

S122953

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

STEPHEN J. BARRETT, *et al.*,
Plaintiffs and Appellants,

v.

ILENA ROSENTHAL,
Defendant and Respondent.

BRIEF OF AMICI CURIAE

**AMAZON.COM, INC., AMERICA ONLINE, INC., EBAY INC.,
GOOGLE INC., MICROSOFT CORPORATION, YAHOO! INC.,
ABC, INC., ASK JEEVES, INC., CABLE NEWS NETWORK LP, LLLP,
COMPUSERVE INTERACTIVE SERVICES, INC., EARTHLINK, INC.,
ESPN, INC., NETSCAPE COMMUNICATIONS CORPORATION,
SBC INTERNET SERVICES, TIME WARNER CABLE INC.,
THE WASHINGTON POST COMPANY, ASSOCIATION FOR
COMPETITIVE TECHNOLOGY, CALIFORNIA NEWSPAPER
PUBLISHERS ASSOCIATION, INFORMATION TECHNOLOGY
ASSOCIATION OF AMERICA, INTERNET ALLIANCE,
INTERNET COMMERCE COALITION, NATIONAL
CABLE & TELECOMMUNICATIONS ASSOCIATION, NETCHOICE,
NETCOALITION, NEWSPAPER ASSOCIATION OF AMERICA,
ONLINE NEWS ASSOCIATION, ONLINE PUBLISHERS
ASSOCIATION, TECHNET, AND UNITED STATES INTERNET
SERVICE PROVIDER ASSOCIATION**

After Decision by the Court of Appeal
First Appellate District, Division Two, No. A096451
Alameda County Superior Court Case No. 833021-5
The Honorable James Richman

**WILMER CUTLER PICKERING
HALE AND DORR LLP**
Patrick J. Carome
Samir Jain (SBN 181572)
C. Colin Rushing
2445 M Street NW
Washington, DC 20037
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION..... 1

BACKGROUND..... 5

ARGUMENT 9

I. THE COURT BELOW MISCONSTRUED THE PLAIN MEANING OF THE STATUTORY PROHIBITION ON “TREAT[ING]” AN ONLINE INTERMEDIARY AS THE “PUBLISHER OR SPEAKER” OF SOMEONE ELSE’S CONTENT. 9

A. Imposing Liability on an Online Intermediary for Third-Party Content Necessarily Treats It as a “Publisher or Speaker.” 10

B. The Court Below Erred in Holding that Liability May Be Imposed on a “Distributor” Without Necessarily Treating It as a “Publisher” Under Established Common Law Doctrine. 14

1. The Lower Court’s Conclusion that So-Called “Distributor Liability” Is Distinct from “Publisher Liability” Is Contradicted Even by the Scant Authority on Which the Court Relied. 15

2. Legions of Authority Demonstrate that Imposing Tort Liability on an Intermediary for Other’s Communications Treats It as a “Publisher” Within the Meaning of the Common Law. 23

II. THE LOWER COURT’S UNPRECEDENTED INTERPRETATION OF SECTION 230(C)(1) WOULD DEFEAT THE STATUTE’S PRINCIPAL POLICY OBJECTIVES AND DEFY CONGRESS’S INTENT. 32

A. The Settled Construction of Section 230(c)(1) Serves Congress’s Twin Goals of Promoting Free Speech and Eliminating Disincentives to Self-Regulation. 32

1.	The Court Below Failed to Recognize that Notice-Based Liability for Online Intermediaries Would Severely Chill Online Speech in Direct Contravention of Statutory Policy.	33
2.	The Court Below Failed to Recognize that Notice-Based Liability for Online Intermediaries Would Discourage the Very Sorts of Self-Regulation that the Statute Was Designed to Promote.	42
B.	Congress Has Explicitly Endorsed the Broad Construction of Section 230(c)(1) Uniformly Adopted by All Other Courts.....	47
C.	The Court Below Erroneously Second-Guessed the Policy Balance that Congress Struck.	49
III.	THE LIMITATIONS ON SECTION 230(C)(1) IMMUNITY DERIVE FROM THE STATUTE’S EXPRESS TERMS, AND ARE NOT FOUND IN EITHER A NARROW DEFINITION OF “USER” OR A DISTINCTION BETWEEN “ACTIVE” AND “PASSIVE” INTERMEDIARIES.	53
	CONCLUSION	59

TABLE OF AUTHORITIES

CASES

<i>Anderson v. New York Telephone Company</i> (1974) 35 N.Y.2d 746	24, 25
<i>Anderson v. New York Telephone Company</i> (N.Y.App.Div.1973) 42 A.D.2d 151.....	24, 25
<i>Astoria Fed. Sav. & Loan Ass'n v. Solimino</i> (1991) 501 U.S.104	31
<i>Barrett v. Fonorow</i> (Ill.App.2003) 799 N.E.2d 916	7, 13
<i>Batzel v. Smith</i> (9th Cir.2003) 333 F.3d 1018.....	passim
<i>Ben Ezra, Weinstein, and Co. v. America Online, Inc.</i> (10th Cir.2000) 206 F.3d 980.....	passim
<i>Ben Ezra, Weinstein and Co. v. America Online, Inc.</i> (D.N.M.1998) 26 Media L. Rep. 2211, 1998 WL 896459	41
<i>Blumenthal v. Drudge</i> (D.D.C.1998) 992 F. Supp. 44	7, 55
<i>Bowerman v. Detroit Free Press</i> (Mich.1930) 283 N.W. 642	28, 29
<i>Carafano v. Metrosplash.com, Inc.</i> (9th Cir.2003) 339 F.3d 1119.....	7, 13, 32, 34, 55
<i>Church of Scientology v. Minnesota State Medical Ass'n Found.</i> (Minn.1978) 264 N.W.2d 152	27, 28
<i>Cubby, Inc. v. CompuServe, Inc.</i> (S.D.N.Y.1991) 776 F.Supp. 135.....	19, 20

<i>Doe v. America Online, Inc.</i> (Fla.2001) 783 So.2d 1010.....	7
<i>Eldred v. Ashcroft</i> (2003) 537 U.S 186.....	51
<i>Gentry v. eBay</i> (2002) 99 Cal.App.4th 816.....	7, 12
<i>Green v. America Online, Inc.</i> (3d Cir.2003) 318 F.3d 465.....	7, 10, 32, 55
<i>Hellar v. Bianco</i> (1952) 111 Cal.App.2d 424.....	29
<i>Hughes Aircraft Co. v. Jacobson</i> (1999) 525 U.S. 432.....	32
<i>Isbrandtsen Co. v. Johnson</i> (1952) 343 U.S. 779	31
<i>Jones v. Rath Packing Co.</i> (1977) 430 U.S. 519	53
<i>Kathleen R. v. City of Livermore</i> (2001) 87 Cal.App.4th 684.....	7, 11
<i>Lunney v. Prodigy Servs.</i> (1999) 94 N.Y.2d 242	25, 26, 27
<i>N.L.R.B. v. Amax Coal Co.</i> (1981) 453 U.S. 322.....	30
<i>Noah v. AOL Time Warner, Inc.</i> (E.D.Va.2003) 261 F.Supp.2d 532.....	7, 13
<i>Patentwizard, Inc., v. Kinko's Inc.</i> (D.S.D.2001) 163 F.Supp.2d 1069	7, 13
<i>Perfect 10, Inc. v. CCBill, LLC</i> (C.D.Cal.2004) 71 U.S.P.Q.2d 1568.....	7, 13

<i>Pilot Life Ins. v. Dedeaux</i> (1987) 481 U.S. 41	53
<i>Schneider v. Amazon.com, Inc.</i> (Wash.App.Div.2001) 31 P.3d 37.....	7, 11, 55
<i>Shulman v. Group W Productions, Inc.</i> (1998) 18 Cal.4th 200	13
<i>Smith v. California</i> (1959) 361 U.S. 147	20
<i>Stratton Oakmont v. Prodigy</i> (N.Y.Sup.Ct.May 25, 1995) 23 Media L.Rep.1794, 1995 WL 323710.....	18, 19
<i>Street v. Johnson</i> (Wis.1891) 50 N.W. 395	29
<i>Tacket v. General Motors Corp.</i> (7th Cir.1987) 836 F.2d 1042.....	29
<i>Zeran v. America Online, Inc.</i> (4th Cir.1997) 129 F.3d 327.....	passim
<i>Zeran v. America Online, Inc.</i> (E.D.Va.1997) 958 F.Supp.1124.....	44

STATUTES AND CONGRESSIONAL MATERIAL

17 U.S.C. §512	52
47 U.S.C. §230	passim
47 U.S.C.A. §941	47
141 Cong.Rec. H8287 (daily ed. Aug. 2, 1995).....	35
141 Cong.Rec. H8469-71 (daily ed. Aug. 4, 1995)	21, 34, 35, 43
141 Cong. Rec. S8345 (daily ed. June 14, 1995).....	35
H.R. Conf. Rep. No. 104-458.....	27

H. Rep. No. 107-449 48
Pub. L. No. 105-277 47

OTHER AUTHORITIES

Becker, *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others* (1989) 22 Conn.L.Rev. 203 22
Keeton et al., *Prosser & Keeton on the Law of Torts* (5th ed.1984) 23
Perritt, *Tort Liability, the First Amendment, and Equal Access to Electronic Networks* (1992) 5 Harv.J.L.Tech. 65..... 22
Restatement (Second) Torts passim
Sack, *Libel Slander, and Related Problems* (2d ed. 1994) 24
Smolla, *Law of Defamation*..... 24
Webster’s Third New International Dictionary (2002)..... 54
Witkin, *Summary of California Law* (9th ed.) 12

INTRODUCTION

The *Amici Curiae* who submit this brief are at the forefront of the ongoing communications revolution that has been spawned by the advent and explosive growth of new electronic media and technologies that utilize the Internet. They comprise twenty-nine companies and organizations that together constitute the core of the Nation's online and Internet industries: Amazon.com, Inc., America Online, Inc. ("AOL"), eBay Inc., Google Inc., Microsoft Corporation, Yahoo! Inc., ABC, Inc., Ask Jeeves, Inc., Cable News Network LP, LLLP, CompuServe Interactive Services, Inc., EarthLink, Inc., ESPN, Inc., Netscape Communications Corporation, SBC Internet Services, Time Warner Cable Inc., The Washington Post Company, the Association for Competitive Technology, the California Newspaper Publishers Association, the Information Technology Association of America, the Internet Alliance, the Internet Commerce Coalition, the National Cable & Telecommunications Association, NetChoice, NetCoalition, the Newspaper Association of America, the Online News Association, the Online Publishers Association, TechNet, and the United States Internet Service Provider Association.^{1/}

^{1/} A brief description of each Amicus is provided in the accompanying Application for Leave to File this Amicus Curiae Brief.

The diverse businesses that these Amici collectively represent are providing people throughout the world with an ever-expanding array of interactive computer services. These services are dramatically changing and improving how we share and access information, educate ourselves and our children, buy and sell products and services of every sort, explore virtually any topic, and live our daily lives. Unlike predecessor communications media, these new interactive media have, as their defining quality, the phenomenal capacity for virtually anyone with just a computer, from individuals to large businesses and other organizations, to disseminate virtually instantaneously vast quantities of diverse content that is then available to people all across the Nation and all around the globe.

These Amici have a vital stake in the proper resolution of the important issue of *federal* law presented here: whether providers and users of interactive computer services may be held liable for harmful content that is made available through such a service but that originated with someone else. This issue is governed by 47 U.S.C. §230(c)(1) (“Section 230”), which provides 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.” Before the Court of Appeal decision in this case, numerous federal and state courts had *uniformly* held that, under the plain meaning of Section 230, interactive computer service providers generally may not be sued for harms caused by third-party

content made available through their services. Congress itself, in recently enacting new legislation extending Section 230's reach, expressly embraced and approved these precedents as having correctly encapsulated its intent—significant legislative history that the court below did not even mention.

Notwithstanding all of this prior authority, the Court of Appeal held that Section 230(c)(1) does not protect online intermediaries who were “on notice”—that is, who “knew or should have known”—of the nature of the allegedly harmful third-party content. Although the court below purported to find support in the common law for its carve out of so-called “distributor liability,” in fact the common law makes clear that holding “distributors” liable for content that they disseminate treats them as publishers. (*See infra* Part I.)

The lower court's unprecedented narrowing of Section 230(c)(1) fundamentally conflicts with the statute's plain language and structure. It also frustrates the two principal policy objectives articulated in both the statute's preamble and its legislative history. (*See infra* Part II.) *First*, notice-based liability would undermine Congress's goal of protecting and promoting the ability of interactive computer services to flourish as platforms for robust and vibrant free speech. If, simply by receiving “notice,” service providers were potentially liable for the unimaginable volume of third-party content that constantly flows through their services,

they would have little choice but to automatically and immediately take-down and block third-party content in response to virtually all complaints, and many of them would even need to consider shuttering whole forums and services that now carry large quantities of third-party speech. Notice-based liability thus would unleash a “heckler’s veto” that would suppress swaths of entirely legitimate content in direct contravention of Section 230’s purpose.

Second, the lower court’s interpretation of Section 230 would undermine Congress’s intent to eliminate disincentives for online intermediaries to voluntarily *self*-regulate third-party content. Today, protected by Section 230 as construed by every other court and as expressly endorsed by Congress, many service providers, including many represented by these Amici, engage in a variety of self-regulatory mechanisms, such as screening content and maintaining user-friendly mechanisms for reporting complaints, in order to learn about and remove objectionable content. Under the lower court’s standard, however, these same mechanisms might well operate to put service providers on “notice” of allegedly tortious content and therefore subject them to potential liability. This would be a powerful incentive for service providers to curtail or forego voluntary measures for self-regulating third-party content. Congress passed Section 230 to avoid precisely this result.

The Court of Appeal’s decision has created unwarranted confusion in California—the home of many of the companies represented by these Amici—on a critical issue that Congress saw required a nationwide solution. Amici respectfully urge this Court to correct the fundamental error made below and to end this confusion. Otherwise, California’s courts may become a haven for forum-shopping plaintiffs who, in contravention of the plain language and policies of Section 230, will seek to make providers of interactive services liable for harms that may arise from any of the billions of pieces of third-party content that flow through their services every day. Such a result would profoundly harm the continued development of the new electronic media industry, particularly in this State.

BACKGROUND

The facts of this case differ from nearly all prior cases in which Section 230 has been applied because the defendant asserting statutory immunity here, Ilena Rosenthal, asserts the defense as an individual “user” of an interactive computer service and not as a service provider. Specifically, Rosenthal made negative postings about plaintiff Terry Polevoy on certain Internet forums, at least one of which contained the entire contents of an e-mail sent to her by her co-defendant, Timothy Bolen. The Superior Court concluded that Polevoy’s claim for defamation against Rosenthal based on that posting treated her as the “publisher or speaker of...information provided by another information content provider” and

therefore was barred by Section 230. (Opinion on Rehearing at 5 [hereafter “Op. _”]).

The Court of Appeal reversed, holding that Section 230(c)(1) does not protect any online intermediary—whether a service “user” or “provider”—who “knows or has reason to know” of the tortious nature of the third-party content. (Op.14.) According to the court, imposing liability on an online intermediary for disseminating defamatory content with that state of mind treats it as a “distributor” and not as a “publisher or speaker.” (Op.13-14.) The court held that Rosenthal possessed this level of scienter with respect to the posting at issue because she failed to withdraw it from the Internet after someone else sent her an email asserting that it was false. (Op.36-37.)

The court below acknowledged that its construction of Section 230(c)(1) was unprecedented and that it directly contravened the central holding of the seminal decision in *Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327, and many additional Section 230 precedents, including decisions by the Third, Ninth, and Tenth Circuits, the Florida

Supreme Court, and numerous other federal and state courts.^{2/} (Op.13-18.)

It further recognized that two different panels of the California Court of Appeal had followed *Zeran*, though it erroneously suggested that they had not addressed whether Section 230 immunity precludes notice-based liability. (See *Gentry v. eBay* (2002) 99 Cal.App.4th 816, 833 fn.10, 835 [rejecting arguments that “notice” extinguishes section 230 immunity and that section 230 distinguishes between so-called “distributors” and “publishers”]; *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 695 [“section 230(c)(1) immunity extends to distributor, as well as publisher, liability for defamation”]).

The court below did not address or focus on the relatively anomalous facts of this case as compared to prior Section 230 cases. Instead, its holding amounts to a broadside attack on the entire body of prior precedent, and the court clearly assumed that its narrow construction would apply across-the-board to all “providers” and “users” of interactive services.

^{2/} See, e.g., *Carafano v. Metrosplash.com, Inc.* (9th Cir.2003) 339 F.3d 1119, 1124; *Green v. America Online, Inc.* (3d Cir.2003) 318 F.3d 465, 471; *Ben Ezra, Weinstein & Co. v. America Online, Inc.* (10th Cir.2000) 206 F.3d 980, 986 (hereafter “BEW”); *Doe v. America Online, Inc.* (Fla.2001) 783 So.2d 1010, 1013-17; *Barrett v. Fonorow* (Ill.App.2003) 799 N.E.2d 916, 924-26; *Schneider v. Amazon.com, Inc.* (Wash.App.Div. 2001) 31 P.3d 37, 38-42; *Noah v. AOL Time Warner, Inc.* (E.D.Va.2003) 261 F.Supp.2d 532, *aff’d* (4th Cir. March 24, 2004) No. 03-1770; *PatentWizard, Inc., v. Kinko’s, Inc.* (D.S.D.2001) 163 F.Supp.2d 1069, 1071; *Blumenthal v. Drudge* (D.D.C.1998) 992 F.Supp. 44, 52; *Perfect 10, Inc. v. CCBill, LLC* (C.D.Cal.2004) 71 U.S.P.Q.2d 1568.

Indeed, the court below focused *exclusively* on the legal question of the basic scope of Section 230's key operative provision, and not at all on particular facts that might affect how the case should have been decided under prevailing law. As a result, this idiosyncratic feud amongst several outspoken individuals has produced an erroneous ruling that, if not reversed, would have far-reaching detrimental consequences for the new electronic media that Congress intended to protect and promote.

After granting review in *Barrett*, this Court granted review in another case that presents the same legal issue, but in the prototypical setting in which a large service provider invoked Section 230 as a defense against a claim arising from user-provided content. (*See Grace v. eBay* (Cal. Oct. 13, 2004) S127338 [granting petition for review of *Grace v. eBay* (Cal.App. July 22, 2004) No. B168765 (opinion formerly published at 120 Cal.App.4th 984)].) In *Grace*, one of the millions of users of eBay's online auction service sued eBay for an allegedly defamatory comment posted by another eBay user on a "Feedback Forum" established by eBay to permit its users to rate their dealings with one another. The trial court held that Section 230 barred the plaintiff's claims against eBay, and the Court of Appeal initially agreed. (*See Grace v. eBay* (Cal.App. Feb. 5, 2004) No.B168765, 2004 WL 214449.) The plaintiff in *Grace* then sought rehearing based on *Barrett*. Specifically, he argued that Section 230 was inapplicable because he had made complaints that allegedly put eBay "on

notice” of the tortious nature of the other user’s posting. Even though this Court had already granted review in *Barrett*, rendering the decision below non-citable (Cal. Rule 976(d), 977), the *Grace* court adopted the *Barrett* analysis and concluded Section 230 did not shield eBay from liability. This result, which conflicts with the statute’s key policies, underscores the potentially far-reaching consequences of the decision below and the importance of reversing it before the full measure of these consequences is realized.

ARGUMENT

I. THE COURT BELOW MISCONSTRUED THE PLAIN MEANING OF THE STATUTORY PROHIBITION ON “TREAT[ING]” AN ONLINE INTERMEDIARY AS THE “PUBLISHER OR SPEAKER” OF SOMEONE ELSE’S CONTENT.

The key interpretive question in this appeal is the meaning of the statutory proscription that no online intermediary shall be “treated as the publisher or speaker” of third-party content. (47 U.S.C. §230(c)(1).) As *Zeran* and its progeny have held, imposing liability on an interactive service provider for tortious third-party content necessarily would “treat” it as a “publisher or speaker” of that content in at least three critical respects. (*See infra* Part I.A.) In this case, however, the court below cast aside this universally accepted holding without even addressing two of its key rationales, opting instead to rest its unprecedented interpretation of the statute on its erroneous assumption that the common law recognizes a

separate form of defamation liability that may be imposed on so-called “distributors” without treating them as “publishers.” (*See infra* Part I.B.) The lower court’s analysis of this straightforward question of statutory interpretation is contrary to the plain meaning of the statute and should be reversed to avoid frustrating Congress’s intent, as well as to restore national uniformity on an important issue of federal law.

A. Imposing Liability on an Online Intermediary for Third-Party Content Necessarily Treats It as a “Publisher or Speaker.”

As many state and federal courts have held, claims that seek to hold an online intermediary liable for injury resulting from content that was created or developed by a third party inherently “treat” the intermediary as the “publisher or speaker” of that content from at least three distinct perspectives.

First, claims based on an intermediary’s dissemination of someone else’s content seek to impose on the intermediary the quintessential duties of a traditional publisher. As the Fourth Circuit explained in *Zeran*, “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.” (*Zeran, supra*, 129 F.3d at p.330; *see also Green, supra*, 318 F.3d at p.471 [Section 230 prevents claims against AOL based on its “decisions relating to the monitoring, screening, and deletion of content from its network—actions

quintessentially related to a publisher’s role”]; *BEW, supra*, 206 F.3d at p.986 [“Congress clearly enacted §230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.”]; *Schneider, supra*, 31 P.3d at p.41 [Section 230 bars claim based on Amazon.com’s alleged “editorial discretion and decisionmaking authority over the posting of comments at its site”]; *Kathleen R., supra*, 87 Cal.App. at p.692 [Section 230 prohibits “hold[ing] interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium”].) In particular, holding a service provider liable because it allegedly knew or somehow was “on notice” that particular content was tortious but nevertheless did not block or remove it—which is what the lower court’s standard would do—subjects the service provider to liability for its exercise of the traditional duties of a publisher.

Second, tort claims that would hold an online intermediary liable for harmful third-party content “treat” it as the “publisher or speaker” of that content because they attempt to place the intermediary in the same legal position as the original “publisher[s] or speaker[s]” of the harmful remarks. For example, a plaintiff necessarily seeks to treat an online intermediary as a publisher of third-party information when he asserts legal theories against the intermediary that would apply equally to the person who originally published the content. (*See Zeran, supra*, 129 F.3d at p.333 [the plaintiff

may not seek to “attach liability to AOL under the same theory” as the original publisher “without conceding that AOL too must be treated as a publisher of the statements”]; *Gentry, supra*, 99 Cal.App.4th at p.831 [“If by imposing liability...we ultimately hold eBay responsible for content originating from other parties, we would be treating it as the publisher, viz., the original communicator....”].) Here, for example, the lower court’s holding would put Rosenthal in the same legal shoes as her co-defendant, Bolen, who was the original publisher of the allegedly tortious content and against whom Polevoy asserts the same causes of action.

Third, holding a service provider liable for a tort such as defamation necessarily treats it as a “publisher” as a matter of bedrock common law doctrine. The most basic and essential elements of *every* defamation claim include both “an unprivileged *publication* to a third party” and “fault amounting at least to negligence on the part of the *publisher*.” (Restatement (Second) Torts (hereafter “Restatement”) §558 (emphasis added); *see also Zeran, supra*, 129 F.3d at p.331 [“the *publication* of a statement is a necessary element in a defamation action” and “*only one who publishes* can be subject to this form of tort liability” (emphasis added)]; 5 Witkin, *Summary of California Law* § 471 (9th ed.) [tort of defamation “involves a *publication* which is false, defamatory and unprivileged” (emphasis added)].) Likewise, other tort actions arising out of the dissemination of harmful information, such as the torts of injurious

falsehood or invasion of privacy, can be brought only against defendants who are deemed to have “published” the information.^{3/}

Because publication is a necessary element of these torts, speech-based tort liability arising from dissemination of third-party content by an online intermediary inherently would “treat” the intermediary as a “publisher or speaker.” Not surprisingly, therefore, Section 230 has been held to bar a wide variety of torts based on allegedly injurious speech, ranging from garden-variety defamation claims to federal civil rights claims based on allegedly harassing speech.^{4/}

^{3/} See Restatement §623A (only “one who *publishes* a false statement harmful to the interests of another is subject to liability for injurious falsehood” (emphasis added)); *id.* §§652D,652E (key element of invasion of privacy tort is that defendant gave “publicity” to harmful information); *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214-15 (elements of tort of “*publication* of private facts” include “*public* disclosure” by defendant, and “that the matter *published* is not of legitimate public concern” (emphasis added)).

^{4/} See, e.g., *Carafano, supra*, 339 F.3d at pp.1121-22 (invasion of privacy, misappropriation of right of publicity, defamation); *BEW, supra*, 206 F.3d at p.983 (defamation, negligence); *Noah, supra*, 261 F.Supp.2d at p.539 (Title II civil rights claim); *Patentwizard, supra*, 163 F.Supp.2d at p.1070-71 (interference with prospective business relationships); *Barrett v. Fonorow, supra*, 799 N.E.2d at p.919 (false light invasion of privacy); *Schneider, supra*, 31 P.3d at p.39 (negligent misrepresentation, tortious interference, breach of contract); *Perfect 10, supra*, 71 U.S.P.Q.2d at p.1592-94 (unfair competition, false advertising).

B. The Court Below Erred in Holding that Liability May Be Imposed on a “Distributor” Without Necessarily Treating It as a “Publisher” Under Established Common Law Doctrine.

The opinion below broke ranks with the unanimous body of case law interpreting Section 230 over the question whether imposing liability on an intermediary who “knew or should have known” about the nature of the content it disseminated—what the lower court called “distributor liability”—treats the intermediary as “a publisher.” In answering this question in the negative, the lower court eschewed any mention, much less analysis, of two of the three rationales laid out in the prior case law to support the opposite conclusion—namely, that such liability holds the intermediary liable for its exercise of “a publisher’s traditional editorial functions” and effectively places the intermediary in the shoes of the third party who was the original “publisher” of the content.

Thus, the opinion below joined issue with the uniform holdings of other courts on only one of the key rationales that have animated those decisions—that holding an intermediary liable for defamation or other similar torts for which being a “publisher” is an element necessarily treats the intermediary as a “publisher” regardless of the standard of fault applied in assessing liability. The entire weight of the lower court’s rejection of this rationale rests on its assertion that, at common law, the “conventional” meaning of “publisher” does not encompass an intermediary who is held

liable based on the fault/scienter standard associated with so-called “distributor liability.” (Op.22.) This linchpin proposition flies in the teeth of the central holdings of *Zeran* and its progeny. It also is wrong.^{5/}

1. The Lower Court’s Conclusion that So-Called “Distributor Liability” Is Distinct from “Publisher Liability” Is Contradicted Even by the Scant Authority on Which the Court Relied.

Aside from the various academic commentaries penned by law students and law professors that captured so much of its attention, the court below cited only *three* authorities to support its novel conception of the relationship between so-called “distributor liability” and the tort of defamation. However, far from suggesting that an intermediary may be held liable for defamation without being treated as a “publisher” within the meaning of the common law, these authorities actually demonstrate the opposite.

The first authority to which the court below pointed is a subparagraph of a single provision of the Restatement (Section 581(1)) that does not even mention “distributor” or “distributor liability”—indeed, those words appear nowhere in the text, comments, or illustrations to the

^{5/} Ironically, in contending that so-called “distributor liability” is not simply a subset of “publisher liability,” even the court below slipped into using the term “publisher” to refer to both “primary publisher[s]” and “distributor[s]” who are subjected to defamation liability. (Op.20 [“the common law subjects [these] *two types of publishers* to distinctly different standards of liability”(emphasis added)].)

Restatement’s 177-page exegesis on defamation liability. Section 581(1) merely defines a heightened fault/scienter standard that must be satisfied before a certain type of potential defendant—namely, “one who only delivers or transmits defamatory matter published by a third person”—can be “subject to liability” for committing the tort of defamation. (*Ibid.*) Specifically, this standard requires that the defendant “knows or has reason to know of [the transmitted matter’s] defamatory character.” (*Ibid.*)

The lower court’s fatal error was to treat Section 581(1)’s recognition of a heightened fault/scienter requirement applicable to one class of defamation defendants as creating a distinct tort divorced from all the other essential elements of a defamation claim. This error pervades the lower court’s opinion, but surfaces especially clearly in its criticism of *Zeran* for supposedly “focusing solely” on Restatement Section 577, which defines “publication,” and for supposedly “ignor[ing]” Section 581(1), which it characterized as describing “the complementary common law rule.” (Op.16.) What the lower court failed to apprehend, however, is that *neither* Section 577 nor Section 581 purports to define an entire tort, much less two different torts. To the contrary, each is merely a distinct subpart of the Restatement’s overall explanation of the four essential “elements of a cause of action for defamation,” as set out at the beginning of its chapter on defamation:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged *publication* to a third party;
- (c) *fault* amounting at least to negligence on the part of the *publisher*; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the *publication*.

Restatement §558 (emphasis added). Section 581(1), like the other sections within the Restatement topic entitled “Requirement of Fault,” explicates the third of these elements, which requires “fault...on the part of the *publisher*.”^{6/} Other sections under that same topic define various other fault/scienter requirements that must be met, depending on the type of plaintiff involved, before any defendant may be liable for the tort of defamation. *See* Restatement §§580A, 580B. Section 577, entitled “What Constitutes Publication,” defines the word “publication” as it is used in the second and fourth elements.

The court below failed to grasp what *Zeran* and all its successors correctly perceived—that no defendant of any kind can be held liable for the tort of defamation without being treated as a “publisher” of the defamatory content. This is readily apparent from Restatement Section

^{6/} Significantly, all of the illustrations to Section 581 describe the operative inquiry as whether the person who “delivers or transmits” the information may be “liable...for *publishing* a libel.” (Restatement §581 illus.1-4.)

558, which includes among the essential elements of any defamation claim a “publication” by the defendant “publisher.” It is also apparent throughout the entire Restatement chapter on the elements of defamation, which invariably uses the term “publisher” in defining specific scenarios in which liability is imposed.²⁷

The second authority on which the court below mistakenly relied is *Stratton Oakmont v. Prodigy* (N.Y.Sup.Ct.May 25, 1995) 1995 WL 323710, 23 Media L.Rep. 1794, a decision of a New York state trial judge that Congress specifically condemned when it enacted Section 230 and whose reasoning was later rejected by the New York Court of Appeals. (*See infra* at 25-28.) That is the *only* published decision issued before or since enactment of Section 230 in which an interactive service provider has been found potentially liable for tortious third-party content. In support of the proposition that the “conventional” meaning of “publisher” refers “only to an original or primary publisher,” the court below focused on the following statement from *Stratton Oakmont*: “[a] finding that Prodigy is a *publisher* is the first hurdle for Plaintiffs to overcome in pursuit of their

²⁷ For example, Section 561 describes the requirements for imposing liability on “one who *publishes* defamatory matter concerning a corporation.” (Restatement §561(emphasis added).) No fewer than twelve other sections define the circumstances in which liability may be imposed using the same “one who publishes” formulation. (*See id.* §§560, 562, 564A, 569-575, 580A-580B.)

defamation claims, because one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it.” (Op.22 [quoting *Stratton Oakmont*, 1995 WL 323710 at p.*3].) This quotation, however, actually proves the opposite. That the concept of “publisher” could encompass an intermediary like Prodigy, which was neither the original nor primary publisher of the third-party content at issue, reflects that the conventional meaning of “publisher” includes intermediaries who are subject to liability for a harmful communication. Moreover, *Stratton Oakmont*’s statement that the plaintiff had to demonstrate that Prodigy was a “publisher,” and its ultimate holding that Prodigy could be subject to liability as a “publisher” under the facts of that case, is entirely consistent with, and indeed confirms, the proposition that only a defendant deemed a publisher can be liable for defamation.

The third authority on which the court below relied is *Cubby, Inc. v. CompuServe, Inc.* (S.D.N.Y.1991) 776 F.Supp. 135, a pre-Section 230 decision of a federal district court in New York that absolved an online service from liability for third-party content. This decision also thoroughly undermines, rather than supports, the lower court’s analysis. Contrary to the lower court’s supposition, while *Cubby* deemed CompuServe to be a “distributor,” it did not conjure any distinct tort of “distributor liability.” Instead, it simply recognized that distributors enjoy special threshold *protections* from defamation claims—defenses that are “deeply rooted in

the First Amendment.”^{8/} (*Id.* at pp.139-40.) Addressing the garden-variety defamation claim that was the main focus of that case, the *Cubby* court framed the question presented as whether there was a factual basis for treating CompuServe as if it had “originally *published*” a third-party’s defamatory statements. (*Id.* at pp.139 (emphasis added).) And when considering the other tort claims at issue in that case—business disparagement and unfair competition—*Cubby* said that no liability could be imposed without evidence that CompuServe had made a “knowing *publication* of false matter” or that CompuServe had “intentionally *uttered*” an injurious falsehood. (*Id.* at pp.141-42 (emphasis added).) Thus, *Cubby* did not recognize a distinct cause of action for “distributor liability” that would impose liability on an intermediary without treating it as a “publisher or speaker.” Rather, it defined the circumstances in which, before Section 230’s enactment, an online intermediary could be treated as the “publisher or speaker” of third-party information.

^{8/} The U.S. Supreme Court has recognized that, absent the requisite fault/scienter, the First Amendment prohibits holding persons or entities who are intermediaries for third-party content liable for the unlawful nature of any such content. (*See Smith v. California* (1959) 361 U.S. 147, 152-53 [prohibiting prosecution of bookseller for obscenity violation absent showing of knowledge of unlawful contents].) The fact that this heightened fault/scienter requirement has a constitutional dimension that transcends defamation common law further underscores that it simply limits the circumstances in which state law may impose liability, and that it is not a *source* of some distinct “distributor liability.”

The court below erroneously conjured from Section 230's legislative history a supposed implication that Congress intended that online intermediaries be subject to notice-based liability because it explicitly condemned *Stratton Oakmont* but supposedly did not criticize *Cubby*. (Op.24-26.) No such implication may be fairly drawn. *First*, as discussed, notice-based liability inevitably treats the intermediary as a "publisher," as *Cubby* itself explicitly recognized. *Second*, any supposed lack of criticism of *Cubby* would appear, at most, to reflect that Congress felt no discomfort regarding *Cubby's result*—that is, CompuServe's being held not liable for third-party content—rather than some unspoken and complex plan to preserve a subspecies of liability that was not imposed in *Cubby*.^{2/} *Third*, the only reference to *Cubby* in the legislative history on which the court below relied (Op.26) was a floor statement by Representative Cox, who characterized *Cubby* as having held that "CompuServe would not be liable in a defamation case because it was *not the publisher* or editor of the material." 141 Cong.Rec. H8469 (daily ed. Aug. 4, 1995) (emphasis added).) Although the court below viewed this statement as recognizing

^{2/} Indeed, the premise that the legislative history did not criticize *Cubby* is itself dubious. Representative Cox referred to *Cubby* as one of "two quick examples" (the other being *Stratton Oakmont*) of the way in which "the existing legal system provides a massive disincentive for the people who might best us control the Internet to do so." (141 Cong.Rec. H8469 (daily ed. Aug. 4, 1995).)

that “distributor liability” may be imposed on an online intermediary without treating it as a “publisher,” Op.26, it is far more natural to read the statement as using “publisher” in the normal common law sense, as a prerequisite for holding anyone liable for a defamatory communication. *Finally*, neither Representative Cox’s statement *nor any other* aspect of Section 230’s legislative history makes any reference to “distributors,” “distributor liability,” “notice-based” liability, or the “knew or should have known” standard. In these circumstances, the snippet of legislative history on which the court below seized cannot bear the heavy weight of its unprecedented construction of the statute.^{10/}

^{10/} The court below, while relying heavily on selected academic critiques of *Zeran*, ignored substantial pre-Section 230 literature addressing the potential common law liability of service providers for third-party content. Much of that literature confirms that imposing liability on such intermediaries treats them as “publishers or speakers.” (See, e.g., Perritt, *Tort Liability, the First Amendment, and Equal Access to Electronic Networks* (1992) 5 Harv.J.L.Tech. 65, 107 [“Because a transmitter is *not a republisher* unless the transmitter acts with knowledge of the content, and because one who supplies the means of communication is *not a republisher* unless there is knowledge of the defamatory content, the focus is on what the network intermediaries knew or should have known.”]; Becker, *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others* (1989) 22 Conn.L.Rev. 203, 215 [“Existing law divides those who disseminate defamatory information into three categories: primary publishers, secondary publishers, and ‘not publishers at all.’” Those in the third category, “such as the telephone company, may pass information along *but are not said to have published it* and thus are not liable at all.” (emphasis added)].)

2. Legions of Authority Demonstrate that Imposing Tort Liability on an Intermediary for Other’s Communications Treats It as a “Publisher” Within the Meaning of the Common Law.

It is hardly surprising that the court below found no authority that actually supports its novel contention that holding so-called distributors liable for defamatory third-party content does not treat them as “publishers or speakers” of that content. In fact, a broader review of the relevant authorities resoundingly confirms that, under mainstream common law doctrine, “publisher” has always been the definitive term of art that identifies *anyone*—including an intermediary—who is subject to liability for any defamatory or otherwise tortious communication.

Leading treatises reflect that “publisher” is the classic defining term that distinguishes those who are subject to liability for disseminating defamatory communications from those who are not. Within the common law of defamation, a crucial issue involves the extent to which “one who is in the business of making available to the general public what another writes or says [may] be subject to liability for the defamatory matter that was published.” (Keeton et al., *Prosser & Keeton on the Law of Torts* §113, at 803 (5th ed.1984) (“Prosser & Keeton”).) Participants in that business generally fall “into three categories: primary publishers, secondary publishers or disseminators, and those who are suppliers of equipment and facilities *and are not publishers at all.*” (*Ibid.* (emphasis added).) Those

who fall within the third category—that is, those who “are not publishers at all”—may not be held liable for defamation. (*Ibid.*) Whether persons or entities in the middle category, which corresponds to what the Court of Appeal called “distributors,” may be liable for tortious content turns on whether, under the particular factual circumstances, they can “be regarded as publishers.” (*Ibid.* (emphasis added).)^{11/}

Anderson v. New York Telephone Company (N.Y. 1974) 35 N.Y.2d 746, 748, the leading common law precedent concerning the potential liability of a telephone company for tortious third-party speech, confirms that asking whether an intermediary may be subject to liability for disseminating someone else’s content is synonymous with asking whether it was the “publisher” of the content. The plaintiff in *Anderson* alleged that the telephone company was liable because it had failed to terminate a subscriber after being informed that the subscriber was using the telephone service to broadcast a defamatory recording. *See Anderson v. New York Telephone Company* (N.Y.App.Div.1973) 42 A.D.2d 151, 151-55, *rev’d* (1974) 35 N.Y.2d 746. The New York Court of Appeals, adopting the

^{11/} See also Smolla, *Law of Defamation* §4:92 (“merely being a conduit for distribution of libelous material normally does not make one a ‘publisher’” subject to defamation liability); Sack, *Libel Slander, and Related Problems* §6.3.1 (2d ed. 1994) (“Those who merely deliver or transmit defamatory material previously published by another will be considered to have published the material only if they knew, or had reason to know, that the material was false and defamatory.”(citation omitted)).

opinion of the dissent below, *see Anderson*, 35 N.Y.2d at 748, held that the telephone company “cannot be liable to plaintiff under the law of defamation unless it is held that by providing service to [the subscriber] it ‘published’ [the] messages.” (42 A.D.2d at 162 (Witmer, J., dissenting) (emphasis added).) The opinion further held, as a matter of law, that the telephone company had not “published” the communication at issue: “The sender’s message in such cases is communicated directly to the recipient without being *published* by or to any person employed by the telephone company,” and, as a result, “there has been *no publication*” by the telephone company. (*Id.* at 163 (emphasis added).) Excluding the telephone company from the status of “publisher” automatically meant that it “was not the legal cause for communicating the defamatory matter to third persons” and therefore was immune from liability. (*Ibid.*)

The New York Court of Appeals reaffirmed these same common law concepts in *Lunney v. Prodigy Servs.* (1999) 94 N.Y.2d 242, a case involving e-mail and bulletin board messages disseminated through the same online service that was sued in *Stratton Oakmont*. *Lunney* ruled that, as a matter of “established tort principles...fashioned long before the advent of e-mail,” Prodigy could not be liable for the allegedly defamatory content

of a miscreant user.^{12/} (*Lunney, supra*, 94 N.Y.2d at p.248-49.) Without advertent to any notion of “distributor liability,” *Lunney* repeatedly declared that Prodigy “was not a *publisher*” of either the e-mail or electronic bulletin board messages and that it therefore could not be subject to defamation or other tort liability. (*Id.* at p.249-50 (emphasis added).) *Lunney*’s entire analysis was grounded in the axiom that holding an intermediary liable for someone else’s tortious content necessarily treats it as the “publisher”:

In *Anderson v. New York Tel. Co.*, this Court was asked to determine whether a telephone company could be held liable as a *publisher* of a scurrilous message that a third party recorded and made available to the public....The Court...conclud[ed] that the telephone company could not be considered a *publisher*, because in “no sense has...[it] participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility.”

...Prodigy’s role in transmitting e-mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers’ conversations. In this respect, an ISP, like a telephone company, is merely a conduit. Thus, we conclude that under the decisional law of this State, *Prodigy was not a publisher* of the e-mail transmitted through its system by a third party....

We agree with the Appellate Division in its conclusion that, in this case, Prodigy was not a *publisher* of the electronic bulletin board messages. We see no occasion to hypothesize

^{12/} *Lunney* granted summary judgment in Prodigy’s favor without addressing the applicability of Section 230, which Prodigy had raised as an additional defense. (*Lunney, supra*, 94 N.Y.2d at p.251-52.)

whether there may be other instances in which the role of an electronic board operator would qualify it *as a publisher*.

(*Id.* at 249-251 (emphasis added, citations omitted).) Thus, while *Lunney* left open the possibility that an online intermediary could in some circumstances be held liable—at common law—for defamatory third-party content, it could not have made more clear that doing so would, by definition, treat the intermediary “as a publisher.”^{13/}

Courts throughout the country routinely use “publish” or “publisher,” or close derivations thereof, as the term of art defining the *entire category* of persons or entities who, at common law, are subject to liability for disseminating harmful communications. Thus, in *Church of Scientology v. Minnesota State Medical Ass’n Found.* (Minn.1978) 264 N.W.2d 152, the Supreme Court of Minnesota held that a medical organization that sent out a few copies of an article that had appeared in a magazine published by a different organization could not be sued for defamatory statements in the article because, on the facts alleged, it could not be deemed to have “published” the article. (*Id.* at p.156.) The court

^{13/} *Lunney* specifically held that, at common law, neither a service provider’s reservation of a prerogative to exercise editorial discretion over third-party content, nor its actual exercise of a power to exclude certain vulgarities from such content, would permit a court to treat the service provider as the “publisher” of, and therefore as liable for, third-party content. (*Lunney, supra*, 94 N.Y.2d at p.250-51.) This holding *sub silentio* overruled *Stratton Oakmont*, which Congress itself had already condemned. (See H.R.Conf.Rep.No. 104-458, at p.194.)

plainly recognized that the heightened fault/scienter standard for entities who merely deliver other people’s content (i.e., the “knew or should have known” standard) simply delimits when an intermediary may be held liable as a “publisher” and does not create or define any distinct form of liability:

“Publication” is a term of art in defamation law expressing one of the elements of that tort. Those who merely deliver or transmit defamatory material previously published by another *will be considered to have published the material* only if they knew, or had reason to know, that the material was false and defamatory. See, Restatement, Torts 2d, §581....

In this case, [the defendants] merely acted as a conduit between the original publisher and the parties who had requested information.... [The defendants] had no reason to believe that the article was false and defamatory. *In these circumstances, the acts of [the defendants] were analogous to those of a library or news vendor and did not constitute publication.*

(*Ibid.* (emphasis added).)

Older case law reflects that, at common law, the heightened fault/scienter standard that protects intermediaries such as news vendors from liability emerged as an *affirmative defense* to a claim for defamation, and not (as the court below erroneously assumed) the defining element of a distinct cause of action. For example, in *Bowerman v. Detroit Free Press* (Mich.1930) 283 N.W. 642, the Supreme Court of Michigan made clear that both the original publisher of a newspaper and a vendor who distributes the newspaper are, in the first instance, subject to the same “*general rule* that all persons who cause or participate in the publication of a libelous or

slandorous matter are responsible for such *publication*.” (*Id.* at 645.) The only difference is that, unlike the original publisher, the vendor would have a “good defense”—and avoid being treated as a publisher—if he could “show that he had no knowledge of the libelous matter and that there were no extraneous facts which should have put him on his guard.” (*Ibid.*) Similarly, in *Street v. Johnson* (Wis.1891) 50 N.W. 395, the Supreme Court of Wisconsin explained that proof by a newspaper vendor that he did not know, and lacked reason to know, of the defamatory article at the time of distribution would operate as a defense because it would “show that [he] did not *publish* the libel.” (*Id.* at 396 (emphasis added).) Conversely, in the absence of this defense the vendor would be deemed to have “publish[ed] the libel.” (*Ibid.*)

The proposition that being held liable for someone else’s harmful content equates with being treated as its publisher also is evident from common law precedents addressing property owners’ liability for failing to remove defamatory signs or graffiti posted by others. As the leading precedent addressing this scenario declared, the determinative inquiry is whether “[a] reasonable person could conclude that [the defendant] ‘intentionally and unreasonably fail[ed] to remove’ [the posted message] and thereby *published its contents*.” (*Tacket v. General Motors Corp.* (7th Cir.1987) 836 F.2d 1042, 1046 (emphasis added).) California precedent is in accord. (*Hellar v. Bianco* (1952) 111 Cal.App.2d 424, 427 [by

“permit[ting] [defamatory matter] to remain after reasonable opportunity to remove the same,” the property owner becomes, by its actions, “guilty of *republication* of the libel” (emphasis added)]. *See also* Restatement §577(2) [owner who “intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels...is subject to liability for its *continued publication*.”(emphasis added)].)

Thus, the Court of Appeal’s various assertions that the term “publisher” is “legally uncertain,” “ambiguous,” and “capable of two reasonable constructions,” Op.21-22, cannot be reconciled with the overwhelming authority showing that this term has long been the classic term of art for defining who may be liable for a tortious communication. When, as here, Congress uses a term that has clear and long-standing meaning at common law, “a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.” (*N.L.R.B. v. Amax Coal Co.* (1981) 453 U.S. 322, 329. *See also* Singer, *Statutes and Statutory Construction* §50:03 (6th ed. 2000) [“The interpretation of well-defined words and phrases in the common law carries over to statutes dealing with the same or similar subject matter.”].)

Congress certainly understood that Section 230 would directly impact rights and liabilities that, absent federal legislation, would likely have been determined by applying traditional common law tort doctrine to the then emerging realm of cyberspace. Given that “publisher” is a well-

defined term of art in an area of law that Congress knew it was affecting, and that Section 230 does not “dictate[.]” a different meaning for the term, the conclusion that Congress here used “publisher” in its common law sense—so as to encompass all intermediaries held liable for third-party content, regardless of the level of fault/scienter—is inescapable.

Not only did the court below fail to acknowledge this governing principle of statutory construction, but it also placed heavy weight on a different but inapposite canon: that statutes in derogation of the common law should generally be read narrowly. (Op.19, 22, 35-36.) This canon may not be applied “when a statutory purpose to the contrary is evident.” (*Astoria Fed. Sav. & Loan Ass’n v. Solimino* (1991) 501 U.S. 104, 108.) Here, there can be no doubt that Congress has “spoken directly to the issue” and fully intended Section 230 to abrogate common law rights and liabilities with respect to certain classes of plaintiffs and defendants. (*Zeran, supra*, 129 F.3d at pp.333-34.) This is evident on the face of the statute, including its express mandate that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” (47 U.S.C. §230(e)(3).) The lower court’s erroneous reliance on this canon to narrow the scope of Section 230(c)(1) impermissibly “defeat[ed] an obvious legislative purpose [and] lessen[ed] the scope plainly intended to be given to the measure.” (*Isbrandtsen Co. v. Johnson* (1952) 343 U.S. 779, 783.)

Thus, for all of the foregoing reasons, the lower court's wholly unprecedented construction of Section 230(c)(1) is inconsistent with the statute's plain meaning and must be rejected.^{14/}

II. THE LOWER COURT'S UNPRECEDENTED INTERPRETATION OF SECTION 230(C)(1) WOULD DEFEAT THE STATUTE'S PRINCIPAL POLICY OBJECTIVES AND DEFY CONGRESS'S INTENT.

A. The Settled Construction of Section 230(c)(1) Serves Congress's Twin Goals of Promoting Free Speech and Eliminating Disincentives to Self-Regulation.

As courts have confirmed in the eight years since the statute's enactment, Congress designed Section 230 to achieve two fundamental goals. First, Congress wanted to preserve and foster the ability of interactive service providers to serve as vehicles for vibrant free speech, free from governmental regulation. Second, Congress wanted to reduce disincentives for service providers to *voluntarily self-regulate* objectionable third-party content.^{15/} The court below wrongly downplayed the first goal by suggesting it was inconsistent with the second, and failed

^{14/} See *Hughes Aircraft Co. v. Jacobson* (1999) 525 U.S. 432, 438 (“[I]n any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well.”).

^{15/} See, e.g., *Carafano, supra*, 339 F.3d at p.1122 (“Congress enacted this provision...for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.”); *Batzel v. Smith* (9th Cir.2003) 333 F.3d 1018, 1027-28; *Zeran, supra*, 129 F.3d at p.330-332; *Green, supra*, 318 F.3d at p.471; *BEW, supra*, 206 F.3d at p.985-86.

to recognize that a regime under which service providers may be subject to “notice-based” liability for third-party content would fundamentally undermine *both* these policy objectives.

1. The Court Below Failed to Recognize that Notice-Based Liability for Online Intermediaries Would Severely Chill Online Speech in Direct Contravention of Statutory Policy.

Although the lower court disparaged Congress’s first goal of preserving an environment for vibrant speech on the Internet, Op.29, Section 230’s preamble is clear: It declares that “interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,” and finds that these services have “flourished, to the benefit of all Americans, *with a minimum of government regulation.*” (47 U.S.C. §230(a)(3)-(4)(emphasis added).) The preamble further declares that 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(b)(2)(emphasis added).) Based on this statutory language, *Zeran* explained:

The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. 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.

(*Zeran, supra*, 129 F.3d at p.330. *See also Carafano, supra*, 339 F.3d at p.1122 [Section 230 was intended “to promote the free exchange of information and ideas over the Internet”].)

The court below pointed to the legislative history of Section 230 as a supposed basis for avoiding the purpose expressed in the statute’s preamble. But the court’s analysis of the congressional debates missed the mark. Relying on law review summaries of the legislative history, the court assumed that Congress wanted *only* to encourage service providers to restrict or filter objectionable content. (Op.28.) But the debates plainly show otherwise, namely, that Congress simultaneously intended, as another chief objective, to encourage vibrant, free speech on the Internet.^{16/} Chairman Cox, a co-sponsor of Section 230, explained that it has two purposes: to insulate service providers who engage in self-regulatory efforts, *and* to “encourage what is right now the most energetic technological revolution that any of us has ever witnessed.” (141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995).) Going further, he explained that

^{16/} The Ninth Circuit has refuted the contention of some academic critics that *Zeran* improperly “imposed the First Amendment goals” on the statute, noting that “[t]hese critics fail to recognize that laws often have more than one goal in mind, and...it is not uncommon for these purposes to look in opposite directions. The need to balance competing values is a primary impetus for enacting legislation. Tension within statutes is often not a defect but an indication that the legislature was doing its job.” (*Batzel, supra*, 333 F.3d at p.1028.)

“[t]he message should be from this Congress we embrace this new technology, we welcome the opportunity for education and political discourse that it offers for all of us,” and “[w]e want to help it along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us.”

(Ibid.)

Rep. Goodlatte similarly declared that immunity is necessary to encourage diverse online content because service providers could not, as a practical matter, review or edit the staggering volumes of information they carry: “[t]here is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. *This will cure that problem....*” (141 Cong. Rec. H8471 (emphasis added).)^{17/} Similarly,

^{17/} The remarks of Senator Coats on which the court below relied (Op.27) are entirely inapposite. They addressed a *different* provision of the CDA altogether, and were made nearly two months *before* Section 230 was even offered as an amendment. (141 Cong. Rec. S8345 (daily ed. June 14, 1995).) Further, as the House sponsors of the later amendment explained, Section 230 was intended as an antidote to Senator Coats’ efforts to *mandate* some form of monitoring of online content. (141 Cong.Rec. H8287 (daily ed. Aug. 2, 1995).)

Rep. Lofgren urged adoption of Section 230 “so that we preserve the first amendment and open systems on the Net.” (*Ibid.*) Thus, “there is little doubt that [Section 230] sought to further First Amendment and e-commerce interests on the Internet while also promoting the protection of minors.” (*Batzel, supra*, 333 F.3d at 1028.)

The broad immunity conferred by Section 230 was essential to this free speech goal. As the Fourth Circuit explained:

Congress made a policy choice...not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.

Congress’ purpose in providing the §230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.

(*Zeran, supra*, 129 F.3d at p.330-31(citation omitted). *See also, e.g., Batzel, supra*, 333 F.3d at p.1028 [“Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet.”].)

As Congress, the Fourth Circuit, and subsequent courts have all understood, interactive services faced with notice-based liability would have powerful incentives to remove third-party material on the slightest sign of a complaint from anyone in order to minimize the risk of a lawsuit—whether or not the complaint is legitimate. Indeed, imposing a

notice-based liability regime on interactive service providers might make it impossible for companies such as the Amici even to continue *offering* many of the rich array of services that they now provide. The sheer volume of third-party content carried by these services illustrates the challenge that online intermediaries represented by these Amici would face under such a regime:

- Amazon.com's site makes available millions of individual reviews posted by third-party users. These user reviews enable other purchasers to gather valuable feedback about the products offered for sale.
- AOL, the provider of the world's largest online service and the defendant held to be immune in many of the leading cases construing Section 230, disseminates an enormous range of third-party content, including message boards (at issue in *Zeran*), chat rooms (at issue in *Doe, Green and Noah*), and feature publications (at issue in *Blumenthal*). Users of AOL message boards alone post more than six-million new messages per month.
- eBay has over one-hundred-million registered members, and each day, more than 4 million new items for sale by third parties are added to eBay's auction website. eBay invites all buyers and sellers to rate and comment on their dealings with other users, and the comments and composite ratings are displayed in eBay's Feedback Forum (the venue of the content at issue in *Grace*). To date, eBay users have posted over 2.4 *billion* comments in the Feedback Forum. eBay also enables users to create their own home pages, known as About Me pages, on which they may display any content they choose concerning themselves or their eBay activities.
- Google's Web page search service, used by tens of millions of users every day, is based on an index of more than eight billion third-party Web pages. In addition, through its Google Groups service, Google offers users access to a vast archive of Usenet

postings, dating back to 1981, to which approximately three-million new posts are added every day.

- Microsoft's MSN division provides users with access to vast amounts of third-party content. For example, MSN Search, a Web-based service, offers an index of approximately one-billion documents from third-party content providers. MSN Groups—an online forum with Web sites addressing specific topics that are created and managed by users—disseminates several hundred-thousand new postings every day.
- Yahoo!, which has 274 million unique users a month and has 2.4 billion page views per day, hosts millions of personal Web sites; provides forums for all manner of organizations, large and small, through Yahoo! Groups; offers message boards covering more than 80,000 topics and including more than fifteen-million messages at any given time; and makes available numerous other types of third-party content, ranging from user reviews for shopping and travel services to listings on its Web search service.

As these examples illustrate, the “staggering” volume of third-party content available through interactive computer services makes it impossible for entities like these Amici to screen out all or even most tortious or unlawful content passing through their networks or to investigate the truth or even authenticity of the complaints they receive about this content. Congress correctly determined that, because a notice-based liability regime would create “potential liability for each message republished by their services,” *see Zeran, supra*, 129 F.3d at p.331, such a regime would severely chill online speech.

In particular, the lower court's standard would effectively create an online “heckler's veto” under which any individual “heckler” could cause content to be removed simply by lodging a complaint or otherwise

providing “notice” asserting that the content is somehow false or injurious. That veto often would be exercised on types of content that are especially valuable, ranging from whistleblowers’ disclosures about corporate accounting scandals to feedback about problems that buyers have encountered with an online seller. And this chilling effect—which is precisely what Congress enacted Section 230 to prevent —would occur without any oversight by courts that could take account of First Amendment concerns.

The court below nonetheless asserted that notice-based liability would not have much of a chilling impact at all. (Op.29-31.) Not only, as discussed below, was the court’s second-guessing of Congress’s policy balance wholly inappropriate (*see infra* at 49-53), but its conclusions make no sense. For example, the court speculated that “the excessive removal of Internet postings, or a type of postings, without any inquiry as to whether they are actually defamatory would not likely be tolerated in the market.” (Op.30.) It also hypothesized that the real cost to service providers of dealing with litigation based on third-party content would not be too great. According to the court, plaintiffs would have a difficult time prevailing because they would have to prove “that an alleged defamation is not an opinion or satire or mere hyperbole,” “knowledge and the requisite degree of fault,” “actual malice” in cases involving public officials and public figures, and “special damages” in certain cases. (Op.30-31.)

All of these speculations fall of their own weight. The very list of complex and nuanced factors on which defamation liability depends would make it practically impossible—and extremely costly—for a service provider to determine in response to a complaint whether a particular item of third-party content was tortious and therefore should be removed. Indeed, simply determining whether a statement was true or false often would require time-intensive fact-finding in which no service provider could reasonably engage. Even if only a miniscule percentage of online postings and other third-party content generated complaints, the number of such complaints nonetheless would quickly mount into the thousands for many service providers, which may host millions of user postings and other pieces of third-party content. Rather than invest resources in investigating such complaints, service providers would have virtually irresistible incentives automatically and immediately to remove all content subject to complaints so as to reduce risks of liability.

The lower court's suggestion that a service provider need not be concerned about the potential deluge of litigation because defamation plaintiffs face an uphill fight in court, and often obtain only relatively small awards when successful, Op.30-31, totally misses the point. Even leaving aside that there is always a risk that a party will lose in a particular litigation, the inevitable costs, attorneys' fees, time, and other company resources associated with litigating such cases, especially given the

potential for a huge number of such cases, would create overwhelming burdens for service providers.^{18/} Indeed, these same concerns about litigation burdens were a key motivation behind the enactment of the California anti-SLAPP statute that Rosenthal invoked here. A service provider that had a choice between responding to a complaint by removing a user's review of a book or an individual's feedback about a particular online seller on the one hand, or incurring the costs of investigating and then possibly litigating the complaint on the other, would almost certainly choose the former in most, if not virtually all, instances. But automatic removal of content upon receipt of any complaint—a practice that, as public awareness of it grew, would itself unleash a vicious circle of ever-increasing numbers of complaints from anyone who objected to someone else's message—would make these forums and services far less useful and gut the vibrancy of online discourse, in direct contravention of the statute's policy.

^{18/} For this reason, courts have recognized that Section 230(c)(1), like many analogous forms of immunity, protects service providers from not only the imposition of liability, but also the *burdens of litigation*. (See *Ben Ezra, Weinstein and Company v. America Online, Inc.* (D.N.M.1998) 26 Media L. Rep. 2211, 1998 WL 896459, *aff'd* (10th Cir. 2000) 206 F.3d 980.)

2. The Court Below Failed to Recognize that Notice-Based Liability for Online Intermediaries Would Discourage the Very Sorts of Self-Regulation that the Statute Was Designed to Promote.

The court below seemed to recognize that Congress intended Section 230 to eliminate disincentives that service providers would otherwise have to engage in voluntary self-regulation of third-party content, including measures to detect and remove content deemed unlawful or objectionable. But when the court concluded that “expansive” immunity would “completely defeat” this goal, Op.18, it completely mixed up the relationship between immunity from notice-based liability and the willingness of service providers to engage in voluntary self-regulation.^{19/}

Notice-based liability would *discourage* self-regulation, because service providers could be liable for anything a jury determines they *should have* uncovered—that is, “had reason to know” about—in the course of their efforts to police their service, even if they had overlooked and not removed the unlawful content. Under such a regime, service providers would have strong disincentives to conduct any self-policing whatsoever,

^{19/} The court below also erroneously suggested that the statute’s separate protection for voluntary “Good Samaritan” blocking (47 U.S.C. §230(c)(2)) becomes “mere surplusage” if subsection (c)(1) is construed broadly. (Op.23.) In fact, subsection (c)(2) serves the important but separate purpose of shielding online intermediaries from any liability for *removing* content. For example, Section 230(c)(2) prevents an *originator* of objectionable content from suing a service provider for blocking or removing that content. (See *Batzel, supra*, 333 F.3d at 1030 fn.14.)

because such activity would itself likely supply them with the kind of “notice” that would subject them to potential liability. (*See, e.g., Zeran, supra*, 129 F.3d at p.333 [notice-based liability would “reinforce[] service providers’ incentives to...abstain from self-regulation.”].) Congress designed Section 230 to remove exactly these sorts of disincentives, and to give service providers “a reasonable way to...help them self-regulate themselves without penalty of law.” (141 Cong.Rec. H8470 (daily ed. Aug. 4, 1995)(statement of Rep. Barton).)

The court below concluded that a regime permitting so-called distributor liability would impose liability only on those “who not only made no independent effort to identify and remove offensive material, but who failed or refused to remove it even when placed on notice of [its] injurious character.” (Op.24.)^{20/} According to the court, however, its approach would avoid “punish[ing] providers or users who tried to identify and remove offensive material but failed.” (*Ibid.*)

^{20/} The outer reach of the lower court’s unprecedented construction is murky. Although the court stated that “[d]istributor liability would not require a service provider to review communications in advance of posting them,” Op.31, it also suggested that intermediaries *are* “obliged to review messages from a particular source in advance of posting” if they have been “informed that a specified source is likely to communicate actionable messages,” Op.31 fn.15—a standard that would require service providers to predict whether particular users are “likely” to distribute tortious content and, if so, to prescreen those users’ content.

The court below got it backwards. In a notice-based liability regime, a service provider would be liable *only* if it was on “notice” of the allegedly harmful content—and the self-regulatory efforts that Congress wanted to encourage might very well generate the type of notice that would trigger liability. A company that “tried to identify and remove offensive material” by, for example, providing a mechanism to help users submit complaints, is much more likely to obtain “notice” of harmful material by virtue of those efforts. (*See, e.g., Zeran v. America Online, Inc.* (E.D. Va. 1997) 958 F.Supp. 1124, 1135 [“by eliminating the hot-line or indeed any means for subscribers to report objectionable material, an Internet provider effectively eliminates any actual knowledge of the defamatory nature of information provided by third parties”], *aff’d* (4th Cir. 1997) 129 F.3d 327.) On the other hand, a company that is a purely passive conduit and does not screen or monitor content and makes it difficult for users to report harmful content would have a much lower chance of receiving “notice” and therefore facing the risk of liability. (*See Zeran, supra*, 129 F.3d at p.333 (“Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability.”).) Thus, under a regime of notice-based liability, a service would *expose* itself to potential liability if it established a robust regulatory regime, while companies that

did no self-regulation at all would more likely escape liability. That is exactly the opposite of what Congress intended.

The court below also suggested that, as a practical matter, the settled construction of Section 230 actually frustrates Congress's goal of self-regulation. Quoting yet another law review article, it asserted that "[c]ommon sense dictates that an ISP will not waste its time and money monitoring content over the Internet when it will suffer no repercussions from failing to do so." (Op.28.) But this has no basis in fact. To the contrary, after years of adapting to the broad immunity regime uniformly recognized by all courts but the court below, many of the most successful and popular service providers today voluntarily engage in robust screening and monitoring of content, *secure in the knowledge* that those actions will not subject them to liability. Indeed, nearly all of the service providers represented by these Amici have adopted and enforce robust Terms of Service delimiting appropriate bounds of user behavior, and many have implemented procedures to enforce those terms. Further, many of them employ a variety of self-regulatory mechanisms through which they can detect and eliminate objectionable content. To name just a few examples:

- Amazon.com provides users with mechanisms for reporting complaints about content, including a link below each user-provided review allowing any viewer to report the review as "inappropriate." It has automated and manual processes to review complaints and removes third-party content that fall outside its guidelines.

- AOL's Terms of Service include detailed Community Guidelines setting rules and standards for member-supplied content. AOL also has a "Community Action Team" that responds to complaints, monitors message boards and chat rooms, and has authority to enforce the Terms of Service and Community Guidelines. AOL receives approximately 15,000 to 20,000 complaints per week just about postings on its regular message boards.
- eBay offers users a simple Web form that they can use to complain about all manner of third-party content on the eBay service, including inappropriate Feedback, listing violations, and problems with other sellers and buyers (including potential fraud).
- Google maintains numerous Web pages and e-mail addresses (such as groups-abuse@google.com) through which users can submit complaints and other comments concerning third-party content available through its services.
- Microsoft's MSN division offers its users online mechanisms for reporting complaints about content and employs teams to review and respond to those complaints. Microsoft personnel review approximately 10,000 complaints per month in connection with its MSN Search service and thousands of complaints per month in connection with its MSN Groups service.
- Yahoo! offers easy access to its "customer care" page for reporting inappropriate content on the Yahoo! service, a kid-friendly service through Yahoooligans, and special programs to screen specific types of content, such as certification requirements for online pharmacies that want to participate in Sponsored Search.

These and many other kinds of self-regulatory mechanisms that interactive service providers use today starkly demonstrate the naiveté of the lower court's self-labeled "common sense" conclusion that immunity from notice-based liability inevitably drives service providers to eschew self-regulation. Each of these online intermediaries engages in the kind of

self-policing that Congress wanted to encourage, and Section 230—as broadly construed to date—is therefore having its intended effect. Because each of these measures could generate the kind of “notice” that could create the basis for liability under the new regime advocated by the court below, however, adoption of that regime would *discourage* these and other self-regulatory mechanisms in contravention of the statute’s clear policy.

B. Congress Has Explicitly Endorsed the Broad Construction of Section 230(c)(1) Uniformly Adopted by All Other Courts.

If there were any doubt that every other court had correctly discerned Congress’s intent, Congress has erased it. Congress has had over seven years to amend §230(c) since *Zeran* was decided, but has not done so, even though during this same period it amended a different part of the statute. (See Pub.L.No.105-277, Title XIV, §1404(a)(2), (3) (adding new §230(d)).) If, as the court below assumed, all of the prior cases interpreting Section 230 were fundamentally wrong, Congress easily could have corrected the error.

Instead, Congress has *explicitly* expressed its agreement with the interpretation of Section 230 by *Zeran* and its progeny. In 2002, Congress passed the “Dot Kids Implementation and Efficiency Act,” establishing a second-level domain—.kids.us—for “kid-friendly” Web sites. (See 47 U.S.C.A. §941.) In so doing, Congress specifically extended the protections of Section 230 to cover certain entities that would operate in the

new domain, knowing full well how those provisions had been applied by the courts. (*Id.* §941(e)(1).) The definitive committee report accompanying the new statute could not have been more clear and direct in embracing the uniform precedents:

The courts have *correctly interpreted section 230(c)*, which was aimed at protecting against liability for such claims as negligence (See, e.g., *Doe v. America Online*, 783 So.2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 980 (2000); *Zeran v. America Online*, 129 F.3d 327 (1997)). The Committee *intends these interpretations of section 230(c) to be equally applicable* to those entities covered by H.R. 3833.

(H.Rep.No. 107-449, at 13 (emphasis added).)

The lower court's opinion, which inexplicably failed even to mention this subsequent legislative history, collides head-on with this express congressional endorsement. While subsequent legislative history sometimes may not be a reliable indicator of Congress's intent, the Committee report here was not mere commentary about a prior statute; rather, it is the explication of a new statute that extended the coverage of Section 230 to a new group of entities. And one of the members of the committee that issued the report was Representative Cox—one of the principal authors of Section 230. It would be senseless, and contrary to the will of Congress, to interpret the same statutory language in Section 230 to prohibit notice-based liability for purposes of the entities covered by the

new legislation, but to permit such liability for all others to whom Section 230 applies.

C. The Court Below Erroneously Second-Guessed the Policy Balance that Congress Struck.

In addition to directly disserving the principal objectives of the statute, the lower court's unprecedented construction of Section 230 was erroneously based, in large measure, on the court's own free-form reweighing of what it perceived to be the competing policies implicated by Section 230. It is, of course, *Congress*, and not the courts, that is entitled to weigh the competing policy objectives, and then strike whatever balance it sees fit, based on whatever facts and considerations it deems pertinent when it enacts a statute. That some law review commentators might disagree with Congress's policy choice is not a license for a court to revisit and undo the policy balance reflected in the statute. Judicial reassessment of whether a particular construction of a statute best serves the legislature's policy goals or is good public policy in a broader sense is particularly inappropriate when, as here, the meaning of the statute is plain and unambiguous.

The lower court's willingness to look far beyond the language of the statute and its legislative history, and its stated desire for a more developed *factual* "record" to help it answer questions about the varying impacts of alternate constructions of the statute, Op.34, appear to reflect a basic

misapprehension of the appropriate role of courts in construing Congressional enactments. For example, the court below repeatedly dove headlong into the “ongoing debate” among academics about whether broad immunity from liability for third-party communications represents optimal public policy for cyberspace. Although the court professed to “take no position” on this issue, in fact, it appeared to rely on the existence of competing views of scholars about questions of policy as a basis for construing the statute narrowly. (*E.g.*, Op.33-34.)

Even more troubling, the court below also repeatedly expressed a reluctance to embrace the broader reading of Section 230(c)(1)—the reading uniformly accepted by all other courts *as a matter of law*—without a full evidentiary record about the varying effects that alternative constructions would have in the real world.^{21/} At one point, the court went so far as to state that “[r]esolution of this controversy requires information this court (which, like the *Zeran* court, is asked to review a pretrial ruling) does not now possess” concerning the burdens associated with notice-based liability; at another, it expressed an unwillingness “to lurch prematurely

^{21/} See, e.g., Op.29 (complaining that “[n]either the record before us nor any other information brought to our attention provides an answer to [the] question” of “whether notice liability would actually have an undue chilling effect on cyberspeech”); Op.34 (suggesting it could not resolve policy debate without a better understanding of “the state of Internet technology, a matter never addressed by the parties in this case or by the trial court”).

into emerging issues, given a record that does not at all lend itself to their determination.” (Op.34.)

But the court’s role is not to develop a *post hoc* legislative record and determine the appropriate policy. It is the policy choice that *Congress* itself made eight years ago that determined the scope and meaning of Section 230(c)(1).^{22/} To be sure, if there is ambiguity in a statute (which there is not here), considerations of which interpretation most coincides with the legislature’s policy objectives may be appropriate. But in no case may a court either second-guess that legislative judgment by counting the noses of academics or other policy experts or attempt to reformulate that judgment through a trial or other evidentiary proceeding. Nor may a court decline to enforce a statute to its full extent because, as seems to have occurred here, the court feared that doing so might be too “bold,” “dangerous,” and “premature” in light of the rapidly changing state of Internet technology. (Op.34 [quoting law review articles].) Once Congress has enacted a statute and chosen a policy, the role of the court is simply to determine what Congress itself intended.^{23/}

^{22/} See *Eldred v. Ashcroft* (2003) 537 U.S. 186, 222 (“[P]etitioners forcefully urge that Congress pursued very bad policy in prescribing the [federal statute’s] long terms. The wisdom of Congress’ action, however, is not within our province to second guess.”).

^{23/} Congress knows full well how to draft a statute that preserves notice-based liability for service providers—it did just that for copyright

The court below further erred by according substantial weight, in its own free-ranging balancing of relevant policy considerations, to the generalized interest in protecting individuals' reputations that is served by State defamation laws.^{24/} The court suggested that these interests are of a "constitutional" dimension and criticized *Zeran* for "barely allud[ing]" to them. (Op.21.) Once again, however, it was entirely within Congress's prerogative to rank the federal policy objectives it sought to advance—namely the promotion of free speech on the Internet and the removal of

infringement claims in the Digital Millennium Copyright Act ("DMCA"). (See 17 U.S.C. §512.) Ironically, the opinion below suggested that the DMCA's safe harbors show that when Congress grants an immunity, it does so with "particularity as to the conditions and limits of the immunity it creates." (See Op.23 fn.11.) But the need to spell out "conditions and limits"—reflected in the DMCA's elaborate set of requirements governing the take-down and putting-back of third-party content (e.g., a statement "signed under penalty of perjury" that the notice is accurate and the complainant is the copyright owner or his agent)—arises from the very fact that the DMCA's safe-harbors are qualified and conditional. Where, as with §230(c)(1), the immunity is simple and absolute, no such need exists.

^{24/} Contrary to the lower court's suggestion, Congress did not eliminate all legal recourse for victims of online defamation. In particular, they may still pursue claims against the originator of the defamatory content. (See *Zeran*, 129 F.3d at p.330 ["None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability."].) In fact, both here and in *Grace*, the originators of the content were themselves named as defendants. Furthermore, many service providers voluntarily remove content that is adjudicated to be tortious or otherwise unlawful. And one of the unique characteristics of interactive computer services is the ability to respond virtually instantaneously, often in the same forum, to speech with which one disagrees—a remedy that often is far more effective, and less expensive, than achieving a litigation verdict years after the fact.

disincentives for service providers to self-regulate their content—as superior to State interests in ensuring that victims of online defamation may sue not only the “culprits” who inject defamatory content into cyberspace, but online intermediaries as well.^{25/}

III. THE LIMITATIONS ON SECTION 230(C)(1) IMMUNITY DERIVE FROM THE STATUTE’S EXPRESS TERMS, AND ARE NOT FOUND IN EITHER A NARROW DEFINITION OF “USER” OR A DISTINCTION BETWEEN “ACTIVE” AND “PASSIVE” INTERMEDIARIES.

This Court requested briefing on two additional questions: (1) what is meant by the term “user” in Section 230, and (2) whether the protection of Section 230 depends on whether the intermediary took an “active or passive” role with respect to the content.

In answer to the first question, the term “user” should be interpreted in accordance with its plain, everyday meaning. By its terms, Section 230(c)(1) applies equally to “providers or users” of interactive computer services, and nothing in the statute suggests any reason not to give “user” its ordinary, plain language meaning, so as to encompass all persons or entities who “use”—that is, employ or otherwise avail themselves of—interactive computer services. (*See, e.g., Webster’s Third New*

^{25/} *See, e.g., Pilot Life Ins. v. Dedeaux* (1987) 481 U.S. 41, 54 (recognizing prerogative of Congress to further federal policies by preempting pre-existing state law); *Jones v. Rath Packing Co.* (1977) 430 U.S. 519 (same).

International Dictionary (2002) [defining “user” as “[o]ne that uses”].) Indeed, Section 230 repeatedly employs the term “user” consistently with this ordinary meaning to refer to anyone who accesses an interactive service provider’s computers and receives information through the service. (See 47 U.S.C. §230(a)(2) [interactive computer services offer “users a great degree of control over the information that they receive”]; *id.* §230(b)(3) [Section 230 was designed “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”]; *id.* §230(f)(2) [defining “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple *users* to a computer server”](emphasis added in each quotation).)

In answer to the Court’s second question, the availability of immunity does not turn on whether the conduct of the online intermediary was “passive or active,” terms that do not appear anywhere in the statute. To the contrary, as set forth above, the statute was designed to give online intermediaries breathing-room to be active in self-regulating the third-party content they make available, by, for example, monitoring and screening

content they deem objectionable,^{26/} establishing systems for viewers to report inappropriate postings,^{27/} or engaging in other duties of a traditional publisher.^{28/}

That is not to say, of course, that Section 230(c)(1) immunity automatically protects every user or provider of an interactive computer service regardless of what role it plays with respect to the content at issue. In particular, because the statute shields online intermediaries only with respect to content provided by “*another* information content provider,” courts have held that an intermediary is not immune if it was an “information content provider” of the particular content in question.^{29/} The statute defines “information content provider” as “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)(emphasis added).) Thus, if an online intermediary itself is responsible for the “creation or development” of

^{26/} See *BEW, supra*, 206 F.3d at p.986 [“By deleting the allegedly inaccurate stock quotation information, [AOL] was simply engaging in the editorial functions Congress sought to protect.”].

^{27/} See *Zeran, supra*, 129 F.3d at p.329.

^{28/} See, e.g., *Green, supra*, 318 F.3d at p.471; *Schneider, supra*, 31 P.3d at p.41.

^{29/} See *Carafano, supra*, 339 F.3d at p.1123; *BEW, supra*, 206 F.3d at p.985 fn.4; *Blumenthal, supra*, 992 F.Supp. at p.50.

content, the content loses its third-party status, and the intermediary loses its eligibility for Section 230(c)(1) immunity with respect to that particular content. For this reason, the court below missed the point when it posited that, under *Zeran*, a “clever libeler” could escape liability by conspiring with another user outside the jurisdiction of the court to have that user prepare intentionally libelous material that the “clever libeler” could then disseminate with impunity. (Op.13.) Under these hypothetical facts, the “clever libeler” would likely be deemed “responsible,” at least “in part,” for the “creation or development” of the intentionally libelous material and therefore, under existing case law, be ineligible for immunity.

A divided panel of the Ninth Circuit recently inferred that the statutory language imposes a further limitation on Section 230(c)(1) immunity, derived from the word “provided” as used in the phrase, “information *provided* by another information content provider.” In *Batzel*, *supra*, a case bearing some resemblance to this case, the court concluded that immunity applies only where the content was “provided” under circumstances in which a reasonable person in the position of the online intermediary would conclude that the information was provided for publication through an interactive computer service. (333 F.3d at p.1034.) Although the court below acknowledged that the Ninth Circuit had inferred this limitation, Op.4 fn.4, it refused to address the issue in favor of its

broad-gauged attack on the entire pre-existing body of precedent construing Section 230.

By focusing on whether an online intermediary reasonably believed that the content at issue was meant by someone else to be made available online, rather than whether there is some special definition of the term “user” or some form of different treatment for “active” or “passive” conduct, *Batzel*’s analysis is more consistent with the language and core objectives of Section 230.^{30/} Such an interpretation protects those who disseminate third-party content—whether large providers with millions of user postings or individual users who moderate online bulletin boards—so that these intermediaries will not be motivated by fear of liability to

^{30/} Although Amici believe that the *Batzel* majority’s gloss on the term “provided” is closer to correct than the unworkable and untethered alternatives suggested by Plaintiffs or the *Batzel* dissent, that gloss may still not be fully consistent with the statute. That gloss might have unfortunate and unwarranted consequences that would be in tension with Section 230’s policies. For example, it could create disincentives for service providers to make huge store-houses of old, pre-Internet era literature and writings available and easily searchable online, exactly the kind of valuable service Congress recognized that online media make possible.

automatically suppress all third-party speech that generates a complaint or other concern or to forego and curtail all forms of active self-regulation.^{31/}

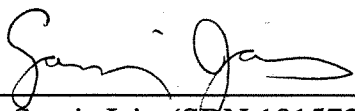
^{31/} Amici take no position as to whether either the definition of “information content provider” or the *Batzel* court’s interpretation of “provided” would preclude Rosenthal from claiming immunity on the particular facts of this case. Because neither the Court of Appeal nor the Superior Court addressed these issues, this Court could, after reversal of the Court of Appeal’s erroneous interpretation of Section 230, remand for further factual development relating to these subsidiary issues.

CONCLUSION

The Court of Appeal fundamentally erred when it held—in direct conflict with the plain meaning of Section 230(c)(1), all prior case law under the statute, and the manifest intent of Congress both before and since the statute’s enactment—that the prohibition against treating online intermediaries as “the publishers or speakers” of third-party content does not protect intermediaries who somehow “knew or should have known” about the nature of the content. Amici therefore respectfully submit that the decision of the Court of Appeal regarding the scope of Section 230(c)(1) should be reversed so that the courts of California may return to interpreting Section 230(c)(1) in harmony with the well-reasoned and uniform decisions of federal and state courts throughout the Nation.

Respectfully submitted,

WILMER CUTLER PICKERING
HALE AND DORR LLP
Patrick J. Carome
Samir Jain (SBN 181572)
C. Colin Rushing
2445 M Street NW
Washington, DC 20037

BY: 
Samir Jain (SBN 181572)

Attorneys for Amici Curiae

Of Counsel

David A. Zapolsky
Vice President & Associate General
Counsel
Amazon.com, Inc.
1200 12 Avenue S.
Suite 1200
Seattle, WA 98144

Charles E. Graf
Assistant General Counsel
America Online, Inc.
22000 AOL Way
Dulles, VA 20166

Jay Monahan
Vice President & Deputy General
Counsel
Litigation & Intellectual Property
eBay Inc.
2145 Hamilton Avenue
San Jose, CA 95125

Michael J. Richter
Senior Counsel
eBay Inc.
2145 Hamilton Avenue
San Jose, CA 95125

Michael S. Kwun
Litigation Counsel
Google Inc.
1600 Amphitheatre Parkway
Mountain View, CA 94043

Timothy G. Fielden
Senior Attorney
Law and Corporate Affairs
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Elizabeth Banker
Associate General Counsel -
Compliance
Yahoo! Inc.
2000 Pennsylvania Avenue, NW
Suite 4200
Washington, DC 20006

Henry S. Hoberman
Senior Vice President, Counsel,
Litigation & Employment
ABC, Inc.
77 W. 66th Street
New York, NY 10023

John W. Zucker
Senior Vice President, Law &
Regulation
ABC, Inc.
77 West 66 St.
New York, New York 10023

Dan Caul
Associate General Counsel
Ask Jeeves, Inc.
5858 Horton Street, Suite 350
Emeryville, CA 94608

David Vigilante
Vice President and General Counsel
Cable News Network LP, LLLP
1 CNN Center
Atlanta, GA 30303

David N. Baker
Vice President, Law and Public Policy
Earthlink, Inc.
1375 Peachtree Street, NW
Atlanta, GA 30309

Of Counsel (continued)

Michael Standard
Senior Counsel
SBC Internet Services
1010 N. St. Mary's Street
Room 14K
San Antonio, TX 78215

Jeff Zimmerman
Vice President and Chief Counsel,
Litigation
Time Warner Cable
290 Harbor Drive
Stamford, CT 06902

Clifford M. Sloan
Vice President, Business Development &
General Counsel
Washingtonpost.Newsweek Interactive
Company, LLC
1515 North Courthouse Road
Arlington, VA 22201

Thomas W. Newton
General Counsel
California Newspaper
Publishers Association
1225 8th Street, Suite 260
Sacramento, CA 95814-4879

James W. Ewert
Legal Counsel
California Newspaper
Publishers Association
1225 8th Street, Suite 260
Sacramento, CA 95814-4879

Mark Uncapher
Senior Vice President & Counsel
Internet Commerce & Communications
Division
The Information Technology Association
of America
1401 Wilson Boulevard, #1100
Arlington, VA 22209

James J. Halpert
Piper Rudnick LLP
1200 19th Street, NW
Washington, DC 20036
(Counsel for Internet Alliance and
Internet Commerce Coalition)

Daniel L. Brenner
Senior Vice President for Law &
Regulatory Policy
National Cable & Telecommunications
Association
1724 Massachusetts Avenue, NW
Washington, DC 20036

Markham C. Erickson
General Counsel
NetCoalition
400 North Capitol Street, NW
Suite 585
Washington, DC 20001

René P. Milam
Vice President and General Counsel
Newspaper Association of America
1921 Gallows Road, Suite 600
Vienna, VA 22182-3995

Of Counsel (continued)

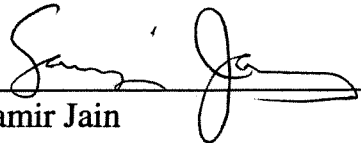
Jonathan Hart
Dow Lohnes & Albertson, PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, DC 20036-6802
(Counsel for Online News Association)

Jim Hawley
California Director and General Counsel
TechNet
2600 East Bayshore Road
Palo Alto, California 94303

Stewart Baker
General Counsel
US Internet Service Provider Association
1330 Connecticut Ave., NW
Washington, DC 20036

CERTIFICATE OF WORD COUNT

In compliance with Rule 29.1(c)(1) of the California Rules of Court,
I, Samir Jain, certify that the foregoing brief consists of 13,987 words as
reported by Microsoft Word, the word processing program used to prepare
the brief.



Samir Jain

PROOF OF SERVICE

In the California Supreme Court
(No. S122953)

I am a citizen of the United States and a resident of the Commonwealth of Virginia. I am employed in Washington, D.C., 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 Wilmer Cutler Pickering Hale and Dorr LLP, 2445 M Street, Washington, D.C., 20037. On November 23, 2004, I am serving the attached **Brief of Amici Curiae** on the parties, the Court of Appeal, and the Superior Court by causing copies thereof to be delivered this day to a representative of FedEx, in sealed delivery packages designated by FedEx, with fees provided for, and addressed as follows:

Roger Myers
Piper Rudnick, LLP
333 Market Street,
32nd Floor
San Francisco, CA 94105

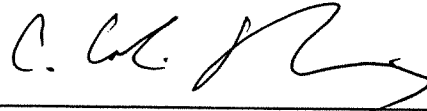
Mark Goldowitz
California Anti-Slapp Project
2903 Sacramento Street
Berkeley, CA 94702
Attorneys for
Defendant-Respondent
Ilena Rosenthal

Christopher E. Grell
Law Offices of
Christopher E. Grell
360 22nd Street, Suite 320
Oakland, CA 94612
Attorney for Plaintiffs-Appellants

Clerk of the Court
Court of Appeal, First District
350 McAllister Street
San Francisco, CA 94102-3600

Clerk of the Court
Alameda County Superior Court
201 13th Street
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 23, 2004, at Washington, D.C.

A handwritten signature in black ink, appearing to read "C. Colin Rushing", written over a horizontal line.

C. Colin Rushing