

August 28, 2014

Chief Justice Tani Gorre Cantil-Sakauye  
The Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

Re: Support for Petition for Review, PDX v. Hardin, 1st Civ. No. A137035

Dear Chief Justice Cantil-Sakauye,

Pursuant to California Rule of Court Rule 8.500(g) (2014), we submit this letter to support the petition for review in PDX, Inc. v. Hardin, No. A137035. The appellate court's ruling raises important issues about 47 U.S.C. § 230 (Section 230), a key statutory foundation for the Internet industry.

### Statement of Interest

The signatories (listed at the end of this letter) are Internet Law professors. We have no financial interest in this dispute or the litigants. Collectively, we have over 45 years of experience teaching Internet Law. We have seen first-hand how Section 230 has fostered the Internet's development, and we are interested in preserving these benefits. We support the petition for review because the appellate court ruling will encourage costly but meritless challenges to Section 230 or, even worse, override Congress' objectives in establishing the immunity.

### Rationale for Supporting the Petition for Review

*Section 230's Importance.* Section 230 immunizes websites and other online services for republishing third party content. As this court explained in *Barrett v. Rosenthal*, 40 Cal.4th 33, 53 (2006), Congress intended to

broadly shield[] all providers from liability for "publishing" information received from third parties....It chose to protect even the most active Internet publishers, those who take an aggressive role in republishing third party content.

Congress enacted Section 230 more than 15 years ago in part to "promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). As *Barrett* explained, "[t]he provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are themselves a strong demonstration of legislative commitment to the value of maintaining a free market for online expression." *Barrett*, 40 Cal.4th at 56.

Just as Congress hoped, Section 230 has provided a key legal foundation for the modern Internet. All of the top dozen websites in the United States, as measured by Alexa,<sup>1</sup> republish third party content as a primary or substantial line of business. Of those, ten are headquartered in California, which means legal questions about content republication are especially important to California's economy. Collectively, these websites and many others facilitate the global publication of many billions of content items, including some content—such as consumer reviews—that never existed in the offline world. Section 230 facilitates these activities by creating certainty about the (lack of) legal risks for republishing third party content, which helps those websites cheaply handle huge volumes of content.

*The Appellate Court Ruling.* Although PDX isn't a traditional "user-generated" content website, it functions in an indistinguishable manner. PDX electronically received the monographs from a third party (WKH) and electronically delivered the monographs to another party (Safeway's pharmacies). PDX didn't add content of its own. By republishing third party content without adding any content, PDX performed the same technological functions as Google's search engine, Yelp's consumer reviews, or the moderator of an email list (the technology at issue in the *Barrett* case).

Based on its republication of third party content, PDX clearly establishes a prima facie Section 230 defense. Nevertheless, the appellate court rejected Section 230 because PDX "intentionally modified its software to allow Safeway to distribute abbreviated drug monographs that automatically omitted warnings of serious risks." There are at least two significant problems with this conclusion.

First, Section 230 protects PDX's editorial decisions. As the Fourth Circuit said in *Zeran v. America Online, Inc.*, 129 F.3d 327, 331-33 (4th Cir. 1997), "230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions....[including] deciding whether to publish, withdraw, postpone or alter content." PDX's decisions about how to publish third party content are editorial decisions and thus qualify for Section 230's immunity. The appellate court's contrary ruling raises doubts about Section 230's scope.

Second, the appellate court's ruling focuses on PDX's software coding choices. However, every website republishing third party content necessarily makes choices about how its software will display that content. Sometimes, it makes sense to truncate or redact third party content.

For example, Google's search engine displays only a small "snippet" of indexed websites in its search results. By providing a brief preview of each indexed website, Google makes it easier for users to scan the search results. Similarly, the travel review website TripAdvisor only shows the first 60 words of each consumer's review; interested readers who want to see a longer review must select a "more" link. The truncated display keeps an overly long review from dominating readers' screens and helps readers evaluate several reviews at a glance. In both cases, the online service intentionally codes its software to display redacted versions; and these truncation

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<sup>1</sup> The sites are (in order) Google.com, Facebook.com, YouTube.com, Yahoo.com, Amazon.com, Wikipedia.org, LinkedIn.com, eBay.com, Twitter.com, Craigslist.org, Bing.com and Pinterest.com. See Top Sites in United States, Alexa.com, <http://www.alexa.com/topsites/countries/US> (visited April 9, 2014).

decisions inevitably result in the omission of important information contained in the full version of the indexed website or consumer review.

Several cases have held that Section 230 immunizes a website's redacted display of third party content. *See, e.g.*, *O'Kroy v. Fastcase Inc.*, 2014 WL 2197029 (M.D. Tenn. 2014); *Maughan v. Google Technology, Inc.*, 143 Cal. App. 4th 1242 (Cal. App. Ct. 2006). The appellate court's ruling may conflict with these rulings.<sup>2</sup> Because every republisher intentionally makes choices about how to display third party content, plaintiffs *always* can claim that they are suing a defendant for those software coding choices, even if the plaintiff's real target is third party content. Litigating this plead-around substantially increases an immunized website's defense costs, and that alone undermines one of Section 230's primary benefits. *See Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) ("section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles"). Even more problematically, if tortious software coding becomes a judicially accepted way to hold websites liable for third party content, Section 230's immunity will fail despite Congress' clear intent.

Thus, we ask the court to grant the petition for review to reexamine the implications of the appellate court's ruling on Section 230's immunity. We appreciate your consideration of this letter.

Sincerely,



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<sup>2</sup> This conflict will encourage plaintiffs to forum-shop, something the *Barrett* court expressly sought to avoid. *Barrett v. Rosenthal*, 40 Cal.4th 33, 58 (2006).

## **Signatories**

(affiliations are for identification purposes only)

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