



April 6, 2004

Honorable Ronald M. George, Chief Justice
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Barrett v. Rosenthal*, Supreme Court No. S122953 (Ct. of App. No. A096451)

Dear Chief Justice George and Associate Justices of the Court:

Pursuant to Rule 28(g) of the California Rules of Court, the American Civil Liberties Union of Northern California (ACLU-NC) and the Electronic Frontier Foundation (EFF) submit this letter urging the Court to grant review of the court of appeal's decision in *Barrett v. Rosenthal*, 114 Cal. App. 4th 1379 (2004).

The ACLU-NC is a regional affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with approximately 400,000 members dedicated to the defense and promotion of the guarantees of individual liberty secured by the state and federal Constitutions and statutes. Since at least 1996 the ACLU has been a leader in supporting efforts to ensure that the Internet remains a free and open forum for the exchange of information and ideas.

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco. EFF has members all over the United States and maintains one of the most-linked-to Web sites (<http://www.eff.org>) in the world. Both the ACLU-NC and EFF frequently provide information to Internet users about the legal implications of their intended

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behavior. In this capacity, both amici hear from users who are concerned about potential liability and find reassurance in 47 U.S.C. § 230 (“section 230”).

For example, EFF provided information about section 230 to the owner of a website that provides a valuable service to renters: it allows tenants to share their opinions about apartments and landlords around the country with other potential tenants. Not surprisingly, property management firms often view this website; so far, however, probably because of the protections of section 230, no one has filed a claim against this website.

Similarly, the ACLU-NC relied on section 230 in defending the creator of a website that gave students at a community college an opportunity to evaluate their professors. The webmaster was sued for defamation by two professors who claimed that some of the student comments about them were defamatory. *Curzon Brown v. San Francisco Community College District*, San Francisco Superior Ct., case no. 307335 (2000). The ACLU-NC believes that the arguments it made under section 230 were instrumental in causing the plaintiffs to ultimately dismiss their suit. Section 230 is similarly important to participants in newsgroups, listservs, and bulletin boards, as well as users of email, who not only use these forums to express their own views (for which liability will still attach) but to make available or discuss the views of others.

We will not repeat the arguments made in the petition for review (“Petition”) or in the letter submitted on behalf of Amazon.com, America Online, Inc., eBay, Inc., Google Inc., Yahoo! Inc, the Internet Commerce Coalition, and the United States Internet Service Providers Association (“Requesters’ letter”), other than to emphasize the following: First, the court of appeal’s decision stands in stark opposition to the decisions of every other court to have considered the issue. This is particularly significant for two reasons. (1) The decision conflicts with the two other California court of appeal decisions that have addressed the issue, *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (2002) and *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684 (2001); and (2) it conflicts with the interpretation of every federal court to address this issue of federal law. See Petition at 15-17; Requesters’ Letter at 4-5. This introduces an unacceptable degree of uncertainty for providers and users of interactive computers services who make available the content of third parties (“Internet intermediaries”), particularly those located in California.

Second, were there any doubt as to the scope of the immunity Congress intended to extend to Internet intermediaries, that doubt has been erased by Congress itself. In enacting the “Dot Kids Implementation and Efficiency Act, 47

U.S.C. § 941(e)(1), the House Report cited the Fourth Circuit's interpretation of section 230 in *Zeran v. America Online*, 129 F.3d 327 (1997), as "correct" in the context of defamation suits. H. Rep. No. 107-449, at 13 (2002).

But there is a third reason that this Court should grant review in this case. The chilling effect on Internet discourse that will result from the court of appeal's rewriting of section 230, far from being "speculative," *Barrett*, 114 Cal. App. 4th at 1404, is both real and substantial in a wide variety of contexts. Contrary to Congress' desire to maintain the robust nature of the Internet, *Zeran*, 129 F.3d at 330, permitting the imposition of distributor liability will cause Internet intermediaries to remove any controversial content at the first sign of opposition.

Denying Section 230 Immunity to Internet Intermediaries Who Have "Notice" That a Third Party's Content Is Allegedly Defamatory Will Inevitably Impoverish the Internet as a Forum for Divergent Views.

One of the hallmarks of the Internet is the development of a variety of forums in which either an Internet Service Provider, an individual website creator, or a chat room or newsgroup host offers Internet users an opportunity to express their views on a particular subject. This may take the form of a message board allowing readers' to give their views of the performance of a particular company's stock, *see, e.g.*, <http://finance.yahoo.com/q/mb?s=YHOO>, an invitation to readers to post their reviews of hotels, *see, e.g.*, http://www.tripadvisor.com/Hotels-g60713-San_Francisco_California-Hotels.html, or a Usenet newsgroup such as the one to which Ilena Rosenthal re-posted the Bolen article. A quick review of some of the reported cases in which section 230 immunity has been applied further illustrates the great variety of forums and information services through which Internet intermediaries provide content from third parties. *See, e.g.*, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. (2003) (online matchmaking service); *Batzel v. Smith*, 333 F.3 1018 (9th Cir. 2003) (electronic newsletter about stolen art); *Green v. America Online*, 318 F.3d 465 (3d Cir. 2003) ("romance" chat room); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 984-985 (10th Cir. 2000) (stock quotation service); *Marczeski*, 122 F. Supp.2d at 327 (chat room to discuss pros and cons of a controversial email); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. App. 2001) (forum for readers to air their views about books); *Gentry*, 99 Cal.App.4th 816, 834 ("Feedback Forum" about sellers on auction site). The list could go on and on.

Amici urge this Court to recognize, as Congress did in enacting section 230, that this diversity of Internet content does not appear by magic or come only

from traditional publishers or media giants. This incredible variety of content flows largely from the Internet's openness to the contributions of individuals who might otherwise never have the resources or ability to speak to a national or global audience. As the United States Supreme Court noted *Reno v. ACLU*, the Internet allows "tens of millions of people to communicate with one another and to access vast amounts of information from around the world." 521 U.S. 844, 850 (1997) (citation omitted).

Internet intermediaries will be willing to provide these forums, however, only if they can do so free from the fear of litigation resulting from content originating with those to whom they have provided a forum. Faced with the choice between removing a posting that has raised the ire of a complainant or of spending the time and money needed to investigate the validity of the complaint (even assuming that such a fact-intensive inquiry could produce a reliably accurate determination) and then risking a lawsuit when the complainant disagrees, a rational Internet intermediary will obviously choose the path of least resistance: it will remove the offending material. Even a large and well-financed Internet intermediary ordinarily will have little or no incentive to take up the cause of the third party content provider and allow the material to remain. As a result, the court of appeal's rule of distributor liability will inevitably provide a heckler's veto to any individual or business that objects to being criticized over the Internet, regardless of the merits of the criticism. That is not what Congress had in mind when it enacted section 230. *See, e.g.*, 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); *id.* § 230(a)(1) ("rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens"); *id.*, (a)(3) ("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"); *id.*, (a)(4) ("Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation").

While the court of appeal's reinterpretation of section 230 will affect all Internet intermediaries, large and small, the ACLU-NC and EFF are particularly concerned about its impact on the individual website creator who, with no profit motive, seeks to provide a valuable source of information and opinions to others. The same is true for the millions of individuals like Ilena Rosenthal, who use email, chat rooms, listservs, and newsgroups to pass on information that they

believe will be of interest to others. These individuals — ordinary people of ordinary means — often do not speak for commercial purposes. They simply engage in conversation. And when they do so, they do not merely exchange information that they themselves have authored; they frequently “forward” e-mail and other information found on the Internet to colleagues, friends and family. Ignoring the clear mandate of section 230 will lead to self-censorship and timidity by Internet users akin to that which the *Zeran* court recognized would affect large ISPs. Small website operators will have no choice but to remove material at the slightest hint of protest or face the prospect of costly litigation over whether they knew or should have known that the information that they allowed others to post was, in fact, defamatory. Individual Internet users will be reluctant to pass on information, articles, or the comments of others that they find interesting or worthy of discussion out of fear that their inability to assess the accuracy or reliability of Internet material will provoke ruinous litigation against them. Moreover, such self-censorship would be far less visible to society than a decision by AOL to stop providing bulletin boards or chat rooms. In short, the protections of section 230 are as valuable, if not more valuable, to the small website operators and many individuals who exchange information via newsgroups or e-mail lists.

The U.S. Supreme Court has emphasized the need to protect means of communication that are “essential to the poorly financed causes of little people.” *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (upholding right to distribute leaflets door to door); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (protecting paid editorial advertisements from libel judgments because “any other conclusion would discourage newspapers from carrying “editorial advertisements” of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities — who wish to exercise their freedom of speech even though they are not members of the press”); *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (protecting residential signs, which are “an unusually cheap and convenient form of communication[, e]specially for persons of modest means or limited mobility”). The Internet serves this same function, but on an enormously expanded scale, by providing “relatively unlimited, low-cost capacity for communication” that makes possible “vast democratic forums” of all kinds. *Reno v. ACLU*, 521 U.S. at 870. It is truly “a unique and wholly new medium of worldwide human communication.” *Id.* at 850.

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In sum, the court of appeal's departure from the considered, unanimous interpretation of section 230 ignores the real life impact of its decision on the free exchange of ideas that Congress sought to foster by the enactment of this important provision. This Court should grant review in this case to correct this error.

Respectfully submitted,



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Counsel for Amici ACLU-NC and
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AVB: lc

L: Active Cases/Barret/Drafts/Letter support rev.doc

PROOF OF SERVICE

In the California Supreme Court
Letter Brief in Barrett v. Rosenthal, 114 Cal. App. 4th 1379 (2004)
(Petition for Review pending in Sup. Ct. No. S122953)

I am a citizen of the United States and a resident of the State of California. I am employed in San Francisco, in the office of a member of the California State Bar, at which member's direction this service is made. I am over the age of eighteen years, and not a party to the within action. My business address is American Civil Liberties Union of Northern California, 1663 Mission Street, Suite 460, San Francisco, CA, 94103. On April 6, 2004, I served the attached letter brief on the parties and on the Court of Appeal, by causing copies of the letter brief to be delivered to a representative of UPS, in sealed delivery packages designated by UPS, with fees provided for, and addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 6, 2004, at San Francisco, CA.



Leah J. Cerri