No. S122953

IN THE
Supreme Court of the State of California

STEPHEN J. BARRETT M.D., ET AL,
Plaintiffs and Appellants,

v.

ILENA ROSENTHAL,
Defendant and Respondent.

After Decision by the California Court of Appeal, First District, Div. Two
[No. A096451]

BRIEF OF *AMICI CURIAE*

ELECTRONIC FRONTIER FOUNDATION
AND
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA
IN SUPPORT OF DEFENDANT-RESPONDENT ILENA ROSENTHAL

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INTRODUCTION

The Internet is one of the most diverse forums for individual communication ever invented. Persons with unusual or unpopular ideas can find online communities of like-minded individuals. Consumers can research products or services they want to buy or use, and find information about other consumers' actual experiences. The Internet hosts information on a vast array of subjects, from politics to health to financial matters to the ordinary issues of day-to-day life, and allows people to pass on that information to others who share their interests, regardless of their geographic location.

Section 230 of the Communications Decency Act, 47 U.S.C. § 230, has been critical to protecting and expanding this forum, facilitating the exchange of opinions and ideas within these diverse online communities by encouraging both large and small intermediaries to open forums for discussion, free from fear of liability for what someone else says. Congress wrote Section 230 expansively, covering individual intermediaries – the users of online forums. Under the cloak of federal immunity, such individuals are protected from being held liable for exchanging others' articles or observations as part of the dialog carried on through newsgroups, weblogs, listservs, or through the simple action of forwarding an interesting message to a group of friends.

Plaintiff-Respondent Terry Polevoy seeks to reverse this rule and exclude those individual intermediaries who pass on third party information over the Internet. To adopt his argument, however, would be to read the term "user" out of the statute and thus deprive a significant set of Internet intermediaries of the protection that Congress intended to provide.

Both the Electronic Frontier Foundation ("EFF") and the American Civil Liberties Union of Northern California ("ACLU-NC") are deeply

concerned about Polevoy's argument and its ramifications for individual users. Amici frequently provide information to Internet users about the legal implications of their intended behavior. In this capacity, both amici hear from users who are concerned about potential liability and find reassurance in Section 230.

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

Similarly, the ACLU-NC relied on Section 230 in defending the creator of a website that gave students at a community college an opportunity to evaluate their professors. The webmaster was sued for defamation by two professors who claimed that some of the student comments about them were defamatory. *Curzon Brown v. San Francisco Community College District*, San Francisco Superior Ct., Case No. 307335. The ACLU-NC believes that the arguments it made under Section 230 were instrumental in causing the plaintiffs to ultimately dismiss their suit.

Section 230 is similarly important to participants in newsgroups, weblogs, listservs, and bulletin boards, as well as users of email, who not only use these forums to express their own views (for which liability will still attach) but to make available or discuss the views of others. Accordingly, amici respectfully urge this Court to reverse the decision of the Court of Appeal.

SUMMARY OF ARGUMENT

Federal law 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.

47 U.S.C. §230(c)(1), and 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.

id. § 230(e)(3)).[1]

As California and other courts have held, Section 230 "immunizes providers of interactive computer services . . . and their users from causes of action asserted by persons alleging harm caused by content provided by a third party." *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 830 (2002); *Kathleen R. v. City of Livermore*, 87 Cal.App.4th 684, 692 (2001) (city immune under § 230 from liability for public library's providing computers allowing access to pornography); *see also Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) ("[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service").

The relevant statutory text expressly grants providers and users the same immunity on the same terms. 47 U.S.C. § 230(c)(1) ("[n]o provider or user . . . ."); *see also Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 2812 (2004) (the "language of § 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services."). This parity of treatment is also reflected in the statute's second immunity provision, subsection 230(c)(2), which uses the

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[1]The statute contains important exceptions that are not at issue in this case. See, e.g., 47 U.S.C. § 230(e)(1) (excepting federal criminal liability); § 230(e)(2) (scope of intellectual property laws remain unchanged).

same phrasing of "[n]o provider or user. . . ." Basic principles of statutory construction require that the word "user" be given effect, and plaintiff Polevoy's claim that the statute does not apply to users such as Rosenthal can be disposed of on this point alone.

The text of Section 230 also makes clear that Congress created this immunity in order to limit the impact on the Internet of federal or state regulation imposed either through statute or through the application of common law causes of action. 47 U.S.C. § 230(a)(4) (the Internet and other interactive computer services "have flourished, to the benefit of all Americans, with a minimum of government regulation"; *id*. § 230(b)(2) ("[i]t is the policy of the United States" to minimize Internet regulation).

This policy of regulatory forbearance clearly applies to the imposition of defamation liability for the communications of others. As the U.S. Court of Appeals for the Fourth Circuit found in the seminal case interpreting Section 230, such liability was, "for Congress, simply another form of intrusive government regulation of speech." *Zeran*, 129 F.3d at 330 ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."). Congress thus recognized in Section 230 what the U.S. Supreme Court later confirmed in extending the highest level of First Amendment protection to the Internet: "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

Thus, California courts and courts across the country have upheld Section 230 immunity and its policy of regulatory forbearance in a variety of factual contexts. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (website operator immune for distributing email sent to listserv); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (Internet dating service provider was entitled to Section 230 immunity from liability

stemming from third party's submission of false profile); *Gentry*, 99 Cal.App.4th at 830 (eBay is entitled to immunity); *Kathleen R.*, 87 Cal.App.4th at 692 (library not liable for providing access); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 39 (Wash.Ct.App. 2001) (online bookseller providing forum for others to submit book reviews is "interactive computer service" provider ("ICS provider"));[2] *Doe v. America Online*, 783 So.2d 1010, 1013-1017 (Fl. 2001), *cert. denied*, 122 S.Ct. 208 (2000) (§ 230 immunizes America Online ("AOL") for negligence); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 984-985 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000) (no liability for posting of incorrect stock information); *Marczeski v. Law*, 122 F.Supp.2d 315, 327 (D. Conn. 2000) (individual who created private "chat room" was ICS provider entitled to immunity); *Blumenthal v. Drudge*, 982 F. Supp. 44, 49-53 (D.D.C. 1998) (AOL has Section 230 immunity from liability for content of independent contractor's news reports, despite agreement with contractor allowing AOL to modify or remove such content).

Given this backdrop, there can be no doubt that Section 230 protects Rosenthal against respondents' claims as to her reposting of the Bolen article.

ARGUMENT

I. Under Federal Law, Rosenthal is Immune from Civil Liability for Republishing Tim Bolen's Article.

In adopting Section 230, Congress sought to effect a number of different, but interrelated policies. Most important in the context of this appeal, Congress believed that minimizing government regulation of the

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[2]An ICS provider is defined as "any information service, system, or access system provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2).

Internet would "maintain the robust nature of Internet communication." *Zeran*, 129 F.3d at 330; *see* 47 U.S.C. § 230(a)(1) ("rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens"); *id*., (a)(3) ("Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity"); *id*., (a)(4) ("Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation"); *id*., (b)(2) ("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*.,(b)(3) ("encourage the development of technologies which maximize user control over what information is received").

Accordingly, in creating the immunity of Section 230(c)(1), 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." *Zeran*, 129 F.3d at 330-31. California and other courts have endorsed this reasoning. *Gentry*, 99 Cal.App.4th at 828-831 (following *Zeran* and other § 230 decisions); *Kathleen R.*, 87 Cal.App.4th at 698 (approving *Zeran*).

At the same time, Congress made a complementary policy choice to immunize from liability both providers *and users* who choose to exercise editorial discretion over information provided by another. 47 U.S.C. § 230(c)(2)(A) ("No provider or *user* . . . .") (emphasis added); *See also Schneider*, 31 P.3d at 41 ("Congress intended to encourage self-regulation, and immunity is the form of that encouragement.").

A. Rosenthal qualifies for Section 230 immunity.

Immunity under Section 230 requires that: "(1) the defendant be a provider or user of an interactive computer service; (2) the cause of action treat the defendant as a publisher or speaker of information; and (3) the information at issue be provided by another information content provider." *Gentry*, 99 Cal.App.4th at 830.

It is not disputed that the Internet newsgroups to which Rosenthal posted Bolen's article are "interactive computer services," *accord*, *Marczeski*, 122 F. Supp.2d at 327 (individual who created private "chat room" was ICS provider), and there is no serious dispute that Rosenthal acted as a "user" of interactive computer services. *Barrett v. Rosenthal*, 114 Cal.App.4th 1379, 1391 (2002) (the "parties agree Rosenthal acted as the 'user of an interactive computer service'"); *see also* 47 U.S.C. § 230(c)(2); *Batzel* 333 F.3d at 1031 (defendant was ICS user because it "uses interactive computer services to distribute its on-line mailing and to post the listserv on its website"); *Optinrealbig.com, LLC v. Ironport Systems, Inc.*, 323 F.Supp.2d 1037 (N.D.Cal. 2004) (defendant protected where it "uses interactive computer services to distribute its on-line mailing and to post the reports on its website"); *Barrett v. Fonorow*, 799 N.E.2d 916, 923-24 (Ill. App. 2003) (poster of Bolen's messages was ICS "provider or user").

There can also be no dispute that plaintiffs' defamation claims treat Rosenthal as a publisher or speaker of information. The growing body of Section 230 case law and the statute's legislative history clearly show that defamation claims lie at the core of the claims for which Congress intended to create statutory immunity from civil liability in Section 230(c)(1). *Zeran*, 129 F.3d at 330-31. Finally, there can be no doubt that the Bolen article republished by Rosenthal was provided by Bolen, and therefore by another "information content provider." 47 U.S.C. § 230(f)(3) (defining

"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").

Polevoy seems to suggest, however, that Rosenthal should be deemed the "content provider" of the Bolen article because she "developed" the information. Essentially, Polevoy argues that any act that makes material more prominent or noticeable is part of "the creation and development." Opening Reply Brief of Respondent/Appellant ("ORB") at 32.

Not only did Polevoy fail to cite to the record to support his assertions, that argument is contrary to the statute and the caselaw. As an initial matter, under Polevoy's broad definition of "develop," the statutory definition of "information content provider" would become devoid of meaning, and all publishers would lose the statutory immunity. Section 230 would become a nullity, because all ICSs would also be information content providers.

More fundamentally, however, Section 230 plainly immunizes a "provider or user" from liability for editing another's material. *See* 47 U.S.C. § 230(c)(2)(A) ("No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material…."). It thus contemplates that those who repost the material of others will be more than simply a passive conduit. As noted by the Ninth Circuit, a central purpose of Congress in enacting Section 230 "was to protect from liability service providers and users who take some affirmative steps to edit the material…." *Batzel*, 333 F.3d at 1031. Accordingly, Section 230 "precludes liability for exercising the usual prerogative of publishers … to edit the material published…." *Id.* Numerous courts have agreed. *See Zeran,* 129 F.3d at 330; *Ben Ezra*, 206 F.3d at 985-986 (deleting of information did not

transform ICS provider into "information content provider"); *Blumenthal*, 992 F.Supp. at 49-53 (defendant not liable despite retaining full editorial control); and *Schneider*, 31 P.3d at 39-43 (website not liable despite right to edit posted mater).

Even providing the canvas upon which a third party places material is insufficient for liability. *Gentry*, 99 Cal.App.4th at 833-34 (eBay not liable despite highly structured Feedback Forum); *see also Carafano*, 339 F.3d at 1124-25 (Internet dating service immune even though it "contributes much more structure and content than eBay by asking 62 detailed questions and providing a menu of 'pre-prepared responses.'").

B. As a user of interactive computer services, Rosenthal's republication is protected by the plain text of Section 230.

Polevoy seems to think that the term "user" in the statute has no real meaning. ORB at 21 (asserting that "user" is undefined, but references receipt, not use, of information). This view, however, violates a "cardinal canon" of statutory construction "that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

It also violates another "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted); *see United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))); *Williams v. Superior Court*, 5 Cal.4th 337, 357 (1993) (an interpretation that renders statutory language a nullity is to be avoided).

Courts may, of course, ignore the plain text of a statute when failing to do so would be demonstrably at odds with the intent of the drafters. But the plain text of the statute here is neither ambiguous nor inconsistent with its structure. Polevoy advances no credible arguments that could justify this Court's excising "user" from Section 230(c)(1) or reinterpreting "user" to mean no more than a recipient of information, and he advances no reasonable construction of the statute that would account for Congress's including "user" in Section 230(c)(1).

Polevoy also argues that the overall intent of the Communications Decency Act, which was to restrict sexually explicit content on the Internet, should be considered in construing Section 230. ORB at 29-30, 32. But one generally may not "invoke the broad purposes of an entire act in order to contravene Congress' intent embodied in a specific provision of the statute." *International Brotherhood of Teamsters v. ICC*, 801 F.2d 1423, 1430 (D.C. Cir. 1986), *different result on merits reached on reh'g*, 818 F.2d 87 (1987) (original decision mooted by subsequent legislation). Had Congress wished to immunize only providers, "it knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994). The U.S. Supreme Court has always been "reluctant to treat statutory terms as surplusage in any setting." *Duncan*, 533 U.S. at 174 (internal alteration and quotation marks and citation omitted). This Court should be as well, and should reject respondents' arguments.

C. Courts have not hesitated to effect the Congressional policy of minimizing regulation of Internet speech.

As amici have already shown, one of Congress's specific purposes in adopting Section 230 was to minimize government regulation of the Internet through the imposition of various kinds of state-law liability that would inevitably inhibit the development of the Internet into the preeminent communications medium of the 21st century. As a result, courts have not

grudgingly interpreted Section 230, preferring instead to give full effect to Congress's policy of regulatory forbearance. Thus, courts have repeatedly rejected attempts to limit the range of actions to which Section 230 immunity applies, instead reading it broadly to cover many different state causes of action. *Gentry*, 99 Cal.App.4th at 830 (summarizing cases). Similarly, the courts have repeatedly rejected attempts to limit the reach of Section 230 to "traditional" Internet service providers, instead treating many diverse entities as "interactive computer service providers." *Id*. at 831 n. 7.

Given that the many courts that have considered the issue have broadly interpreted the Congressional policy of regulatory forbearance for the Internet, it makes absolutely no sense to refuse to apply Section 230 on its own express terms to protect a "user" like Rosenthal from civil liability for defamation, a core concern of Section 230.

1. The courts have read Section 230's immunity to cover many causes of action.

By its very terms, Section 230 prohibits the bringing of any state cause of action or the imposition of any state liability that is inconsistent with the statute's provisions.[3] 47 U.S.C. § 230(e)(3). This is consistent with its policy goal of reducing "Federal and State regulation" generally. 47 U.S.C. § 230(b)(2). If Congress had not meant to create a broad immunity that extends past defamation, there would have been no need to provide that Section 230 does not create immunity for violations of federal criminal law or intellectual property laws. 47 U.S.C. §§ 230(e)(1), (e)(2) .

Accordingly, the courts have routinely held that the immunity conferred by Section 230 is not limited to defamation lawsuits, or even to

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[3] It also has been read to immunize ISPs from federal causes of action. *See Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532 (E.D.Va. 2003) (AOL immune from federal civil rights claim that treated it as a publisher).

tort actions. It extends to claims of negligence. *Doe v. America Online,* 783 So.2d at 1013-1017; *Schneider,* 31 P.3d at 41-42 (negligent misrepresentation and interference with business expectancy). It extends to state causes of action for violating a statute that forbids dealers in autographed sports items from misrepresenting those items as authentically autographed. *Gentry,* 99 Cal.App.4th at 828-833 (§ 230 immunity protects against liability under Civil Code § 1739.7). It extends to unfair competition laws. *Stoner v. eBay, Inc.,* 2000 WL 1705637, (Cal.Super.2000) (unpublished) (claiming eBay violated Calif. Bus. & Prof. Code § 17200 for auctions of bootleg and other unauthorized 'infringing' sound recordings). It protects a library from being held liable for misuse of public funds, nuisance, and premises liability for providing computers allowing access to pornography. *Kathleen R.,* 87 Cal.App.4th at 692. It extends to contract claims. *Morrison v. America Online, Inc*., 153 F.Supp.2d 930, 934 (N.D. Ind. 2001) (rejecting attempt to evade § 230 immunity by claiming to be third-party beneficiary of AOL's member agreement with chat-room users); *Jane Doe One v. Oliver*, 755 A.2d 1000, 1003-1004 (Conn. Super. Ct. 2000) (applying § 230 to dismiss breach of contract action against AOL, as well claims such as negligence, breaching a mandated public policy, intentional nuisance, and emotional distress).

2. The courts have read Section 230's immunity to cover many entities that are not "traditional" Internet service providers.

Similarly, the courts have almost unanimously held that, while the phrase "provider . . . of interactive computer services" may seem to refer only to the activities of traditional ISPs, the broad policies of Section 230 require that entities as different as an online matchmaking service, a copy shop, an online bookseller, an online auction service, a public library, and an Internet user who created a "chat room" all receive immunity from civil liability. *Carafano,* 339 F.3d 1119 (online matchmaking service is an ICS);

PatentWizard, Inc. v. Kinko's, Inc., 163 F.Supp.2d 1069, 1071 (D.S.D. 2001) (photocopy shop not contested as ICS provider under § 230); *Schneider*, 31 P.3d at 40 (Amazon.com an ICS); *Gentry*, 99 Cal.App.4th at 931 n.7 (eBay an ICS); *Kathleen R.*, 87 Cal.App.4th at 692-693 (public library protected by § 230); *Marczeski*, 122 F. Supp.2d at 327 (organizer of chat room for discussion of dispute about plaintiff held to be ICS provider); *Batzel*, 333 F.3d at 1031 (website and listserv operator held to be ICS provider and user); *Smith v. Intercosmos Media Group, Inc.*, 2002 WL 31844907 (E.D. La. 2002) (domain name registrar is an ICS provider).

The courts' reasoning in *Gentry* and *Schneider* is instructive. Although in *Gentry* the plaintiffs had conceded that defendant eBay was a provider of interactive computer services, the Court of Appeal went out of its way to say:

> Even if appellants had not conceded the issue, the allegations . . . indicate eBay's Web site enables users to conduct sales transactions, as well as provide information (feedback) about other users of the service. In this way, eBay provides an information service that enables access by multiple users to a computer server and brings it within the broad definition of an interactive computer service provider.

Gentry, 99 Cal.App.4th at 831 n. 7.

In *Schneider*, the plaintiff argued that Amazon.com, an interactive web site operator, was not an ICS provider because web site operators generally do not provide access to the Internet. Using *Zeran* as a starting point for analysis, but relying principally on the text of Section 230, the Washington court found that "Amazon's web site postings appear indistinguishable from AOL's message board for § 230 purposes." *Schneider*, 31 P.3d at 40; *id*. at 41 ("Congress intended to encourage self-regulation, and immunity is the form of that encouragement.").

In short, virtually every court that has faced a Section 230 immunity question has construed that immunity broadly in order to effectuate Congress's expressly stated policy of regulatory forbearance to encourage, not limit, speech.

D. Immunity for users like Rosenthal is consistent with Section 230's purpose of encouraging free speech.

Amici recognize that under Section 230, the rules of defamation liability in the online world are significantly different from those in other media. But that was a policy choice that Congress was empowered to make — and did. *See, e.g., Zeran*, 129 F.3d at 330-331; *Gentry*, 99 Cal.App.4th at 829; *Drudge*, 992 F. Supp. at 52. That the defendant in this case is a "user," not a "provider," cannot change the analysis given that Congress in Section 230(c) consistently treated providers and users as co-equals. 47 U.S.C. § 230(c)(1) ("provider or user"); *id*. § 230(c)(2) (same); *id*. § 230(c)(2)(A) (same).

In adopting Section 230, Congress was concerned about the chilling effect that the possibility of tort liability for others' speech would have on ICS providers. "Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted." *Zeran*, 129 F.3d at 331.

Smaller ICSs will be especially chilled by the elimination of distributor immunity from Section 230. For example, Separated Parenting Access & Resource Center (SPARC) is a 501(c)(3) non-profit that operates a website containing an Internet forum for parents who are divorcing and having custody issues.[4] *See* <http://www.deltabravo.net/custody/>. Faced

[4] "An Internet forum, also known as a message board or discussion board, is a web application that provides for online discussions, and is the modern

with potential distributor liability, SPARC would need to remove posts upon complaint, chilling the speech on this useful forum for people dealing with important legal and personal matters.

Another example is SpamBlogging.com, which is an online weblog. "A weblog, or simply a blog, is a web application which contains periodic, reverse chronologically ordered posts on a common webpage." *See* <http://en.wikipedia.org/wiki/Blog>. Blogs are a type of public forum in which users often add comments to the postings of other users.[5] SpamBlogging.com received a demand letter from a group purporting to represent HRiders.com, insisting that it "remove all postings about Hriders.com from your blogs" on the basis of a defamation claim relating to one post. *See* <http://www.spamblogging.com/archives/000411.html>. While this situation was resolved, without the protections of Section 230, SpamBlogging.com may have been forced to comply with the overreaching request.

Also instructive is Grinnell College's removal of Plans, a Web-based software system that allowed Grinnell students to publish material online. As the college's president explained, the fear that the law "rendered the College, as its host and arguably publisher, and people involved in mounting and storing it liable" to claims of defamation led to the removal. *See* <http://www.cs.grinnell.edu/~stone/plans-archive/plans-outage.xhtml>.

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descendant of the bulletin board systems and existing Usenet news systems that were widespread in the 1980s and 1990s. An Internet forum typically exists as part of a website and invites users to start topics and discuss issues with one another." *See* <http://en.wikipedia.org/wiki/Internet_forum>.

[5] "Blogs run from individual diaries to arms of political campaigns, media programs and corporations, and from one occasional author to having large communities of writers. Some are maintained by single authors, while others have multiple authors. Many weblogs allow visitors to leave public comments, which can lead to a community of readers centered around the blog; others are non-interactive." *Id.*

While amici believe that Section 230 would indeed have protected Grinnell from such liability and that the college was ill-advised in this respect, the college's reaction shows how easily speech will be stifled if the Court of Appeal's ruling is permitted to stand.

The specter of civil liability chills the speech of ICS users at least as much as it does that of ICS providers. Indeed, although individual ICS users are unlikely to face the sheer quantity of messages that AOL or other ICS providers do, at the same time, individual ICS users are also unlikely to possess the financial resources of ICS providers. Thus the incentive to engage in protective self-censorship is even greater for the individual ICS user who lacks both the resources and the commercial motivation to stand up to those who threaten litigation in order to silence speech.

The U.S. Supreme Court often takes special pains to protect means of communication that are "essential to the poorly financed causes of little people." *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (upholding right to distribute leaflets door to door); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (protecting paid editorial advertisements from libel judgments because "any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities — who wish to exercise their freedom of speech even though they are not members of the press"); *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (protecting residential signs, which are "an unusually cheap and convenient form of communication[, e]specially for persons of modest means or limited mobility").

Congress thus recognized what the U.S. Supreme Court later confirmed: The Internet is "a unique and wholly new medium of

worldwide human communication." *Reno v. ACLU,* 521 U.S. at 850 (citation omitted).

In so saying, the U.S. Supreme Court expressly extolled the value of Internet newsgroups — the forum to which Rosenthal republished Bolen's article — to Internet speech.

> Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted every day. In most newsgroups, postings are automatically purged at regular intervals. In addition to posting a message that can be read later, two or more individuals wishing to communicate more immediately can enter a chat room to engage in real-time dialogue--in other words, by typing messages to one another that appear almost immediately on the others' computer screens. The District Court found that at any given time "tens of thousands of users are engaging in conversations on a huge range of subjects." It is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."

Id. at 851-852 (footnotes and citation omitted).

Amici urge this Court to recognize that this diversity of Internet content does not appear by magic or come only from traditional publishers or media giants. This incredible variety of content flows largely from the Internet's openness to the contributions of individuals who might otherwise never have the resources or ability to speak to a national or global audience. As the *Reno* Court noted, the Internet allows "tens of millions of people to communicate with one another and to access vast amounts of information from around the world." *Id*. at 850 (citation omitted); *see also* 47 U.S.C. §§ 230(a)(1), (a)(3) (Internet "represents an extraordinary advance" in

availability of information and "offers a forum for a true diversity of political discourse").

Recognizing protection for users like Rosenthal thus comports with the underlying policy of Section 230, which is intended to encourage the creation of opportunities for members of the public to receive information in which they are interested and to participate in discussions about topics of interest. "The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3); *see also Batzel*, 333 F.3d at 1027-28 (Congress sought to encourage "the unfettered and unregulated development of free speech on the Internet.")

Put another way, the policy of regulatory forbearance expressed in Section 230 protects the Internet and other interactive computer services not only as a market for goods and services, but also as an essential component of the marketplace of ideas. These individuals — ordinary people of ordinary means — often do not speak for commercial purposes. They simply engage in conversation. And when they do so, they do not merely exchange information that they themselves have authored; they frequently "forward" e-mail and other information found on the Internet to colleagues, friends and family. Likewise, a user of blogs may post short summaries or quotes from other sources as a starting point for commentary.[6] Ignoring the clear mandate of Section 230 will lead to self-censorship and timidity by Internet users akin to that which the *Zeran* court recognized would affect providers. Ordinary users will be reluctant to pass

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[6] *See e.g.* <http://slashdot.org/> (a technology-oriented blog), <http://dailykos.com/> (a political blog), and <http://boingboing.net/> (a blog "directory of wonderful things").

on information, articles, or comments of others that they find interesting or worthy of discussion out of fear that their inability to assess the accuracy or reliability of Internet material will provoke ruinous litigation against them. Moreover, such self-censorship would be far less visible to society than a decision by AOL to stop providing bulletin boards or chat rooms. In short, the protections of Section 230 are as valuable, if not more valuable, to the many individuals who exchange information via blogs, newsgroups or e-mail lists.

II. The Individual's Interest in Reputation Can Still Be Addressed and Protected on the Internet

Polevoy continues to argue that Section 230 violates his constitutional interests or rights. *See* ORB at 25-29 (asserting a variety of creative constitutional claims related to a right to protect reputation). All of these ways of stating the argument ultimately reduce to an attempt to hold Rosenthal responsible for Bolen's content.

In making these arguments, Polevoy simply seeks to impose old legal rules upon an entirely new medium—rules that were expressly rejected by Congress because they conflict with the policy choice to forbear from regulating the Internet. As the *Zeran* court stated, Section 230 "represents the approach of Congress to a problem of national and international dimension." *Zeran*, 129 F.3d at 334. Thus, "Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action."); *ibid*; *see also* Statement of Rep. Wyden, 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) ("the Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise.")

Moreover, the very nature of the Internet tends to minimize the harm from the republication of inaccurate or defamatory material. First, the Internet has a reputation as an "uninhibited, robust, and wide-open"

marketplace of ideas in which controversial, even outlandish, ideas are advocated and passed on. *Cf. Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974) ("the erroneous statement of fact is . . . inevitable in free debate"); *id.* at 342 (to create "breathing space" for free speech, courts have "extended a measure of strategic protection to defamatory falsehood"). Internet users know that they must consider the provenance of what they read; given their context, newsgroup postings are unlikely to be accorded the same weight as stories in *The New York Times*. *See Global Telemedia Int'l Inc. v. Doe*, 132 F.Supp.2d 1261 (C.D. Cal. 2001) (statement on Internet bulletin board "strongly suggest[s] that [the statements] are the opinion of the posters."); *Rocker Mgmt. v. John Does*, 2003 WL 22149380 (N.D. Cal. 2003) (context of Internet message boards helps show postings are opinion and hyperbole, not actionable fact).

Second, because of its easy accessibility, the Internet provides the subject of an allegedly defamatory comment a meaningful chance to reply. One of the Internet's unique attributes is that all sides of an argument have equal access to the same audience, perhaps even in the same forum. A person who believes that he or she has been defamed has an immediate opportunity to correct inaccurate information or to counter unfounded accusations. Indeed, the stringent "actual malice" standard for public-figure defamation is partly based on the reasoning that public figures usually have "effective opportunities for rebuttal." *Gertz*, 418 U.S. at 344 ("The first remedy of any victim of defamation is self-help — using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."). Thus, the immunity granted by Section 230 is likely to have a far smaller impact on the subject of allegedly defamatory Internet content than a similar immunity might have in more traditional media.

Finally, Section 230 does not leave victims of defamation without recourse; the actual information content provider remains liable. *Zeran*, 129 F.3d at 330 ("None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability."). Indeed, the plaintiffs have sued Tim Bolen, the author of the message republished by Rosenthal. This, too, acts as a counterbalance to the Congressional decision to provide immunity to Internet intermediaries.

CONCLUSION

Online forums are the modern soapboxes of our age, where the public can debate and comment on the issues of the day, allowing discourse on the widest range of topics and opinions. Both the providers of these interactive computer services and the users of the forums enhance this discourse through the republication and distribution of information from other sources. Accordingly amici respectfully urge this Court to respect the policy choice made by Congress to promote and protect this valuable forum by reversing the Court of Appeal's ruling.

Dated: November 24, 2004

ELECTRONIC FRONTIER FOUNDATION
AMERICA CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

By: _____
Kurt Opsahl, Esq.
Counsel to Amicus Curiae
Electronic Frontier Foundation

CERTIFICATION OF COMPLIANCE

Pursuant to California Rules of Court 14 and 29.1, I certify that the attached Brief of Amici Curiae contains 6,113 words.

Dated: November 24, 2004

ELECTRONIC FRONTIER FOUNDATION
AMERICA CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

By: _____
Kurt Opsahl, Esq.
Counsel to Amicus Curiae
Electronic Frontier Foundation

CERTIFICATION OF SERVICE

I, KURT OPSAHL, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 454 Shotwell Street, San Francisco, California 94110. On November 24, 2004, I served the within documents:

> BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN SUPPORT OF DEFENDANT-RESPONDENT ILENA ROSENTHAL

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Kurt Opsahl