

No. S235968

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**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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DAWN HASSELL, et al.,  
*Plaintiffs and Respondents,*

v.

AVA BIRD,  
*Defendant,*

YELP, INC.,  
*Appellant.*

SUPREME COURT  
**FILED**

MAY 01 2017

Jorge Navarrete Clerk

Deputy

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After 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

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**APPLICATION OF CHANGE.ORG, ENGINE, GITHUB, INC.,  
A MEDIUM CORPORATION, PATREON, INC., SITEJABBER,  
AND WIKIMEDIA FOUNDATION, INC.  
FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND  
*AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT**

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JASON M. SCHULTZ (SBN 212600)  
NYU Technology Law & Policy Clinic  
NYU School of Law  
245 Sullivan Street #609  
New York, NY 10012  
(212) 992-7365  
jason.schultz@exchange.law.nyu.edu  
*Counsel for Amici Curiae*

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**APPLICATION OF CHANGE.ORG, ENGINE, GITHUB, INC., A  
MEDIUM CORPORATION, PATREON, INC., SITEJABBER,  
AND WIKIMEDIA FOUNDATION, INC. FOR LEAVE TO FILE  
*AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT**

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

Pursuant to Rule 8.520(f) of the California Rules of Court,  
Change.org, Engine, Github, Inc., A Medium Corporation, SiteJabber, and  
Wikimedia Foundation, Inc. respectfully apply for permission to file the  
attached *amici curiae* brief in support of petitioner Yelp, Inc. *Amici* are  
technology companies and nonprofit organizations with limited resources  
but significant impact, dedicated to the ideal of an open Internet that  
provides fora for free expression and citizen empowerment. *Amici* have a  
direct interest in ensuring that the protections of Section 230 of the  
Communications Decency Act continue to enable and promote innovation  
and integrity on their platforms and across the Internet services industry as  
a whole.

A legal rule that undermines the established protections of CDA §  
230 threatens all Internet and technology platforms, but its effects would  
fall particularly hard on small collaborative platforms like *Amici* that have  
limited human and financial resources but significant impact and vast  
exposure. For these companies and organizations, the burden of responding  
to removal orders—combined with the looming threat of contempt  
sanctions—is functionally and financially equivalent to direct liability.  
Congress passed § 230 to level the playing field between bigger and smaller  
players in the Internet industry, enabling more competition among  
platforms and thus fostering diversity of expression and sources of

information. To exempt removal orders from § 230's immunity provision would reverse this policy objective, allowing larger and more financially secure platforms that can afford to contest such orders and absorb litigation costs to play by different rules than small collaborative platforms.

**Change.org** is the world's largest petition platform, a mission-driven social enterprise using technology to empower users around the world to create the change they want to make. Change.org has enabled nearly 170 million people in 196 countries to come together to create change in their communities, and has helped more than 100,000 organizations advance their causes and connect with new supporters. In the United States, more than 1,000 new petitions are launched on Change.org every day.

**Engine** is a technology policy, research, and advocacy organization that bridges the gap between policymakers and start-ups, working with government and a community of more than 500 high-technology, growth-oriented start-ups across the nation to support the development of technology entrepreneurship. Engine creates an environment where technological innovation and entrepreneurship thrive by providing knowledge about the start-up economy and helping government and the public to construct smarter public policy. To that end, Engine conducts research, organizes events, and spearheads campaigns to educate elected officials, the entrepreneur community, and the general public on issues vital to fostering technological innovation. Engine has worked with the White House, Congress, federal agencies, and state and local governments to discuss policy issues and draft legislation.

**GitHub, Inc.** is a web-based platform that enables communities of users to collaboratively develop open-source software projects. GitHub has

hosted over 46 million projects created by 9 million registered users and more than 20 million monthly visitors. GitHub-hosted software projects are often applications designed for computers or mobile devices, and they can also contain the material underpinning entire website deployments. GitHub is the Internet platform for Internet platforms—a one-stop shop where third parties can upload, store, and perfect the next popular app or site. As such, GitHub has an interest in protecting its own platform as well as the new and valuable platforms that are frequently incubated through its services.

**A Medium Corporation** provides an online publishing platform where people can read, write, and discuss the ideas of the day. Medium's ecosystem champions thoughtful discourse and a network that connects users with long-form writing by leaders, thinkers, entrepreneurs, artists, and journalists. More than 60 million people visit Medium each month and Medium grows by more than 140,000 new posts each week. Since 2012, tens of millions of people have spent more than seven millennia reading together on Medium.

**Patreon, Inc.** is a membership platform that makes it easy for artists and creators to get paid. Content creators such as artists, writers, podcasters, musicians, photographers and video makers can use Patreon's platform to send rewards and receive subscription payments from their patrons. Patreon has sent over \$100M to creators.

**SiteJabber** is a web-based platform for consumers to find and review online businesses. Developed in part with a grant from the National Science Foundation, SiteJabber is a vital channel of communication for consumers to comment on, rate, and provide reviews of online businesses using criteria such as service, value, returns, quality, and

shipping. SiteJabber also provides consumers with a valuable shield from online scams that may otherwise be indistinguishable from other businesses.

The **Wikimedia Foundation** is a nonprofit organization based in San Francisco, California, which operates twelve free-knowledge projects on the Internet, including Wikipedia. Wikimedia's mission is to develop and maintain educational content created by volunteer contributors, and to provide this content to people around the world free of charge. In August 2016, the Wikimedia projects received 15.69 billion page views, including 7.81 billion page views on English Wikipedia. That month, users submitted nearly 13.5 million edits to Wikipedia. Since its inception, users have created over 40 million articles on Wikipedia.

No party and no counsel for any party in this case authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief. *See* Cal. R. 8.520(f)(4).

Dated: April 14, 2017

Respectfully submitted,

JASON M. SCHULTZ (SBN 212600)  
NYU Technology Law & Policy Clinic  
NYU School of Law  
245 Sullivan Street #609  
New York, NY 10012  
(212) 992-7365  
jason.schultz@exchange.law.nyu.edu  
*Counsel for Amici Curiae*

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## INTERESTS OF THE *AMICI CURIAE*

*Amici* are technology companies and nonprofit organizations with limited resources but significant impact, dedicated to the ideal of an open Internet that provides fora for free expression and citizen empowerment. *Amici* have a direct interest in ensuring that the protections of Section 230 of the Communications Decency Act continue to enable and promote innovation and integrity on their platforms and across the Internet services industry as a whole.

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## INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeal’s unprecedented reading of § 230 of the Communications Decency Act (“CDA”) threatens to undermine the vital role of Internet platforms as modern fora for free expression and citizen empowerment. As intended by Congress and consistently interpreted by courts across the country for twenty years, § 230 has created the necessary conditions for the extraordinary growth and innovation of the Internet in the United States, where today nearly 290 million users access online services.<sup>1</sup> Secure in the protections of § 230’s clear statutory command, interactive Internet service providers have developed pioneering platforms for collaboration, communication, and mobilization that benefit and are used by billions of people. Platforms created and supported by companies and organizations like *Amici* provide twenty-first-century opportunities for communities to engage in online free and open political discourse, cultural development, intellectual activity, and economic enterprise.

A legal rule that undermines the established protections of CDA § 230 threatens all Internet and technology platforms, but its effects would fall particularly hard on small collaborative platforms (“SCPs”) that have limited human and financial resources but significant impact and vast exposure. For these companies and organizations, the burden of responding to removal orders—combined with the looming threat of contempt sanctions—is functionally and financially equivalent to direct liability. The text and purpose of § 230 make clear that it should protect SCPs not only from direct suit and the costs of litigation, but also from other forms of legal action that impose similar burdens and undermine Congress’ stated

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<sup>1</sup> *Statistics and Facts on Internet Usage in the United States*, Statista, <http://bit.ly/2gB5Ita> (last visited Apr. 14, 2017).

objectives. In particular, Congress expressly passed § 230 to level the playing field between bigger and smaller players in the Internet industry, enabling more competition among platforms and thus fostering diversity of expression and sources of information. To exempt removal orders from § 230's immunity provision would reverse this policy objective, allowing larger and more financially secure platforms that can afford to contest such orders and absorb litigation costs to play by different rules than SCPs.

Faced with a situation similar to Appellant's here—that is, a binding removal order after a default judgment in a case to which the provider was never made a party—SCPs would face an impossible choice. First, they could simply blindly obey without contesting an injunction as imposed. But while there would certainly be cases where SCPs agreed that the uncontested content should be removed, in cases where they believed the content was lawful, forced removal by court order would effectively undermine the integrity of their platforms, eroding the trust of their users, stifling critical viewpoints online, and preventing SCPs from fulfilling their missions to empower and inform citizens. Second, they could try to challenge the removal order on the merits, assuming they are allowed to do so. But this would create exorbitant litigation costs that SCPs cannot afford, jeopardizing their financial positions and their ability to both attract investment and compete in the marketplace.

Moreover, in either scenario, SCPs would likely not be able to control their compliance costs, whether they willingly complied with an injunction or litigated it and lost. As has been well-documented, content that is removed from an online platform often triggers the so-called “Streisand Effect”—a phenomenon in which an attempt to delete or obscure

certain content triggers a wave of public interest. Often, users will then repost the information at issue as quickly and as often as they can in order to keep it available online. Thus, the free and open participatory model that defines SCPs would put them at the ever-present risk of noncompliance, with its attendant legal consequences, forcing SCPs to devote extensive human and technical resources to comply with even a few removal orders.

Modern technology allows even the smallest of online platforms, in terms of human or financial capital, to reach thousands if not millions of people. SCPs cannot afford to be embroiled in the conflicts that will inevitably arise among these innumerable third parties. Tampering with § 230 immunity would frustrate the development of the companies and organizations that drive our economy and facilitate the free expression and access to information that define our open society. This is exactly what Congress, in crafting the forward-thinking protections of § 230, intended to avoid.

The Court of Appeal's decision upends the longstanding status quo upon which SCPs rely to weigh risk in a volatile and fast-paced industry. In drawing a distinction between "liability" and "cause of action," the Court directly contradicted the letter and spirit of § 230 as well as all prior case law. SCPs and the millions of activists, businesses, consumers, creators, educators, students, and NGOs that depend upon them have had settled expectations for over two decades that these platforms would protect speech and access to information. The decision below betrays those expectations and undermines confidence in the security of online speech hosted by SCPs.

For these reasons, and for the reasons that follow, this Court should

reverse the Court of Appeal's decision holding that the removal order issued in this case is not barred by § 230.

## ARGUMENT

### **I. THE COURT OF APPEAL'S UNPRECEDENTED READING OF § 230 THREATENS TO UNDERMINE THE VITAL ROLE THAT SMALL COLLABORATIVE PLATFORMS PLAY IN EMPOWERING CITIZENS, ENCOURAGING FREE EXPRESSION, AND SPURRING ECONOMIC GROWTH.**

#### **A. Section 230 has enabled small collaborative platforms to fulfill the promise of the Internet as a tool for citizen empowerment and an engine for economic growth.**

Small collaborative platforms (“SCPs”) have played a prominent role in the modern societal and technological revolution, especially in terms of broadening civic discourse and access to information in the age of the Internet. When Congress enacted the Communications Decency Act in 1996, it stated: “The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” 47 U.S.C. § 230(a)(3). The U.S. Supreme Court, striking down other provisions of the Act as unconstitutional the following year, likewise noted that the “vast democratic forums” of the Internet offer “unlimited, low-cost capacity for communication of all kinds.” *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997). Today, the Internet is “bringing together the small contributions of millions of people and making them matter.” Lev Grossman, *You—Yes, You—Are TIME’s Person of the Year*, *Time* (Dec. 25, 2006), <http://ti.me/W9U4Sd>. The economic and social benefits of these virtual interactions, made possible through Internet intermediaries, are by

now well-documented. *See, e.g., Expanding U.S. Digital Trade and Eliminating Barriers to U.S. Digital Exports: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 114th Cong. 3 (2016) (testimony of Michael Beckerman, President and CEO, Internet Association) (“Beckerman Testimony”), <http://bit.ly/2hn4bqr> (“Internet platforms are the global engine of the innovation economy, with the internet sector representing an estimated 6 percent of U.S. GDP in 2014, totaling nearly \$967 billion, and accounting for nearly 3 million American jobs.”); Karine Perset, Org. for Econ. Co-operation & Dev., *The Economic and Social Role of Internet Intermediaries* 37–40 (2010), <http://www.oecd.org/Internet/ieconomy/44949023.pdf>.

There is widespread consensus that § 230 immunity is to thank for creating the underlying legal conditions enabling these enormous gains. *See* Center for Democracy and Technology, Comment Letter in the Matter of Global Free Flow of Information on the Internet (Dec. 6, 2010), <http://bit.ly/2hq1rsz> (“The U.S. online industry is the most dominant in the world precisely because of the protections afforded intermediaries by Section 230 and the DMCA.”); Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 Harv. L. Rev. 2296, 2313 (2014) (noting that Section 230 has “made possible the development of a wide range of telecommunications systems, search engines, platforms, and cloud services without fear of crippling liability” (citation omitted)); David Post, *A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or So Dollars of Value*, Wash. Post: Volokh Conspiracy (Aug. 27, 2015), [http://wapo.st/1K9AmTh?tid=ss\\_tw-bottom](http://wapo.st/1K9AmTh?tid=ss_tw-bottom) (“No other sentence in the U.S. Code . . . has been responsible for the creation of more value than

[Section 230] . . .”). Section 230 lowers the barriers to entry in the market and levels the playing field between big and small players, enabling competition that has fostered unprecedented diversity of expression, sources of information, and economic development. *See* Beckerman Testimony at 14 (“The intermediary liability protections found in Section 230 of the CDA are a perfect example of future proofed legislation that allowed internet platforms to scale and spurred unprecedented economic growth and innovation.”). Indeed, it is not too much to say that without § 230, SCPs—which provide twenty-first-century opportunities for communities to collaborate and communicate online—would not exist. *See* Post (“Virtually every successful online venture that emerged after 1996 . . . relies in large part (or entirely) on content provided by their users, who number in the hundreds of millions, or billions. . . . I fail to see how any of these companies . . . would exist without Section 230.”)

SCPs are also key drivers of innovation and job creation. *See* Ian Hathaway, Ewing Marion Kauffman Found., *Tech Starts: High-Technology Business Formation and Job Creation in the United States* 16 (2013), <http://bit.ly/2p44HNL> (“[T]he net job creation rate of surviving young high-tech and [information and communications technology] firms is . . . more than twice that of businesses across the economy.”); *cf.* Tim Kane, Ewing Marion Kauffman Found., *The Importance of Startups in Job Creation and Job Destruction* 2 (2010), <http://bit.ly/1eODvIy> (“[W]ithout startups, there would be no net job growth in the U.S. economy.”); John Haltiwanger, Ron S. Jarmin & Javier Miranda, *Who Creates Jobs? Small Versus Large Versus Young*, 95 *Rev. Econ. & Stat.* 347 (2013) (highlighting the important role of business start-ups and young businesses

in U.S. job creation). *Amici* and the SCPs they represent serve, and often are, the companies and consumers that drive the economy by enabling ongoing source code development and facilitating the free flow of information that spurs creativity and innovation. *See, e.g.,* Cade Metz, *How GitHub Conquered Google, Microsoft, and Everyone Else*, *Wired* (Mar. 12, 2015), <http://bit.ly/2naaBb4> (explaining how *Amicus* GitHub, a start-up itself, was able to compete against powerful industry players and become an indispensable “central repository for . . . free code” where now “pretty much everyone hosts their open source projects,” from startups to incumbents).

In addition to economic effects, *Amici* and those they represent are perfect examples of the disproportionate sociocultural impact of SCPs. They provide opportunities for citizens to exercise their First Amendment rights to speak up on political matters, share knowledge with others, and petition for change in their communities. *See, e.g.,* Shaindel Beers, *Steve Bannon’s Racist, Anti-Semitic, Misogynistic Views Don’t Belong in the White House*, *Change.org*, <http://bit.ly/2fDNTFU> (last visited Apr. 14, 2017) (petitioning political leaders to remove a prominent public figure from office and garnering nearly 350,000 signatures); Andrew Cona, *Open an Investigation into Hillary Clinton and the DNC for Election Fraud*, *Change.org*, <http://bit.ly/2nawXKr> (last visited Apr. 14, 2017) (calling on the FCC to investigate due to allegations of “cheating” and “fraud” and garnering over 70,000 signatures). The plethora of such platforms ensures a diversity of outlets for all manner of speech and diversity of issues for all kinds of constituencies. *See, e.g.,* Sue Gardner, *Wikipedia, the People’s Encyclopedia*, *L.A. Times* (Jan. 13, 2013), <http://lat.ms/2oa5Wrn>