No. B335533

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, SECOND DIVISION

SNAP INC.,
Defendant–Petitioner,
v.
SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,
Respondent,

AMY NEVILLE; AARON NEVILLE; JAIME PUERTA MARIAM HERNANDEZ; CINDY CRUZ SARANTOS; BRIDGETTE NORRING; JAMES MCCARTHY; KATHLEEN MCCARTHY; SAMANTHA MCCARTHY; MATTHEW CAPELOUTO; CHRISTINE CAPELOUTO; PERLA MENDOZA; SAMUEL CHAPMAN; DR. LAURA ANN CHAPMAN BERMAN; JESSICA DIACONT; E.B.; AND P.B.,
Plaintiffs—Real Parties in Interest

From an Order of the Los Angeles County Superior Court, Case No. 22STCV33500, Hon. Lawrence P. Riff, Presiding, Department 007, Telephone (213) 310-7007

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF PROF. ERIC GOLDMAN SUPPORTING DEFENDANT AND PETITIONER SNAP INC.

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Under California Rules of Court, rule 8.520(f), Prof. Eric Goldman requests leave to file the attached *amicus curiae* brief in support of Defendant and Petitioner Snap Inc. *Amicus* certifies under Rule of Court 8.520(f)(4) that no party or counsel for any party authored this brief in part or in whole or made any monetary contributions intended to fund the preparation or submission of the proposed brief.

Amicus Prof. Eric Goldman is a law professor and Associate Dean for Research at Santa Clara University School of Law. He submits this brief on his own behalf, not on behalf of his employer or anyone else. Prof. Goldman has been researching and writing about Internet Law for over thirty years, and has written extensively about how courts have applied and interpreted Section 230 of the Communications Decency Act. Wired Magazine said Prof. Goldman "has for years been journalists' go-to source on all things Section 230," and Prof. Goldman has "an outsize effect on the way Section 230 is treated in public discussion."[1] The magazine also described his blog[2] as "an exhaustive repository of Section 230 information."[3]

As a preeminent Section 230 scholar, *amicus* is interested in the proper development of the law in this area and is concerned that the trial court in this case made doctrinal missteps in overruling Snap's demurrer that undermine the important procedural safeguards embedded in Section 230,

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[1] Gilad Edelman, *Everything You've Heard About Section 230 Is Wrong* (May 6, 2021) Wired <https://www.wired.com/story/section-230-internet-sacred-law-false-idol/> (as of March 3, 2024).

[2] Technology & Marketing Law Blog <http://blog.ericgoldman.org> (as of March 3, 2024).

[3] Christopher Zara, *The Most Important Law in Tech Has a Problem* (Jan. 2, 2017) Wired <https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/> (as of March 3, 2024).

about which *amicus* has written extensively. In particular, *amicus* writes this Court to emphasize and explain the profound practical impact the trial court's decision will have on Internet services generally by threatening a critical aspect of Section 230: the ability to dispose of unmeritorious litigation at the earliest possible stage.

Respectfully submitted,

Dated: March 4, 2024

Wilson Sonsini Goodrich & Rosati, P.C.
By: */s/ Matthew K. Donohue*
Matthew K. Donohue

Attorneys for *Amicus Curiae* Prof. Eric Goldman

AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 230, like the First Amendment, serves to protect and advance free speech. Due in large part to Section 230's protections, the Internet today thrives with popular, socially valuable services that allow users to share their own messages, ideas, and more.[4]

What is sometimes overlooked in discussions about Section 230 is the importance of the *procedural* protections Section 230 creates. The threat and expense of litigation, as well as the inherent uncertainties it entails, can serve as an impediment to speech, even where a litigant expects to have a good chance of success. Section 230 helps remove these impediments by facilitating the speedy resolution of litigation on a demurrer or motion to dismiss. And it sets a uniform nationwide standard, giving online publishers assurances that their compliance efforts will succeed regardless of state law variations.

The trial court's decision here threatens those procedural safeguards. Presented with a case that obviously seeks to saddle Snap with liability for third-party content posted on its service, the trial court nonetheless allowed the Plaintiffs' claims to survive a demurrer and proceed into discovery. It did so, ostensibly, because of Plaintiffs' insistence that their theories "do not purport to hold Snap liable for failing to remove some or all of the drug sellers' third-party content from Snapchat." (Order at p. 11 (Jan. 2, 2024).) But that in fact is precisely what Plaintiffs' theories do. Their disclaimers notwithstanding, the claims in this case are obviously based on Snap's enablement of users to exchange messages, which is the *only* link between Snap and the drug-related harms Plaintiffs' children suffered. If courts

[4] See generally Jeff Kosseff, The Twenty-Six Words That Created the Internet (2019).

permit this type of pleading gambit, plaintiffs can always bypass Section 230's procedural protections.

To clarify the important procedural aspects of Section 230, this Court should grant Snap's Petition for Writ of Mandate.

ARGUMENT

I. SECTION 230 IS A SPEECH-ENHANCING STATUTE

While the First Amendment remains the foundational protection of free speech in this country, it serves as a floor, not a ceiling, on speech protections. Above that floor, legislatures have layered additional "speech-enhancing statutes" that grant substantive or procedural protections beyond the constitutional minimum.[5] These speech-enhancing statutes embody a policy determination ranking the importance of free speech above other, potentially conflicting goals.

One example is this State's anti-SLAPP statute (short for "strategic lawsuits against public participation"). Under the statute, defendants can strike a complaint based on "any act . . . in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (Code Civ. Proc. § 425.16(b)(1).) The motion automatically stays all discovery proceedings (*id.* § 425.16(g)) and, if granted, entitles the movant to a fee award (*id.* § 425.16(c)(1)). These provisions serve "'to prevent SLAPPs by ending them early and without great cost to the SLAPP target.'" (*Equilon Enters. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 65, quoting Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope* (2000) 33 Loyola L.A. L.Rev. 801.) Anti-SLAPP laws

[5] See Eric Goldman, *Why Section 230 is Better than the First Amendment* (2019) 95 Notre Dame L.Rev. Reflection 33.

are speech-enhancing because they thwart litigants from using the court system to target and suppress socially important speech.

Section 230 similarly operates as a speech-enhancing statute that builds on the First Amendment's constitutional minimum. Congress made this clear in the text of the statute itself, explaining that it seeks "to promote the continued development of the Internet" because the Internet offers "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) & (b)(1).) It is with these speech-enhancing policy goals in mind that one must examine the valuable procedural benefits of Section 230, as well as its substantive immunity, which courts have construed "broadly in all cases arising from the publication of user-generated content." (*Hassell v. Bird* (2018) 5 Cal.5th 522, 535 (*Hassell*), quoting *Doe v. MySpace Inc.* (5th Cir. 2008) 528 F.3d 413, 418.)

II. SECTION 230 CONFERS IMMUNITY FROM SUIT AT THE EARLIEST POSSIBLE STAGE

To "facilitate the ongoing development of the Internet," Congress chose to create a shield against "the burdens associated with defending against state law claims that treat [Internet intermediaries] as the publisher or speaker of third party content." (*Hassell* at pp. 544-545.) This is apparent in subsections (c)(1) and (e)(3) of Section 230, which provide that "[n]o 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," 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." (47 U.S.C. § 230(c)(1) & (e)(3).)

This broad language conveys a key procedural benefit: "State or local law" may not even allow a "cause of action [to] *be brought*" that would treat "an interactive computer service … as the publisher or speaker of" user

posted content. (See *ibid.*, italics added.) In other words, as the California Supreme Court has explained, Section 230 is "not just a 'defense to liability'; it instead confers 'immunity from suit.'" (*Hassell* at p. 544, quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.* (4th Cir. 2009) 591 F.3d 250, 254.)

Both the language and the underlying policies of Section 230, therefore, call out for speedy and efficient resolution. The legal questions raised by Section 230—whether a claim seeks to treat an "interactive computer service" as a "publisher or speaker" of "another information content provider" (47 U.S.C. § 230(c)(1))—often can be determined based on the facts alleged in the complaint. Courts therefore have routinely treated questions involving the applicability of Section 230 as subject to resolution on the pleadings, be it a motion to dismiss in federal court (e.g., *Dyroff v. The Ultimate Software Grp., Inc.* (9th Cir. 2019) 934 F.3d 1093, 1096), a demurrer (e.g., *Prager Univ. v. Google LLC* (2022) 85 Cal.App.5th 1022, 1031), or an anti-SLAPP motion (e.g., *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 40).

And where trial courts fail to honor Section 230's procedural instructions, opportunities for swift appellate review, including mandamus and other extraordinary writs, should be available. (See, e.g., *In re Facebook, Inc*., (Tex. 2021) 625 S.W.3d 80, 87 [granting mandamus relief to correct trial court's refusal to apply Section 230 and explaining that "if the denials of Facebook's motions to dismiss were erroneous, the company lacks an adequate appellate remedy because its federal statutory right to avoid litigation of this nature would be impaired if it had to await relief on appeal"].)

III. FAILING TO PROVIDE EARLY DISMISSAL UNDER SECTION 230 HAMPERS THE FURTHER DEVELOPMENT OF THE INTERNET

A significant consequence of stripping publishers of Section 230's early resolution of their claims—without opportunities for prompt appellate review—is that defendants lose the ability to resolve these suits at a low cost. If Section 230 cases reach the discovery phase, publisher-defendants would incur substantial additional costs, even if they ultimately prevail. That is why, as the Ninth Circuit has explained, "section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." (*Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1175.)[6]

Additional defense costs inevitably change how online publishers make their editorial decisions. Companies that let users share their own content rely on the ability to minimize the incremental costs for each user-submitted item, including costs of content moderation and reviewing. Many of the most popular forums for speech today can exist only because of their ability to keep those per-item costs low. This is exactly as the drafters of Section 230 intended: reducing the risk of costly litigation has allowed the internet to flourish.[7]

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[6] See also *Jones v. Dirty World Ent. Recordings LLC* (6th Cir. 2014) 755 F.3d 398, 407 ("[T]he immunity provided by § 230 protects against the 'heckler's veto' that would chill free speech. Without § 230, persons who perceive themselves as the objects of unwelcome speech on the internet could threaten litigation against interactive computer service providers, who would then face a choice: remove the content or face litigation costs and potential liability."); *In re Facebook, Inc., supra* 625 S.W.3d at p. 87 (explaining that Section 230 "create[s] a substantive right to be free of litigation, not just a right to be free of liability at the end of litigation").

[7] See generally Brief of Senator Roy Wyden and Former Representative Christopher Cox as Amici Curae in Support of Respondent, *Gonzalez v. Google LLC* (2023) 598 U.S. 617.

If companies cannot secure early dismissals, then plaintiffs gain the ability to impose substantial costs on publishers and put courts in a position to second-guess the publishers' editorial decisions. As countermoves, online publishers could reduce their costs by limiting which author-users get the privilege to publish their content; thus restricting publication access exclusively to uncontroversial/low-risk authors. Alternatively, publishers could invest more upfront into each item's deliberation to better prepare their decisions for the anticipated judicial review—for example, by doing more pre-publication human review of content, including legal review. These costs would overwhelm the value of most individual content items, necessitating that publishers invest only in publishing the highest-value content items.

Either countermove would substantially shrink the quantity of user-generated content on the Internet, which would have substantial distributional effects.[8] In particular, fewer voices would be heard online[9]—and those voices would reflect and reinforce majoritarian privileges. Furthermore, because online publishers' content acquisition costs would increase, online information would become harder to find and increasingly available only on a pay-to-access basis, which would exacerbate the existing digital divides. Such consequences chip away at, if not completely undermine, Congress' intention for Section 230 to preserve the Internet as "a forum for a true diversity of political discourse, unique opportunities for

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[8] See Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules* (2021) 1 J. FREE SPEECH L. 191.

[9] Thus undercutting one of the Internet's benefits, which is that "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." (*Reno v. Am. Civil Liberties Union* (1997), 521 U.S. 844, 870.)

cultural development, and myriad avenues for intellectual activity." (47 U.S.C. § 230(a)(3).)

Eroding Section 230's protections would also make it difficult or impossible for new publishers to enter the market.[10] For example, if publishers must account for state-by-state variations in liability, their legal compliance costs grow exponentially. Furthermore, if new entrants must build sophisticated content moderation processes similar to the systems deployed by the incumbents, it raises the entry costs dramatically. Already, there is substantial concern about consolidation and market power among the online publisher-incumbents. Lowering the bar for lawsuits targeting publishing decisions would almost certainly exacerbate marketplace consolidation by discouraging new entrants. This, too, undermines Congress' intent to "preserve the vibrant and competitive free market that presently exists for the Internet." (47 U.S.C. § 230(b)(2).)

IV. ATTEMPTS AT "CREATIVE" PLEADING SHOULD NOT STRIP AWAY SECTION 230'S PROCEDURAL BENEFITS

These important procedural benefits require vigilance to prevent plaintiffs from evading Section 230 through legal wordplay. As the California Supreme Court has explained, "courts have rebuffed attempts to avoid section 230 through the 'creative pleading' of barred claims." (*Hassell* at p. 542.) The application of Section 230 turns on the *substance* of a given claim—not on the labels a plaintiff uses to describe it. Interactive computer service providers are entitled to Section 230's protections for publishing third-party content, regardless of how "creatively" a Plaintiff pleads its case.

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[10] See Michael Masnick, *Don't Shoot the Message Board* (June 2019) Copia Institute and NetChoice <https://copia.is/wp-content/uploads/2019/06/DSTMB-Copia.pdf> (as of March 3, 2024) (showing how Section 230 helps online publishers raise capital); Eric Goldman, *Want to Kill Facebook and Google? Preserving Section 230 Is Your Best Hope* (June 3, 2019) Balkinization, New Controversies in Intermediary Liability L.

Attempts at such "creative pleading" (which really ought to be called "disingenuous pleading") are not new, and *Hassell* was far from the first to reject them. A long line of Section 230 cases have applied the immunity to reject claims at the pleading stage where plaintiffs—aware, as Plaintiffs were here, of the immunity's broad reach—drafted their complaints in a deliberate effort to evade those protections. (See, e.g., *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 573 ["That appellants characterize their complaint as one for failure to adopt reasonable safety measures does not avoid the immunity granted by section 230."]; *Kimzey v. Yelp! Inc.* (9th Cir. 2016) 836 F.3d 1263, 1266 [affirming dismissal of complaint aimed at the "artful skirting of the CDA's safe harbor provision"]; *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1101-1102 ["what matters is not the name of the cause of action . . . what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another"]; *In re Facebook, supra*, 625 S.W.3d at p. 90 ["The cases are equally uniform in holding that a plaintiff in a state tort lawsuit cannot circumvent section 230 through 'artful pleading' if his 'allegations are merely another way of claiming that [a defendant] was liable' for harms occasioned by 'third-party-generated content' on its website. [Citation]"]; *Daniel v. Armslist, LLC* (2019) 386 Wis.2d 449, 478 [noting courts seek to "prevent[] plaintiffs from using 'artful pleading' to state their claims only in terms of the interactive computer service provider's own actions, when the underlying basis for liability is unlawful third-party content published by the defendant."]; *Doe v. MySpace, Inc.* (W.D. Tex. 2007) 474 F.Supp.2d 843, 849, affd. (5th Cir. 2008) 528 F.3d 413 ["No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities."]; *Ynfante v. Google LLC* (S.D.N.Y., June 1, 2023) 2023 WL 3791652, at *3 ["courts have recognized claims similar to the

plaintiff's as unsuccessful attempts to avoid Section 230 protections through artful pleading"].)

Despite these warnings, the trial court endorsed such evasions. Indeed, this case involves an especially obvious effort at disingenuous pleading—a complaint seemingly drafted specifically to sidestep Section 230 and the statute's core policy of protecting online services from being held liable based on allegedly objectionable third-party communications that they publish. The harm Plaintiffs seek to redress is the death of their relatives, who, it is alleged, encountered drug-related content on Snap leading them to purchase drugs and, tragically, die of fentanyl overdoses. Snap did not sell or offer drugs to the plaintiffs. Its users did, allegedly through messages they posted on the service. Snap's only involvement in the offline tragedy was that it allegedly made it possible for third parties to exchange drug-related communications on its service. But any liability based on providing the facilities for users to talk with each other falls in the heartland of Section 230—as such claims seek to treat Snap as the "publisher" of "information provided by another information content provider," the drug dealers. Indeed, the Ninth Circuit found a materially identical claim barred in *Dyroff v. The Ultimate Software Grp., Inc.*, *supra*, 934 F.3d at p. 1095.

In an effort to avoid that result, Plaintiffs' Complaint seeks to recast the publication of drug dealers' messages into "design" features of Snap that supposedly make it easier for drug dealers to peddle their wares on the service, especially to young people. The Complaint labels claims premised on publishing the harmful communications as "product liability," "design defect," "negligence," and "failure to warn" claims. The only reason for Plaintiffs to frame Snap's liability this way is to negate Section 230's obvious application to the facts—and the holding of *Dyroff* that bars claims against an online service for connecting its users with messages about illegal drug sales. Yet here, unlike in the Ninth Circuit, the trial court allowed this

pleading gambit to succeed. The court waved away the reality of Plaintiffs' claim by accepting, at face value, their insistence that their claim turned on "specific product features," not on treating Snap "as the speaker or publisher of third-party content." (Second Am. Compl. ¶¶ 292-201; see Order at pp. 21-22.)

That ruling renders the procedural protections of Section 230 meaningless, subjecting Snap and potentially other online service providers in California to litigation burdens and expenses that the statute is supposed to prevent. This is a clear-cut case for Section 230. If all plaintiffs need to do to avoid that reality and survive a pleading challenge is give their claims a product liability label and assert that they are about website "features," rather than the third-party content that is manifestly the actual basis for the claim, Section 230 will cease to function as an "immunity from suit." (*Hassell* at p. 544.) As the Ninth Circuit indicated, cases like this must be dismissed early, lest courts would "cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties." (*Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, supra,* 521 F.3d at p. 1174-75). And here the only way to restore what the trial court's erroneous ruling has taken away is for this Court to grant Snap's writ.

CONCLUSION

This Court should grant Snap's petition for writ of mandate.

Respectfully submitted,

Dated: March 4, 2024

Wilson Sonsini Goodrich & Rosati, P.C.
By: /s/ *Matthew K. Donohue*
Matthew K. Donohue

Attorneys for *Amicus Curiae* Prof. Eric Goldman

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), I hereby certify that the text of this brief contains 3,287 words, including footnotes. In making this certification, I have relied on the word count of Microsoft Word, used to prepare the brief.

Dated: March 4, 2024

Respectfully submitted,

Wilson Sonsini Goodrich & Rosati, P.C.
By: /s/ *Matthew K. Donohue*
Matthew K. Donohue

Attorneys for *Amicus Curiae* Prof. Eric Goldman

PROOF OF SERVICE

I, Shannon Hill, declare:

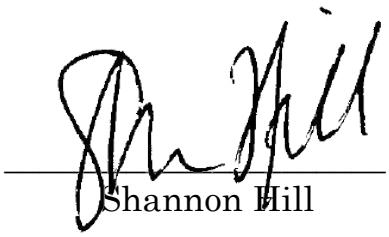
I am employed in Los Angeles County, State of California. I am over the age of 18 years and not a party to the within action. My business address is 953 East Third Street, Suite 100, Los Angeles, California 90013. My electronic mail (email) address is: shannon.hill@wsgr.com.

On this date, I served:

APPLICATION TO FILE AMICUS CURIAE AND AMICUS CURIAE BRIEF OF PROF. GOLDMAN SUPPORTING DEFENDANT PETITIONER SNAP INC.

☒ By forwarding the document by electronic transmission via the TrueFiling interface on this date to the interested parties.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California on March 4, 2024.



Shannon Hill