after a default proceeding to which Yelp was not a party and of which Yelp had no advance notice. To this day, Yelp has *never* been afforded a hearing at which it could challenge Hassell's assertion that the speech at issue in this case is defamatory. Moreover, the court explicitly rejected the principle that Yelp has a First Amendment right to distribute speech authored by others, wrongly claiming that Yelp acted as only the administrator of a forum, not as the distributor of the content at issue, and further wrongly concluding that such an administrator lacks any First Amendment rights in speech carried on that forum. Because Yelp's own First Amendment rights as a distributor in fact were at stake, the Due Process Clause prohibited the lower courts from imposing an injunction on Yelp without notice and an opportunity to be heard.

The Court of Appeal's decision would provide a dangerous roadmap for those who object to online speech to accomplish indirectly what Section 230 prevents them from accomplishing directly: holding Internet platforms responsible for allegedly

defamatory third-party content posted on their sites. The specter of such liability and litigation would undermine the growth and development of free expression on the Internet—the very free expression that Congress sought to promote. The court's decision frustrates congressional intent, contradicts precedent, violates due process, and should be overturned.

ARGUMENT

I. THE COURT OF APPEAL ADOPTED AN IMPERMISSIBLY NARROW INTERPRETATION OF SECTION 230 IMMUNITY

A. Section 230 Shields Internet Providers From The Burdens Of Any Litigation That Treats Them As Publishers Of Third-Party Content

Section 230(c)(1) issues a sweeping command to state and federal courts: "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).) Another provision of 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).) Given the expansive reach of this language and the important interests at stake (*see infra* pp. 32-37), courts across the country have consistently—and for more than two decades—"treated

§ 230(c) immunity as quite robust." (*Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1123; *see also Barrett v. Rosenthal* (2006) 40 Cal. 4th 33, 56 ["The provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are themselves a strong demonstration of legislative commitment to the value of maintaining a free market for online expression."]; *Zeran v. America Online Inc.* (4th Cir. 1997) 129 F.3d 327.)

Because Section 230(c)(1) prohibits "treat[ing]" any provider of interactive computer services as the "publisher" of third-party content, the statute bars courts from requiring a service provider to perform any "traditional editorial function" with respect to such content. (*Barrett v. Rosenthal, supra*, 40 Cal. 4th at p. 64.) That includes the traditional editorial function of "remov[ing]" or not removing "user generated content." (*Doe No. 14 v. Internet Brands, Inc.* (9th Cir. 2016) 824 F.3d 846, 852; *see also Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) (en banc) 521 F.3d 1157, 1170-1171 (hereafter *Roommmates.com*) [Section 230(c)(1) precludes courts from imposing on service providers a duty to perform "any activity that can be boiled down to deciding whether

to exclude material that third parties seek to post online."]; *Doe II v. MySpace, Inc.* (2009) 175 Cal. App. 4th 561, 572-573.)[1]

In particular, courts in California and across the country uniformly have read Section 230 as prohibiting courts from issuing an injunction ordering interactive computer service providers to remove third-party content from their platforms. (*E.g.*, *Kathleen R. v. City of Livermore* (2001) 87 Cal. App. 4th 684, 692, 697-698.) As one court explained in dismissing claims for declaratory and injunctive relief, "[a]n action to force a website to *remove* content on the sole basis that the content is defamatory is necessarily *treating the website as a publisher*, and is therefore inconsistent with [S]ection 230." (*Medytox Solutions, Inc. v. Investorshub.com, Inc.* (Fla. Dist. Ct. App. 2014) 152 So. 3d 727, 729, 730-731, italics added.) The court of appeal in *Kathleen R.* recognized, moreover, that a request for injunctive relief "contravenes [S]ection 230's stated purpose of promoting unfettered development of the Internet no less than damages claims." (87 Cal. App. 4th at pp. 692, 697-698; *see also Ben Ezra, Weinstein, & Co. v.*

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[1] Section 230 includes a few narrow exceptions not applicable to Hassell's defamation claim. *See* 47 U.S.C. § 230(e)(1) (federal criminal prosecution); *id.* § 230(e)(2) (intellectual property law); *id.* § 230(e)(4) (federal Electronic Communications Privacy Act and similar state law).

America Online Inc. (10th Cir. 2000) 206 F.3d 980; *Noah v. AOL Time Warner* (E.D. Va. 2003) 261 F. Supp. 2d 532, 538-539; *Optinrealbig.com, LLC v. Ironport Sys., Inc.* (N.D. Cal. 2004) 323 F. Supp. 2d 1037, 1047; *Giordano v. Romeo* (Fla. Dist. Ct. App. 2011) 76 So. 3d 1100, 1102.)

Breaking from this consensus, the Court of Appeal read Section 230 narrowly, holding that issuing an injunction against Yelp to remove third-party content was consistent with Section 230 because, in its view, such enforcement "does not impose any liability on Yelp." (Op. 29.) This conclusion is wrong for three reasons.

First, the Court of Appeal improperly treated subsection 230(e)(3) as the sole source of immunity under Section 230. It read subsection 230(e)(3)'s reference to "liability" as limiting the scope of Section 230'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"].) This reading misconstrues not only subsection 230(e)(3) (*see infra* pp. 13-14), but also the entire framework of Section 230 immunity. Section 230's immunity derives not from subsection 230(e)(3)'s express preemption provision alone.

It derives also from subsection 230(c)(1), which independently prohibits "treat[ing]" interactive computer service providers as the "publishers" of third-party content. Courts, including this Court, have recognized that *subsection 230(c)(1)* provides the primary source of immunity under the statute. The Ninth Circuit, for example, has explained that "**Section 230(c)(1)** ... provide[s] webhost 'immunity[.]' ... We have characterized this immunity under **§ 230(c)(1)** as 'quite robust.'" (*Roommates.com*, *supra*, 521 F.3d at p. 1179, emphases added, quoting *Carafano v. Metrosplash.com, Inc.*, *supra*, 339 F.3d at p. 1123.). And in *Barrett*, this Court described the statute similarly: "**Section 230(c)(1)** provides immunity from claims by those offended by an online publication." (*Barrett v. Rosenthal*, *supra*, 40 Cal. 4th at p. 49, emphasis added.)

There is further statutory evidence that Section 230(c)(1) is a separate source of immunity. Because subsection 230(e)(3) refers only to "State or local law," an immunity that derived only from that provision could not possibly apply to federal claims. 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 [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, 670-671 [Fair Housing Act].) Those decisions plainly are correct, as confirmed by several exceptions that Congress included in Section 230 for certain federal laws, which presume *a fortiori* that the statute generally covers federal claims. (*See* 47 U.S.C. § 230(e)(1) [federal criminal prosecutions]; *id.* § 230(e)(2) [intellectual property laws]; *id.* § 230(e)(4) [federal Electronic Communications Privacy Act].) The only provision from which this immunity against federal claims could derive is subsection 230(c)(1).

Subsection 230(c)(1), in short, provides immunity to interactive computer service providers. And the injunction entered against Yelp clearly violates subsection 230(c)(1)'s command not to "treat" any provider of interactive computer services as the "publisher" of third-party content. Courts have adopted a "capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party," in keeping with the "broad construction accorded to section 230 as a whole." (*Jane Doe No. 1 v.*

Backpage.com, LLC, supra, 817 F.3d at p. 19.) Here, such a capacious conception is not even necessary: As noted earlier, "removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove." (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1103.)

Respondents' argument (at 38-39) that the injunction does not treat Yelp as a publisher because it simply "prohibits Yelp from continuing to be the conduit through which Bird violates her injunction" is without merit. The Ninth Circuit's opinion in *Barnes v. Yahoo! Inc.* is instructive. In that case, the Ninth Circuit explained that "what matters" in the Section 230 analysis is "whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability." (*Id.* at pp. 1101-1102.) The court went on to hold that Barnes's negligent undertaking claim was barred by Section 230 because the "duty that Barnes claims Yahoo violated derives from Yahoo's conduct as a publisher," namely, Yahoo's decision not to de-publish certain third-party content. (*Id.* at 1103.) Similarly, "prohibit[ing] Yelp from continuing to be the