NO. 11-17676

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BORIS Y. LEVITT, *et al*.,

PLAINTIFFS-APPELLANTS,

v.

YELP! INC.,

DEFENDANT-APPELLEE.

On Appeal From The United States District Court
For The Northern District of California
Case Nos. 3:10-cv-01321-EMC & 3:10-cv-02351-EMC
Honorable Edward M. Chen District Judge

UNOPPOSED *AMICUS CURIAE* BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLEE YELP! INC.

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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* Electronic Frontier Foundation ("*Amicus*") states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of the stock of *Amicus*.

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STATEMENT OF INTEREST

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization that works to protect rights in the digital world. EFF encourages and challenges industry, government, and the courts to support free expression, privacy, and openness in the information society. It is particularly concerned that laws and regulations not be used to stifle free expression on the Internet by holding intermediaries liable where the content in question originates with a third party.

EFF has a substantial interest in this case because it concerns issues related to intermediary liability and free speech on the Internet. Specifically, EFF supports a broad interpretation of Section 230 of the Communications Decency Act because this statute has played a vital role in allowing millions of people to create and disseminate user-generated content through the Internet, enriching the diversity of offerings online.

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. Both Appellants and Appellee consent to the filing of this brief.

ARGUMENT

The Internet is one of the most diverse forums for individual communication ever invented. In its short life, the Internet has moved from the province of technical specialists and educational institutions into a powerful force in the everyday lives of most Americans, allowing them to share, discuss, and develop ideas in their political, professional, and personal lives. As the U.S. Supreme Court observed 15 years ago, "It is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 852 (1997) (citation and internal quote omitted). Not surprisingly, the scope and depth of legal protections for Internet service providers play a direct role in whether and how speech will develop online.

In 1996, Congress passed section 230 of the Communications Decency Act ("CDA 230" or "Section 230"), taking a deliberate, affirmative step to protect speech online by broadly shielding Internet service providers from responsibility for material supplied by their users. Congress recognized that immunizing interactive computer services from liability for hosting diverse content in turn encourages the development and availability of innovative online services that foster free speech. Because it encourages both large and small intermediaries to open forums for discussion, Section 230 has been critical to protecting and expanding the Internet as a forum for free speech.

In this case, Appellants seek to chip away at the clear protections provided by CDA 230. Appellants allege that the statute's protections do not apply to Yelp because Yelp authored reviews, removed positive reviews, and effectively co-authored its aggregated "star reviews" for businesses because it authored some of the reviews itself. While a web site operator falls outside the protections of CDA 230 to the extent that it directly "creates" or "develops" content, Appellants' reliance on speculation and conjecture fails to strip Yelp of the statute's grant of immunity. More broadly, and central to *Amicus*'s concerns, Appellants' argument would amount to bad policy. If adopted, their approach would provide an avenue for other litigants to end-run the bright-line protections provided by the statute, jeopardizing service providers and undermining speech in the process. This Court should reject this effort as the district court did below.

I. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT IMMUNIZES SERVICE PROVIDERS IN ORDER TO PROVIDE THE WIDEST POSSIBLE PROTECTIONS FOR EXPRESSIVE ACTIVITIES.

CDA 230 offers Internet platforms strong protection against litigation based on third-party content. Subsection (c)(1) of CDA 230 provides:

> 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). Similarly, 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). Together, these protections immunize providers of "interactive computer services" and their users from causes of action asserted by persons alleging harm caused by content supplied by others. *See Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1179 (9th Cir. 2008) ("[CDA 230] provides a safe haven for interactive computer service providers by removing them from the traditional liabilities attached to speakers and publishers.") (citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

The plain text of CDA 230 makes clear that Congress created this immunity to limit the impact of federal or state regulation imposed on the Internet either through statute or through the application of common law causes of action. *See*, *e.g.*, 47 U.S.C. § 230(a)(4) (the Internet and other interactive computer services "have flourished, to the benefit of all Americans, with a minimum of government regulation"); *id*. § 230(b)(2) ("[i]t is the policy of the United States" to minimize Internet regulation). This policy of regulatory forbearance squarely applies to any liability imposed based on the exercise of traditional editorial functions such as

decisions to publish or withdraw third party content. Such liability was, "for Congress, simply another form of intrusive government regulation of speech." *Zeran*, 129 F.3d at 330; *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."). 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*, 521 U.S at 885. *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.").

The policy motivations underlying Congress's actions are written directly into the law. CDA 230 itself provides: "[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." 47 U.S.C. § 230(b)(2), (3). As Representative Christopher Cox noted in support of the future

statute, CDA 230 would "protect [online service providers] from taking on liability ... that they should not face ... for helping us solve this problem" as well as establish a federal policy of non-regulation to "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).

Congress's concern that imposing potential liability on providers who host thousands or even millions of messages might lead to overreaching moderation or outright censorship is even more pressing today. When CDA 230 was passed, 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. Today, the number of worldwide Internet users has exploded to over 2 *billion* users.[1] The difficulties related to policing third party content have grown exponentially along with the number of people now regularly speaking online.[2]

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[1] *See* "ITU Statshot," International Telecommunication Union [UN agency for information and communications technology], Issue 5 (January 2011), available at http://www.itu.int/net/pressoffice/stats/2011/01/index.aspx (last visited May 2, 2012).

[2] *See*, *e.g.*, news coverage and law enforcement attention to the problem facing Internet platforms regarding businesses posting fake or paid-for reviews: "Attorney General Cuomo Secures Settlement With Plastic Surgery Franchise That Flooded Internet With False Positive Reviews," Press Release, New York State Office of the Attorney General, July 14, 2009, available at http://www.oag.state.ny.us/press-release/attorney-general-cuomo-secures-settlement-plastic-surgery-franchise-flooded-internet (last visited May 4, 2012);

Yelp is a case in point. Yelp has amassed over 28 million reviews and last quarter saw 71 million unique visitors visit its site each month.[3] That is, more individuals visited Yelp's site last month than inhabited the *entire Internet* the year that Congress saw the need to immunize Internet providers from the potentially crippling burden imposed by second-guessing those providers' editorial decisions. Sites like Yelp that rely on millions of third-party contributions would simply not be able to exist in their current form if their decisions about managing and presenting content were open to second-guessing. 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.

"Firm to Pay FTC $250,000 to Settle Charges That It Used Misleading Online 'Consumer' and 'Independent' Reviews," Press Release, Federal Trade Commission, March 15, 2011, available at http://www.ftc.gov/opa/2011/03/legacy.shtm (last visited May 4, 2012); Karen Weise, "A Lie Detector Test for Online Reviewers: Fake Reviews are Proliferating, and Researchers are Developing New Ways to Identify Them," Bloomberg Businessweek, September 29, 2011, available at http://www.businessweek.com/magazine/a-lie-detector-test-for-online-reviewers-09292011.html (last visited May 4, 2012); David Streitfeld, "For $2 a Star, an Online Retailer Gets 5-Star Product Reviews", New York Times, January 26, 2012, available at http://www.nytimes.com/2012/01/27/technology/for-2-a-star-a-retailer-gets-5-star-reviews.html (last visited May 4, 2012) (discussing problem of businesses paying users to place positive reviews).

[3] *See* "Yelp Announces First Quarter 2012 Financial Results," Yelp.com, May 2, 2012, available at http://www.yelp-ir.com/phoenix.zhtml?c=250809&p=irol-newsArticle&ID=1690650&highlight= (last visited May 4, 2012).

II. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT PROTECTS PROVIDERS OF INTERACTIVE COMPUTER SERVICES AT EARLY STAGES OF LITIGATION SO AS TO AVOID CHILLING SPEECH.

As courts interpreting Section 230 have found, its breadth is clear and unequivocal by its very terms: "By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran*, 129 F.3d at 330. Courts have consistently applied its immunity broadly, not sparingly, to encourage free speech on the Internet. *See*, *e.g.*, *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (To further the policies underlying the CDA, courts have generally accorded § 230 immunity a broad scope."); *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); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 39 (Cal. 2006).

The immunity granted by CDA 230 is both procedural as well as substantive. That is, not only does the statute immunize providers from *liability* based on its decisions surrounding its hosting of third party content, it immunizes them from *suit*. 47 U.S.C. § 230(e)(3) ("*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.") (emphasis added); *see also Carafano*, 339 F.3d at 1125 ("Congress

intended that service providers ... be afforded immunity from suit"); *Ben Ezra, Weinstein & Co. v. AOL*, 206 F.3d 980, 983 (10th Cir. 2000) (holding Internet service provider "immune from suit under § 230"). This is because legal protections that take force only after discovery would be of little benefit to speakers since the vast majority of service providers will simply remove speech instead of engaging in protracted and expensive fact-intensive legal battles, a result that runs counter to CDA 230's policy goals and undermines free expression online. *See*, *e.g.*, *Nemet Chevrolet*, 591 F.3d at 254-255 ("[I]mmunity is an immunity from suit rather than a mere defense to liability and it is effectively lost if a case is erroneously permitted to go to trial.") (citation and internal quotation marks omitted).

A. Plaintiffs Cannot Bypass Provider Immunity By Pleading Speculative Facts.

CDA 230's immunity is properly bounded. Providers can engage in behavior that takes them outside of the statute's protection, such as "creating or developing" content themselves. Yet here, both the district court and Yelp are correct that speculative allegations alone are insufficient to allow a lawsuit to progress beyond the pleadings stage. Appellants allege (in a conclusory manner), for example, that they were harmed because Yelp directly authored actionable reviews of their businesses, but even taking their allegations as true, there are no *specific* factual allegations that would permit a fact-finder to reach that conclusion.

As the district court held, "it remains 'entirely speculative that Yelp manufactures its own negative reviews or deliberately manipulates reviews to the detriment of businesses who refuse to purchase advertising,' and '[t]he [TAC] provides no basis from which to infer that Yelp authored or manipulated the content of the negative reviews complained of by plaintiffs.'" Order Dismissing TAC (ER 8) (citing Order Dismissing SAC (ER 386)). *See also* Appellee's Brief at 20.

Yelp's (and other providers') statutory immunity is consistent with its constitutional due process protections that otherwise bar speculative claims. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'") (quoting Fed. R. Civ. P. 8(a)(2)). *See also* Order Dismissing TAC (ER 8). Especially given Congress's policy choice in passing Section 230 to impose a bright-line statutory bar to suit and not just liability, plaintiffs cannot be permitted to proceed with expensive litigation on the flimsy ground that a violation of law could hypothetically have occurred.

B. The Immunity Granted to Providers in 47 U.S.C. § 230(c)(1) is Categorical and Does Not Hinge on a Finding of Good Faith.

Aside from their speculative allegations, Appellants' core argument is that Yelp exercised its editorial discretion regarding the placement of certain third party reviews for bad purposes, allegedly driven by a desire to coerce business owners

into buying advertising. As Yelp notes, however, such arguments require the court to read a "good faith" requirement into the blanket protections of 47 U.S.C. § 230(c)(1) that simply doesn't exist and would be antithetical to the broad protections provided by the statute. The immunity provided by section 230(c)(1) is intentionally categorical and effectively promotes Congress's policy goals of (among other things) preserving the "availability of educational and informational resources to our citizens" online. 47 U.S.C. § 230(a)(1).

Courts have repeatedly come to this same conclusion: that the protections of subsection (c)(1) apply categorically, without inquiry into the motivations of the provider and regardless of the provider's motive or mental state in making its editorial decisions. *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*, 206 F.3d at 985-86 (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*, Case No. 10–cv-01360, 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.").

While the district court here expressed sympathy to the Appellants' argument that an inquiry into the motives of a service provider is at least *morally* justifiable, the text of 47 U.S.C. § 230(c)(1) simply does not support such a reading. Indeed, the companion provision in the very same subsection – 47 U.S.C. § 230(c)(2)(A) – explicitly conditions a second immunity on a showing of good faith (there, in connection with voluntarily removing access to objectionable content provided by a third party or otherwise). Importing a good-faith

requirement into the blanket protection provided by 47 U.S.C. § 230(c)(1) when it is plainly absent 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.").

More important to users of online services, as the district court noted, such a reading would undermine Congress's speech-protective policy goals:

> 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). *Roommates.com*, 521 F.3d at 1174.

Order Dismissing TAC (ER 13). *Amicus* urges the Court to uphold the district court's holding that any attempt to hold Yelp liable based on its exercise of "traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content" – is precluded by 47 U.S.C. § 230(c)(1). *Zeran*, 129 F.3d at 330.

C. Aggregated Consumer Ratings, Composed of Service Provider-Selected But User-Created Submissions, are Categorically Protected By 47 U.S.C. § 230(c)(1).

Appellants additionally argue that Yelp falls outside the provider immunity granted by 47 U.S.C. § 230(c)(1) because it chooses what third-party reviews are

included in its aggregated "star" ratings. *See* Appellants' Brief at 8-9, 37. For the same reason that Yelp is immune from liability under 47 U.S.C. § 230(c)(1) for making decisions to publish or remove reviews, so too is it immune for aggregating the results of its selected third party reviews. A contrary rule would open the door to second-guessing "traditional editorial functions" that Congress sought to protect when it passed the statute.

The most instructive case on aggregate ratings is the California Court of Appeals' decision in *Gentry v. eBay*, which squarely held that such 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 amount of positive and negative feedback consumers and dealers had provided about their transactions with each seller. The appellant eBay users argued that eBay created or developed the star ratings, which made the company an information content provider and therefore ineligible for CDA 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*.

Like eBay's rating system, Yelp's user star ratings are a reflection of feedback provided by individuals who use the service, which Yelp collects and displays in summary form. Aside from Appellants' insupportable speculation to the contrary, Yelp neither creates nor develops the underlying reviews – its users do. To hold Yelp responsible for displaying information provided by those users would impermissibly treat the service as an publisher of that third-party content, which CDA 230 does not allow.

Likewise, Appellants' allegation that Yelp exercised editorial judgment not to publish certain reviews also does not negate immunity provided by the statute. As this Court has repeatedly held, exercising editorial discretion to choose what information to publish does not amount to creating or developing content. *See*, *e.g.*, *Batzel*, 333 F.3d at 1031 (CDA 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 Yelp may have selected some of the reviews underlying Appellants' star ratings is not relevant to the question of whether the statute's protections apply.

CONCLUSION

Amicus urges this Court to again, as it has in the past, recognize that the 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 *Reno* Court noted, 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. at 850 (citation omitted).

Absent the clear protections provided by Section 230, sites like Yelp could not exist in anything like their current form. With every decision relating to approving or removing third party content subject to second-guessing and potential liability, such platforms will trend toward allowing "safer," less controversial subject matters for discussion or eliminate third-party input altogether. Such a shift in direction hardly comports with the underlying policy of Section 230, which is intended to encourage the creation of opportunities for members of the public to

receive information in which they are interested and to participate in discussions about topics of interest.

Dated: May 4, 2012

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION,
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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 Curiae* In Support Of Appellant Yelp! Inc. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,711 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: May 4, 2012

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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 May 4, 2012.

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.

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