NO. 16-35514

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONSUMER CELLULAR, INC.,

PLAINTIFF-APPELLEE,

V.

CONSUMERAFFAIRS.COM, INC., CONSUMERS UNIFIED, LLC, AND DAVID ZACHARY CARMAN,

DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
for the District of Oregon (Portland)
Case No. 3:15-cv-01908-PK

The Honorable Paul Papak, District Court Judge

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION, CENTER FOR DEMOCRACY AND TECHNOLOGY, AND THE INTERNET ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

Aaron Mackey
David Greene
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Email: amackey@eff.org
Telephone: (415) 436-9333

Counsel for Amici Curiae
Electronic Frontier Foundation,
Center For Democracy & Technology,
and The Internet Association

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* Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae Center for Democracy and Technology states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae The Internet Association states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Legal claims that treat online platforms as the publisher of user-generated content or subject their editorial decisions to second-guessing threaten the Internet's ability to continue to be a vibrant and diverse platform for free speech.

The development of the Internet as a robust space for individuals to speak freely was no accident. Congress recognized the Internet's potential in 1996 and, in enacting 47 U.S.C. § 230 (Section 230), took a deliberate, affirmative step to foster the growth of the medium.

Since its passage, Section 230 has encouraged both large and small intermediaries to open forums for public discussion, and thus has been critical to protecting and expanding the Internet as a forum for free speech. The immunity does this by shielding intermediaries from liability arising from content created by their users. Immunizing online platforms from liability for hosting diverse content encouraged the development and availability of new, innovative online services that foster free speech.

This case threatens that virtuous cycle by permitting otherwise barred claims to proceed upon allegations that a platform improperly aggregated user content or edited such content with bad motives. But aggregation and editing of user-generated content are traditional publication functions protected by Section 230. And any function protected by Section 230 remains so regardless of the publisher's

intent. The district court's contrary holding is inconsistent with both well-settled law of this Court and the plain text of Section 230.

Upholding the district court's decision jeopardizes the certainty Section 230 has provided online providers when they edit or otherwise act as the publishers of user-generated speech. In response to this new legal uncertainty, many providers will restrain user-generated content—the very harm Congress enacted Section 230 to prevent.

This Court should thus reverse the district court's opinion below.

STATEMENTS OF INTEREST[1]

The Electronic Frontier Foundation ("EFF") is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has more than 33,000 dues-paying members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

EFF has a substantial interest in this case because it will increase online intermediaries' liability and, as a result, decrease free speech on the Internet. EFF is particularly concerned about interpretations of Section 230 that can stifle free expression on the Internet by holding intermediaries liable where the content in question originates with a third party. Section 230 has played a vital role in allowing millions of people to create and disseminate user-generated content through the Internet, enriching the diversity of speech online, and courts should continue to be interpret it broadly.

The Center for Democracy & Technology (CDT) is a non-profit public interest organization that advocates for individual rights in Internet law and policy. CDT represents the public's interest in an open, innovative, and decentralized Internet that promotes constitutional and democratic values of free expression,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no one, except for undersigned counsel, has authored the brief in whole or in part, or contributed money towards the preparation of this brief.

privacy, and individual liberty. CDT has litigated or otherwise participated in a broad range of Internet free expression and intermediary liability cases.

The Internet Association represents 40 of the world's leading Internet companies. Its mission is to foster innovation, promote economic growth, and empower people through the free and open Internet. As the voice of the world's leading internet companies, the IA's job is to ensure that all stakeholders understand the benefits the Internet brings to our economy as well as to society in general. Included in these myriad benefits is free expression online.

ARGUMENT

I. CONGRESS GRANTED ONLINE PLATFORMS BROAD PUBLISHER IMMUNITY TO EMPOWER USERS' SPEECH AND PLATFORMS' EDITORIAL DISCRETION.

The astronomical volume of online speech and the many varied platforms that enable it are jeopardized by court decisions, like the one below, that significantly limit Section 230's broad provider immunity.

The Internet it is constructed of and depends upon intermediaries. The many varied online intermediary platforms, including Twitter, Reddit, YouTube, and Instagram, all give a single person, with minimal resources, almost anywhere in the world the ability to communicate with the rest of the world. Without intermediaries, that speaker would need technical skill and money that most people lack to disseminate their message. If our legal system fails to robustly protect intermediaries, it fails to protect free speech online.

In enacting Section 230, Congress recognized the Internet's power to sustain and promote robust individual speech, a value rooted in the First Amendment. Congress sought to further encourage the already robust free speech occurring online and to speed the development of online platforms by providing broad immunity to service providers that host user-generated speech. *See* Section 230 (b)(2), (3) ("[i]t is the policy of the United States . . . to encourage the development of technologies which maximize user control over what information is received by

individuals, families, and schools who use the Internet and other interactive computer services" and "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.").[2] *See also Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) ("Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce.").

Congress thus recognized in Section 230 what the U.S. Supreme Court later confirmed in extending the highest level of First Amendment protection to the Internet: "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Reno v. ACLU*, 521 U.S 844, 885 (1997).

Congress passed Section 230 with the clear intent to limit federal and state regulation of the Internet. As Section 230 (a)(4) states, the Internet and other interactive computer services "have flourished, to the benefit of all Americans, with a minimum of government regulation." *See also* Section 230 (b)(2) ("[i]t is the policy of the United States" to minimize Internet regulation).

[2] As Representative Christopher Cox explained in support of the future statute, Section 230 would "encourage what is right now the most energetic technological revolution that any of us has ever witnessed." 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995).

As explained below, Section 230 bars *all* legal claims against platforms based on the exercise of traditional editorial functions, such as decisions to publish or withdraw third party content. Such court-imposed liability was, "for Congress, simply another form of intrusive government regulation of speech." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *see also id*. ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.").

The importance of Congress' goal of limiting online platforms' liability for exercising traditional publishing functions was as apparent in 1996 as it is today: Imposing potential liability on providers who host thousands or even millions of messages daily might lead to overreaching moderation, outright censorship, or even barring third-party content entirely as platforms sought to limit their liability for others' actions.

When Congress passed Section 230 in 1996, about 40 million people used the Internet worldwide, and commercial online services in the United States had almost 12 million individual subscribers. *Reno*, 521 U.S at 850. If the volume of user-generated content posed difficulties for online platforms to police in 1996, that challenge has grown exponentially along with the number of new voices speaking online in the last twenty years. In 2016, roughly 3.5 billion people used the Internet and prominent online services such as Facebook had 1.79 billion

users.[3] Users of the video platform YouTube today upload roughly 400 hours of video to the website every minute. Bree Brouwer, *YouTube Now Gets Over 400 Hours of Content Uploaded Every Minute*, Tubefilter (July 26, 2015).[4] In late 2016, review website Yelp saw an average of 174 million visitors to its site monthly and hosted an estimated 115 million user-generated reviews of restaurants, businesses, and services. *See* Investor Relations, Yelp 3Q16 Data Sheet.[5]

Faced with the sheer volume of user-generated content present online today, platforms would be placed in an untenable position should they be treated as the publisher of that speech or be held liable for exercising traditional editorial functions over it. Liability could lurk in any of the billions of user-generated postings present on these platforms when anyone offended by that content could seek to hold the platforms liable for such speech or any editorial actions the platform undertakes as part of their site. Further, the state of the law prior to Section 230's passage meant that often, platforms were in a better position of

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[3] *See ICT Facts & Figures 2016*, International Telecommunications Union (U.N. agency for information and communications technology), http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2016.pdf; *Number of monthly active Facebook users worldwide as of 3rd quarter 2016*, Statista, *available at* https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/.

[4] *Available at* http://www.tubefilter.com/2015/07/26/youtube-400-hours-content-every-minute/.

[5] *Available at* http://www.yelp-ir.com/phoenix.zhtml?c=250809&p=irol-irhome.

avoiding liability if they did not edit or remove user-generated content. *See Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

Congress, however, saw the need to immunize Internet providers from the potentially crippling burden of imposing liability on those providers' editorial decisions. As the court in *Levitt v. Yelp!* explained, because "traditional editorial functions often include subjective judgments informed by political and financial considerations," inquiring into a provider's motives would expose them to second-guessing that Congress plainly sought to avoid in passing Section 230. 2011 WL 5079526 *8 (N.D. Cal. Oct. 26, 2011). The court went on:

> Determining what motives are permissible and what are not could prove problematic. Indeed, from a policy perspective, permitting litigation and scrutiny motive could result in the "death by ten thousand duck-bites" against which the Ninth Circuit cautioned in interpreting § 230 (c)(1).

Id., quoting *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008).

Sites such as Yelp, YouTube, and Appellant, which rely on millions or even billions of third-party contributions, would simply not be able to exist in that legal climate. Both overhead and liability would dramatically increase, and third-party speech would inevitably suffer as platforms became more conservative, scaling back speech outlets or eliminating them altogether. That could cripple the Internet,

potentially reverting the world back to speech distribution models in which a person's ability to reach broad audiences depended on their resources and access to traditional media.

II. SECTION 230 IMMUNIZES ONLINE PLATFORMS WHENEVER THEY ACT AS PUBLISHERS OF OTHERS' SPEECH.

A. Section 230 Categorically Protects Online Platforms' Editorial Decisions, Including Aggregating User Reviews.

This Court and others have held that Section 230's immunity covers platforms' aggregation of user-generated content.

Most recently in *Kimzey v. Yelp! Inc.*, this Court rejected an effort to place liability on Yelp for compiling third-party reviews into aggregated star ratings. 836 F.3d 1263, 1269-70 (9th Cir. 2016). "We fail to see how Yelp's rating system, which is based on rating inputs from third parties and which reduces this information into a single, aggregate metric, is anything other than user-generated data." *Id*. at 1270.

Kimzey confirmed what this Court has previously held: when legal claims against platforms are based on content derived from user-generated content, they cannot escape Section 230's broad immunity. *See Carafano v. MetroSplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that a platform's collection of user-generated responses to questions "does not transform [it] into a 'developer' of the 'underlying information.'"); *Roommates.com*, 521 F.3d at 1172 (holding that

there can be no liability under Section 230 when platforms create a tool based on voluntary, user-generated content).[6]

Moreover, Section 230 bars *all* legal claims that treat platforms as the publisher or speaker, not just defamation. *See Nemet*, 591 F.3d at 257-58 (affirming dismissal of defamation and tortious interference with a business expectancy claims against a platform); *Batzel*, 333 F.3d at 1029-30 (noting that Congress' goal in immunizing platforms went beyond concerns about defamation liability).

In *Kimzey* and *Carafano*, this Court drew much of its analysis from the California Court of Appeals' decision in *Gentry v. eBay*, which held that aggregated user ratings do not transform a publisher into an information content provider. 99 Cal.App.4th 816, 834 (Cal. App. 2002). In *Gentry*, the auction web site eBay offered a program to educate users about the safety and reliability of sellers offering items on the service. Among other things, the program included a color-coded star rating that reflected the amount of positive and negative feedback that consumers and dealers had provided about their transactions with each seller. The appellant eBay users argued that eBay created or developed the star ratings,

[6] Other appellate courts have consistently applied Section 230. *See*, *e.g.*, *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 39 (Cal. 2006).

which made the company an information content provider and therefore ineligible for Section 230's protections. The court disagreed, finding that the ratings merely represented underlying content provided by independent third parties. *Id.* Compiling the ratings did not make eBay an information content provider, even if the underlying information on which the ratings were based was misleading or incorrect, "as [eBay] did not create or develop the underlying misinformation." *Id*. Allowing eBay to be held liable for that content "would treat eBay as the publisher or speaker of the individual defendants' materials, and thereby conflict with section 230." *Id*.

Gentry's holding that Section 230 immunizes platforms' aggregation activity is consistent with this Court's holdings that an exercise of editorial discretion to choose what information to publish and not publish does not amount to creating or developing user content. *See*, *e.g.*, *Batzel*, 333 F.3d at 1031 (Section 230 "necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material"); *Roommates.com*, 521 F.3d at 1170 (where an information content provider supplies material for online publication, an editor's role is "to determine whether or not to prevent its posting – precisely the kind of activity for which section 230 was meant to provide immunity."). The fact that a platform chooses to aggregate and display a summary of user-generated content does not nullify the platform's immunity under the statute.

B. In Enacting Section 230(c)(1), Congress Granted Providers Categorical Immunity that Does Not Hinge on a Finding of Good Faith.

Section 230 protects a platform's choice to not include some user-generated content on its site, something publishers traditionally do frequently, regardless of their motives. Congress decided that protecting all Internet platforms that exercise traditional editorial functions over user-generated content was essential to promoting online speech. Congress could have created an immunity that hinged on good faith or another intent requirement, but it did not: the text of Section 230(c)(1)'s immunity clearly contains no such requirement.

Indeed if a mere allegation of bad faith were enough to maintain a lawsuit, Section 230's goals would be easily undermined.

Section 230(c)(1) states that "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."[7] The text explicitly lacks any intent requirement that limits its broad provider immunity. If the legal claims require

[7] An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

treating the provider as a publisher or speaker of the underlying content, then Section 230(c)(1)'s immunity applies.

That Congress purposefully omitted a good faith requirement is made plain by the fact that the companion provision in the very same subsection—Section 230 (c)(2)—explicitly conditions a different immunity on a showing of good faith. Subsection (c)(2) provides:

> No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily *taken in good faith* to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . .

47 U.S.C. § 230 (c)(2) (emphasis added). Importing a good-faith requirement into the blanket protection provided by Section 230 (c)(1) when it is plainly absent thus would impermissibly re-write the statute. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Other courts have consistently refused to insert any intent element into Section 230(c)(1)'s categorical and broad platform immunity. *See*, *e.g.*, *Green v. America Online*, 318 F.3d 465, 470-71 (3d Cir. 2003) (upholding immunity against

argument that provider negligently failed to prevent transmission of defamatory material); *Doe v. America Online, Inc.,* 783 So.2d 1010, 1013-1017 (Fla. 2001) (rejecting the argument that allegations the provider knew or should have known about the distribution of such materials created liability distinct from that of any publisher); *Ben Ezra, Weinstein, and Company, Inc. v. America Online*, 206 F.3d 980, 985-86 (10th Cir.) (upholding immunity for the online provision of stock information even though AOL communicated frequently with the stock quote providers and had occasionally deleted stock symbols and other information from its database in an effort to correct errors); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197 (N.D. Cal. 2009) ("Even assuming that Google is aware of fraud in the mobile subscription service industry and yet disproportionately suggests the term 'free ringtone' in response to an advertiser's entry of the term 'ringtone,' Plaintiff's argument that the Keyword Tool 'materially contributes' to the alleged illegality does not establish developer liability."); *Zeran*, 129 F.3d at 331–33 (finding interactive service providers to be immune from defamation liability even when they have actual knowledge of the statements' falsity); *Asia Economic Institute v. Xcentric Ventures LLC*, 2011 WL 2469822, at *6 (C.D. Cal. May 4, 2011) (holding that defendant's deliberate manipulation of HTML code for paying customers to make certain reviews more visible in online search results was

immune under Section 230 and that "[a]bsent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found.").

CONCLUSION

For the foregoing reasons, the Court should reverse the district's courts decision and reaffirm that Section 230's publisher immunity covers platforms' editorial decisions to aggregate or otherwise edit user-generated content regardless of their underlying motive.

Dated: January 18, 2017

By: /s/ Aaron Mackey

Aaron Mackey
David Greene
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
amackey@eff.org

Counsel for Amici Curiae Electronic Frontier Foundation, Center For Democracy & Technology, and The Internet Association

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 *Amici Curiae* Electronic Frontier Foundation, Center for Democracy and Technology, and The Internet Association In Support of Defendant-Appellant complies with the type-volume limitation, because this brief contains 3,181 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 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: January 18, 2017

By: /s/ Aaron Mackey
Aaron Mackey

Counsel for Amici Curiae
Electronic Frontier Foundation,
Center For Democracy & Technology,
and The Internet Association

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 January 18, 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: January 18, 2017

By: /s/ Aaron Mackey__
Aaron Mackey

Counsel for Amici Curiae
Electronic Frontier Foundation,
Center For Democracy & Technology,
and The Internet Association