

No. S122953

IN THE SUPREME COURT OF CALIFORNIA

<b>STEPHEN J. BARRETT M.D., ET. AL,</b>	)	<b>Court of Appeal</b>
<b>Plaintiffs/Appellants</b>	)	<b>No. A096451</b>
	)	
<b>ILENA ROSENTHAL</b>	)	<b>Superior Court No.</b>
<b>Defendant/Respondent</b>	)	<b>833031-5 (Hon.</b>
	)	<b>James Richman,</b>
	)	<b>Judge Presiding)</b>

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**BRIEF OF *AMICI CURIAE***  
**LAW PROFESSORS WITH EXPERTISE IN INTERNET LAW,**  
**SUPPORTING REVERSAL**

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Deirdre K. Mulligan, Esq.  
Calif. State Bar No. 218804  
Samuelson Law, Technology &  
Public Policy Clinic  
Boalt Hall School of Law  
University of California  
346 Boalt Hall  
Berkeley, CA 94720-7200

*Counsel for Amici Curiae*

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## **APPLICATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*<sup>1</sup>**

Pursuant to California Rule of Court 29.1(f), the professors (listed in Appendix A) at universities throughout the country, request leave to file the attached brief as *amici curiae* in support of defendant Ilena Rosenthal. This application is timely made.

The parties to this brief are professors with a special interest and expertise in Internet law. We are committed to the sound development of appropriate legal rules relating to the Internet. The case is of great public importance to the continued development of the Internet. We believe that the Court of Appeal's decision will deter the targeted self-regulatory efforts, of service providers and users, aimed at limiting objectionable content; and, at the same time, compel service providers and users to systematically remove protected speech from the Internet based upon any and all complaints. The continued development of the Internet as an open, decentralized, gatekeeper-less platform supporting the exchange of diverse, provocative and controversial speech depends upon the simple predictable rule set out in § 230 as properly interpreted by the federal courts.

The brief is filed on our own behalf, and should not be attributed to the institutions by which we are employed. We have no financial interest in the outcome, and do not represent any party.

This brief emphasizes the consequences of holding providers and users liable under the unclear distributor standard of liability for self-regulatory efforts and protected speech, and addresses the flawed reasoning that led the Court of Appeal to adopt such a standard. We believe that additional briefing is necessary in this case to highlight the dramatic

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<sup>1</sup> Aaron Perzanowski and Hartwell Harris, students of the Samuelson Law, Technology & Public Policy Clinic, at the Boalt Hall School of Law, University of California, Berkeley, contributed in the preparation of this brief.

consequences the Court of Appeal's decision would have for self-regulatory efforts to address objectionable content and the free flow of information on the Internet.

Accordingly, we respectfully request that the Court accept and file the attached amicus brief.

Respectfully submitted,

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Deirdre K. Mulligan  
Calif. State Bar No. 218804  
Samuelson Law, Technology &  
Public Policy Clinic  
Boalt Hall School of Law  
University of California  
346 Boalt Hall (North Addition)  
Berkeley, CA 94720  
(510) 642-0499  
*Counsel of Record*

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## SUMMARY OF THE ARGUMENT

The Court of Appeal's departure from the well-settled interpretation of § 230 by federal courts places new, unworkable burdens on the myriad online providers and users that distribute and provide access to content created by others. In response to the increased risk of liability the court's decision will impose, providers and users will reduce monitoring activities aimed at reducing objectionable online content and remove all speech that generates complaints. In recasting § 230 to meet its own policy objective of preserving certain remedies available to defamation victims under common law, the Court of Appeal undermined Congress' goal of encouraging private sector content monitoring efforts to limit objectionable content while preserving the Internet as a platform for uninhibited speech. To reach its anomalous reading of the statute, the Court of Appeal questioned Congress' commitment to free speech, and determined, despite incontrovertible evidence to the contrary, that the consistent interpretation of § 230 dissuades appropriate investment in self-regulation. Application of the "knew or should have known" distributor liability standard will wreak havoc on those who engage in self-regulatory monitoring efforts and will chill protected speech. The Court of Appeal failed to recognize both the likelihood and importance of these outcomes.

This brief addresses these points in turn, rebutting the Court of Appeal's unwarranted conclusions and detailing the certain chilling effect of the ambiguous distributor liability standard on current self-regulatory initiatives and protected online speech. Further, this brief illustrates that neither the legislative history, nor the state of defamation law when § 230 was enacted, support the Court of Appeal's novel statutory interpretation.

## ARGUMENT

### **I. As Legislative History Demonstrates, Congress Intended to Further Two Policy Goals—Both of Which are Thwarted by the Court of Appeal’s Flawed Interpretation of § 230.**

In adopting § 230, Congress reconciled two seemingly conflicting goals: limiting the availability of objectionable content to minors and preserving the robust exchange of ideas enabled by the Internet. 47 U.S.C. § 230. Congress believed that private monitoring by service providers held great promise for fostering both these goals, but service providers’ efforts were hampered by publisher liability. Congress removed this barrier with § 230, which created a blanket immunity for those who host and distribute content created by others from suits that would hold them liable as a publisher, under any standard, regardless of whether they review, screen or remove some such content. Since the passage of § 230, providers have engaged in abundant self-regulatory efforts, and a rich, wide-ranging, online discourse has flourished. The manifest simplicity and benefits of § 230 led to a high degree of consistency of interpretation—until the decision below. The Court of Appeal effectively rewrote § 230 to hold Ilena Rosenthal liable as a publisher under the actual or constructive knowledge standard, the distributor standard. This novel and flawed interpretation imposes an unworkable standard on Internet providers and users for content created by others—and simultaneously manages to frustrate both of Congress’ goals. By exposing providers and users to liability for content created by others under a standard of actual or constructive knowledge, the Court of Appeal’s decision will thwart the self-regulation and online discourse that have evolved since the passage of § 230.

**A. Congress Enacted § 230 to Stimulate Private Sector Efforts to Address Objectionable Online Content in a Manner that Preserved Free Speech Online.**

In § 230, Congress elected to establish a single consistent standard for defamation liability on the Internet, in order to better effect its central goal of fostering self-regulation of the Internet. The operative provisions of § 230 immunize providers and users from lawsuits seeking to hold them liable: 1) as the publishers of content created by others; 2) for removing or restricting access to content; and, 3) for providing others with the technical means to restrict access to objectionable content. Read together, these three provisions encourage service providers to engage in self-policing, which under traditional standards would expose them to distributor liability.

In the mid-1990s, concerns about children's online access to objectionable material developed among both the public and the legislature. Two distinct approaches to remedying this issue emerged in Congress. The first, embodied in a bill sponsored by Senator Exon, the Communications Decency Act (CDA), sought to impose a system of governmental censorship on online speech. S. 314, 104th Cong. (1996). The CDA imposed steep criminal fines on anyone who used the Internet to display or transmit indecent communications to anyone under eighteen years of age. 47 U.S.C. § 223(a)(1)(B) and (d)(1)(A-B) (1997); *overruled by Reno v. ACLU*, 521 U.S. 844 (1997). Due to the open nature of the Internet, the CDA acted to ban indecent information from all publicly accessible portions of the Internet. Other legislators worried that the CDA would be ineffective at curbing children's access to objectionable content and would unconstitutionally interfere with protected speech. Elizabeth Corcoran, *Legislation to Curb Smut On-Line Is Introduced*, *The Washington Post*, July 01, 1995. As then Speaker of the House, Newt Gingrich said:

I think that the Amendment . . . by Senator Exon in the Senate will have no real meaning and have no real impact and in fact I don't think will survive. It is clearly a violation of free speech and it's a violation of the right of adults to communicate with each other. I don't agree with it and I don't think it is a serious way to discuss a serious issue, which is, how do you maintain the right of free speech for adults while also protecting children in a medium which is available to both?

*Progress Report* (National Empowerment Television broadcast), available at [http://www.cdt.org/speech/cda/950620ging\\_oppose.html](http://www.cdt.org/speech/cda/950620ging_oppose.html).

In response to what many legislators perceived to be the overzealous and unconstitutional tack embodied by the CDA the House passed the Internet Freedom and Family Empowerment Act, or the Cox-Wyden Amendment, eventually codified in 47 U.S.C. § 230.<sup>2</sup> Elsa Brenner, *Censorship at Issue on the Internet*, New York Times, January 28, 1996. While the supporters of the Internet Freedom and Family Empowerment Act (§ 230) believed legislation was necessary to restrict children's access to objectionable material, they intended to craft a solution that "[did not] violate free speech or the right of adults to communicate with each other." 141 Cong. Rec. H8460, 8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte). The Internet Freedom and Family Empowerment Act was designed to create a more appropriate online environment for children and families, without sacrificing the Internet's speech enhancing characteristics.<sup>3</sup>

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<sup>2</sup> Ultimately, rather than choosing between the competing visions offered by the CDA and Cox-Wyden, Congress enacted them both.

<sup>3</sup> Section 230 describes the Internet as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" and establishes the "promot[ion] [of] the continued development of the Internet" as a policy goal. 47 U.S.C. § 230(a)(3) & (b)(4). The importance of the Internet as a platform for free expression is found throughout the member's remarks. As Representative

With § 230, Congress intended to spur the market-driven development of filtering tools and self-regulatory policies to address objectionable content. 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). To accomplish this goal, Congress removed a legal stumbling block to voluntary efforts to monitor and regulate content. A developing body of libel case law had created a host of uncertainties for entities that monitored and removed content created by others from their services. In response, Congress adopted § 230 to provide a blanket immunity to providers and users from all causes of action stemming from the publication of third-party created content, including defamation.

Two cases motivated Congress' action—*Stratton Oakmont v. Prodigy* and *Cubby v. CompuServe*. Both cases involved service providers who were sued for their role in hosting and providing access to content created by others. In *Stratton Oakmont*, Prodigy, which “held itself out to the public and its members as controlling the content of its computer bulletin boards” and “implemented this control through its automatic software screening program,” was held liable for publishing messages posted by others to its computer bulletin boards. *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995). According to the court, the establishment of a monitoring policy designed to limit offensive content exposed Prodigy to libel actions for all 60,000 messages posted to its service each day, regardless of whether Prodigy had actual or constructive knowledge of the libelous posts. *Id.* at \*13.

In *Cubby*, the court equated CompuServe's online forums, including electronic bulletin boards, to an “electronic, for-profit library,” concluding

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Wyden, co-author of the amendment, explained, “the Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise.” 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden).

that while CompuServe might decline to carry a given forum, it had little editorial control over the forum's content once it was accepted. *Cubby v. CompuServe*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991). On this basis, the court concluded that CompuServe could only be held liable for publication where it had actual or constructive knowledge. *Id.* at 141. The *Cubby* court, however, found no evidence of actual or constructive knowledge triggering such liability. *Id.*

In combination, these cases threatened to bring private sector content monitoring on the Internet to a screeching halt. Service providers who were "actively utilizing technology and manpower" to monitor and control content created by others would be considered primary publishers, and therefore subject to unbounded liability unless they made flawless efforts to verify the accuracy of all content on their services. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229 at \*10. Moreover, while CompuServe was not found liable under *Cubby's* secondary publisher standard on those particular facts, the circumstances sufficient to establish actual or constructive knowledge remained ill-defined and unclear. While certainly more protective of the fledgling service provider industry, the secondary publisher (distributor) liability standard used in *Cubby* provided little solace to an industry premised on providing a platform for everyone to become a publisher. As one commentator counseled after the *Cubby* decision, "lawyers should also advise these clients to take reasonable precautions . . . [such as] subscriber identification; on-line warnings against libel; review of widely disseminated bulletin board messages; rapid investigation of suspected defamatory statements; rapid removal of known defamatory statements; and the suspension of repeat offenders." Robert B. Charles, *The New World of On-Line Libel*, Manhattan Lawyer, Dec. 1991, at 40. Given the radical differences between the traditional publishing enterprise and the platform for all speakers offered by Internet service providers, the



application of either of the standards advocated by *Stratton Oakmont* or *Cubby* posed a significant threat of exposure to lawsuits.<sup>4</sup>

To address what it viewed as the critical and pressing issue of protecting children from objectionable content, and faced with a judicial climate that stymied self-regulatory efforts and Internet speech alike, Congress elected to alter the law of defamation as it applied to Internet publication.<sup>5</sup> In § 230, Congress granted a broad immunity to online publishers, thereby eliminating the obstacles to content monitoring created by *Stratton Oakmont* and *Cubby*. The operative provisions of § 230 immunize providers and users from lawsuits seeking to hold them liable: 1)

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<sup>4</sup> See discussion *Infra* Part I.B.

<sup>5</sup> While Congress' primary focus was protecting minors from objectionable content, we should assume that Congress was aware of the state of libel law and cognizant of the impact § 230 would have on it. In this light, these policy trade-offs provide ample justification for Congress' decision to maximize the likelihood of private content monitoring activities at a price to defamation victims' recourse via the courts. Courts have long recognized access to means of response as a critical factor in balancing the competing interests in free expression and reputational integrity. As the Supreme Court explained in *Gertz v. Robert Welch, Inc.*:

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. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). Unlike defamation in traditional print media, the unique characteristics of the Internet allow alleged defamation victims to respond with equal speed, distribution, and visibility. Given the unprecedented ease and effectiveness with which victims can dispute and correct defamatory statements online, the harm to their reputations must weigh less heavily than the harms visited upon free expression.

as the publishers of content created by others; 2) for removing or restricting access to content; and, 3) for providing others with the technical means to restrict access to objectionable content.<sup>6</sup> § 230(c)(1) and (2).

Paragraph (c)(1) of § 230, the provision at issue in this case, states: “[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.” “Publisher” is a term of art that encompasses any party who takes part in or contributes to the transmission of a defamatory statement about another to a third party.<sup>7</sup> W. Page Keeton, *Prosser and Keeton on The Law of Torts* § 113 (5th ed. 1984). The principle that both primary publishers and distributors fall within the larger class of “publishers” is long-established, and Congress can be expected to have been familiar with it. As the Court of Appeal correctly understood, “statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles.” *Barrett v. Rosenthal*, 114 Cal. App. 4th 1379, 1396 (2004) (citing *United States v. Texas*, 507 U.S. 529 (1993)). Given the problems faced by providers and users if they were considered to be publishers under either the primary or distributor standard of liability, it makes sense that Congress, seeking to pave the way for private sector content monitoring, would provide a blanket immunity.

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<sup>6</sup> Section 230 removed the federal government from content determinations, leaving the market-place to produce tools and policies that would protect the interests of children as determined by their families.

<sup>7</sup> Although the class of publishers is well defined within defamation law, both courts and commentators have, on occasion, used the term in a manner that belies its traditional meaning. Rather than employing the term “publisher” to refer to all those liable for publication some have used the term as shorthand for “primary publisher”. This imprecision of language, while it may correspond to the layman’s understanding of the term, fails to recognize its legally relevant construction.

The broad blanket immunity created by § 230, as appropriately interpreted in *Zeran*, has led to market-driven content monitoring, a proliferation of monitoring tools,<sup>8</sup> and the continued development of the Internet as an unparalleled medium for speech—achieving precisely the goals envisioned by Congress. *See Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997).

**B. The Court of Appeal’s Decision Undermines Congress’ Goals by Imposing an Unworkable Standard of Distributor Liability on Providers and Users for Content Created by Others.**

Ordinarily, entities that know or have reason to know of the defamatory nature of a publication they participate in distributing can be held liable under the secondary publisher (distributor) standard. Restatement (Second) of Torts § 581. By contrast, the Court of Appeal incorrectly suggested that actual knowledge is both necessary and sufficient to establish distributor liability: “Distributor liability would not require a service provider to review communications in advance of posting them but only to act reasonably after being placed on notice that the communication is defamatory.” *Barrett v. Rosenthal*, 114 Cal. App. 4th at 1406 (citing *Auvil v. CBS “60 Minutes”*, 800 F. Supp. 928, 931-932 (E.D. Wash. 1992)). The precedent in California and other jurisdictions imposes a “duty to investigate” under the constructive knowledge (“reason to know”) prong of the standard, where facts are known that raise questions about the content.<sup>9</sup>

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<sup>8</sup> *See Infra* I.C.

<sup>9</sup> A secondary publisher (distributor) has no liability unless he or she knows of the defamatory nature of the publication or has knowledge of facts which impose a duty to investigate. *Lewis v. Time, Inc.*, 83 F.R.D. 455, 463-464 (E.D. Cal. 1979), *aff’d*, 710 F.2d 549 (9th Cir. 1983); Restatement (Second) of Torts § 581 (“knows are has reason to know”); *Osmond v. EWAP*, 153 Cal. App. 3d 842, 852 (1984) (citing *Lewis*); *Sakuma v.*

Unfortunately, it is unclear what facts and information give rise to a duty to investigate or what sort of investigation and inquiry are required to satisfy it.<sup>10</sup> The case law on the issue of constructive knowledge is limited, and courts have ruled inconsistently when presented with similar facts. A host of “special circumstances” may give rise to constructive knowledge, and thus a duty to investigate, including, but not limited to, the reputation and reliability of the author, the reliability of sources, the type of publication, and knowledge about ongoing defamation disputes between the author and subject.<sup>11</sup>

The law of distributor liability is tied to expectations and norms that have developed around the traditional publishing environment. Distributors, such as libraries and bookstores, make decisions about the content that they acquire and distribute. They know the entities from which they acquire content. They can, and do, make independent judgments about what books to carry from which publishing house. On the other end of the distribution chain, the publishing houses from which distributors acquire content, have editors, fact-checkers, and contractual relationships with

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*Zellerbach Paper Co.*, 25 Cal. App. 2d 309, 322 (1938). “[At] the very least, [the] plaintiff must prove the distributors either knew of the libelous content of the article or that facts were known which imposed a duty to investigate.” *Osmond*, 153 Cal. App. 3d at 854 (citing *Lewis*, 83 F.R.D. at 464).

<sup>10</sup> The paucity of case law addressing distributor liability is undeniable. For this reason, we review what special circumstances give rise to the duty to investigate for both primary and secondary publishers in order to shed some light on the factors courts consider and the reasoning employed. It is unclear, however, whether these duties differ.

<sup>11</sup> The *Reader’s Digest* court listed four circumstances that may give rise to a duty to investigate: “A failure to investigate . . . anger and hostility toward the plaintiff . . . reliance upon sources known to be unreliable . . . or known to be biased against the plaintiff.” *Reader’s Digest Ass’n v. Superior Court of Marin County*, 37 Cal. 3d at 244, 258 (1984). Such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.

authors. Distributors are able to control their risk by choosing publishing houses and choosing titles. When legal complaints arise, primary publishers are typically the target because they are subject to a stricter standard of liability and often have deeper pockets. Not surprisingly, there is far less litigation against distributors.

Unlike the traditional publishing environment, online providers and users typically have no relationship with third parties on the basis of the content they create. Rather, their relationship is a simple exchange of fee (or advertiser access) for access and participation. In the online world, providers and users typically have little information about those who create and post content. Nor do providers and users assess the reliability of individuals who come onto their networks. It is common for individuals to publish anonymously online. Online providers and users deal with a numerous cast of unknown, constantly changing, speakers; provide an open platform for others to establish discussion forums and topics; and enable absolutely anyone to create content, even on controversial topics. As one court described bulletin boards or chat rooms:

Unlike many traditional media, there are no controls on the postings. Literally anyone who has access to the Internet has access to the chat-rooms. The chat-rooms devoted to a particular company are not sponsored by that company, or by any other company. No special expertise, knowledge or status is required to post a message, or to respond. The postings are not arranged by topic or by poster. The vast majority of the users are, because of the "handles," effectively anonymous. The messages range from relatively straightforward commentary to personal invective directed at other posters and at the subject company to the simply bizarre.

*(Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1264 (C.D. Cal. 2001).* The typical content creator is not expected by her audience to be accurate, unbiased, or expert; the service provider likewise has no

expectations regarding any of those who take advantage of its platform to provide content.

The limited number of cases against distributors and the rarer cases in which courts have found them liable may suggest to some that Internet providers and users have little to fear from the Court of Appeal's standard. *See Lewis v. Time*, 83 F.R.D. 455, 463 (E.D. Cal. 1979). Because the economics of publishers and distributors are reversed on the Internet, this assumption fails. The paucity of case law on distributor liability stems primarily from the fact that plaintiffs have traditionally pursued the deep-pockets of primary publishers and not distributors. Robert W. Hamilton, *Constitutional Issues Involving Use of the Internet: Liability for Third-Party Content on the Internet*, 8 Seton Hall Const. L.J. 733 (Summer 1998). On the Internet, the roles are often reversed. The primary publisher may be an individual with shallow pockets, and the secondary publisher (distributor) a service provider with deep ones.<sup>12</sup> *Id.* The secondary publisher may also be easier to identify than the content creator who may have concealed his identity.

Economics aside, the existing case law amply demonstrates why the law that has developed around the traditional publishing enterprise is a poor fit for the online environment. The factors courts consider in assessing whether a duty to investigate exists are simply unworkable in the online environment.

Knowledge of ongoing defamation litigation between the complaining individual and the alleged defamer is a relevant factor in the

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<sup>12</sup> *Carafano v. Metrosplach.com, Inc.* provides a telling example of plaintiffs inclusion of ISPs as defendants for good measure. *Carafano v. Metrosplach.com*, 339 F.3d 1119 (9th Cir. 2003). Matchmaker.com, despite § 230's complete immunity, was forced to defend itself in district court and up to the Ninth Circuit where the court concluded that they were statutorily immune from suit. *Id.*

constructive knowledge analysis. *Spence v. Flynt*, 647 F. Supp. 1266, 1274 (D. Wyo. 1986) (finding that the constructive knowledge standard was met where the market selling the magazines knew of and was a party to previous defamation suits based on other statements against the primary publisher);<sup>13</sup> *Dworkin v. Hustler Magazine*, 611 F. Supp. 781, 787 (D. Wyo. 1985) (finding no liability based on knowledge of prior libel suit and questionable behavior of speaker, and no duty to check subsequent editions of the magazine for defamatory material); *Reader's Digest Ass'n v. Superior Court of Marin County*, 37 Cal. 3d 244 (1984) (holding that knowledge of other libel lawsuits between the author and a notoriously litigious plaintiff, along with a host of other factors, created no duty to investigate because the plaintiff often sought to suppress speech with litigation). Internet service providers are frequently aware of lawsuits, including defamation suits, against their subscribers and users. Service providers are notified of thousands of lawsuits yearly, merely because they receive subpoenas demanding information identifying an otherwise anonymous online speaker. *'John Doe' subpoenas intimidate free speech on the Internet*, San Jose Mercury News, May 16, 2003, available at <http://www.siliconvalley.com/mld/siliconvalley/business/columnists/sveditorial/5874953.htm> (stating Yahoo expects 600 civil subpoenas in one year.); Aaron Elstein, *AOL sides with anonymous posters*, Wall Street Journal Online, March 4, 2001, available at <http://zdnet.com.com/2100-11-528630.html?legacy=zdn> (stating AOL received nearly 475 subpoenas in 2000). When *Barrett* is read in light of this case law, it is certainly conceivable that these subpoenas, or some subset of them, would create constructive knowledge and give rise to a duty

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<sup>13</sup> It is of note that the other court had not ruled on liability in the previous litigation when this court found that the market selling the magazine had a duty to investigate.

to investigate current and subsequent posts by the individual whose information was subpoenaed. Further, if numerous subpoenas are received that relate to postings in a particular forum, a broader duty to investigate all postings to that forum would likely arise. In the real world, however, service providers need to be able to exercise discretion in their self-policing. Where an organization is known to use litigation to suppress speech, such as the notoriously litigious Church of Scientology,<sup>14</sup> a service provider previously could deem it inappropriate to proactively police on their behalf while litigation is still underway. But the *Barrett* standard, when applied to the constructive knowledge factor, would require service providers to evaluate such litigation as it arises—while providing them little guidance about how to do so. In the absence of guidance about how to evaluate the degree and level of involvement in ongoing or past litigation, service providers will remove content at the first hint of litigation, before any determinations on the merits have been made. Given that Internet service providers are frequently the first stop in litigation, the possibility that knowledge of a claim against a subscriber can trigger a duty to investigate is problematic.

The reputation of authors is another factor courts consider when assessing whether a publisher should have known that information was likely to be defamatory and whether reassurances from the author are sufficient to discharge a duty to investigate.<sup>15</sup> In some instances, publishers

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<sup>14</sup> See William W. Horne, *The Two Face of Scientology*, *American Lawyer*, July/Aug. 1992 (discussing the litigious tendencies of the Church of Scientology). A Lexis party name search for “Church of Scientology” produced over 300 results.

<sup>15</sup> Courts have considered not only the author’s reputation for reliability but also the reliability of the source as a factor that may create a duty to investigate. See *Barger v. Playboy Enter., Inc.*, 564 F. Supp. 1151, 1157 (N.D. Cal. 1983) (The publisher did not conceal from readers facts about the source that may affect his credibility; thus, no duty to investigate



have safely relied on the reputation or reassurances of the author. For example, in *Osmond v. EWAP, Inc.*—the only California case addressing constructive knowledge for secondary publishers—the court did not impose liability upon the distributor of a pornographic video because it came from a reputable dealer, but stated that if “a particular author or a particular publisher has frequently published notoriously sensational or scandalous books, a shop or library that offers to the public such literature may take the risk of becoming liable to any one who may be defamed by them.”

*Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 853 (1984). Compare *Bindrim v. Mitchell*, 92 Cal. App. 3d 61 (1979) (upholding a jury verdict against a primary publisher for failure to investigate after receiving notice of defamation and finding that the jury was free to conclude that reassurances from the author to the publisher were insufficient to discharge the duty to investigate), *overruled on other grounds by McCoy v. Hearst Corp.*, 42 Cal. 3d 835 (1986). The scant precedent suggests that a duty to investigate arises where a publisher has reason to question the reliability of the author. It is unclear whether and under what circumstances assurances from the creator of the content discharge the provider’s or user’s duty to investigate.

Consider the confusion these cases would create in the context of message boards dedicated to or known for hosting discussions of controversial issues and in which many if not all the participants are anonymous. Such message boards routinely generate complaints. It is unclear whether either the knowledge that a board is dedicated to a controversial topic or complaints about postings on a particular board would create a duty to investigate. If so, it is uncertain whether the duty would require investigation of only those individuals who made potentially

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arose.), see also *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984) (The court follows the Barger reasoning as to possible unreliable sources).

contestable posts, those individuals and all who responded to them, or all posts to the message board. The anonymity and pseudonymity of the content creators injects an additional wrinkle. It is unclear how courts would evaluate content created by anonymous and unknown speakers. Even where speakers are identifiable and not pseudonymous or anonymous, verifying the reliability of a speaker on the Internet, is distinct from verifying the reliability and scholarly reputation of a published author. The shift in publication platforms, from durable, time-consuming print, to ephemeral, immediate Internet significantly alters the calculus of how to evaluate a speaker's reliability. The distinction between reliable and unreliable content creators does not fit in an environment where distributors exercise little to no control over who contributes content, and have no viable method of assessing their reliability.

The paucity of precedent on distributor liability leads to substantial uncertainty for providers and users facing litigation. The fact-intensive and case-specific nature of defamation law further limits the ability to generalize and establish business practices around existing decisions. The substantial differences between speech on the Internet and speech on other traditional platforms compound this lack of guidance. Contributory knowledge factors such as pending litigation and reliability of the author, are manageable in a traditional publishing enterprise with limited authors, fact checkers, and contracts—but are wholly impractical on the Internet. Combined with the deep pockets of ISPs, this legal uncertainty is an open invitation to file illegitimate claims.

### **C. Liability Premised Upon Actual or Constructive Knowledge Discourages Self-Monitoring by Providers and Users.**

Congress intended § 230, in part, to create incentives for providers and users to self-regulate content published on their services. The Court of Appeal erroneously asserted that the blanket immunity standard established

in *Zeran* removed all incentive for self-regulation and simultaneously discounted the deterrent effect distributor liability would exert on self-regulation. *Barrett*, 114 Cal. App. 4th at 1403. The Court’s misguided assumption that immunity would remove all incentives for self-regulation may be attributable, in part, to the court’s reliance on a number of law review notes, which generally fail to consider the strong market forces demanding the regulation of network content and pay little attention to the actual marketplace. *Barrett*, 114 Cal. App. 4th at 1395 (citing Robert T. Langdon, Note, *The Communications Decency Act § 230: Makes Sense? Or Nonsense?--A Private Person's Inability to Recover if Defamed in Cyberspace*, 73 St. John's L. Rev. 829 (1999); Brian C. McManus, Note, *Rethinking Defamation Liability for Internet Service Providers* 35 Suffolk U. L. Rev. 647 (2001)). A look at the market reveals that the Court of Appeal and the scholars they cite are mistaken. The *Zeran* interpretation of § 230, implementing the plain language of the statute, paved the way for a flourishing market in Internet monitoring tools and self-regulatory practices aimed at objectionable content—precisely the self-regulation Congress sought.<sup>16</sup>

By contrast, imposing a constructive knowledge standard provides a strong disincentive for self-regulation because those who take active efforts to police content substantially expand the likelihood of gaining the requisite

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<sup>16</sup> The Court of Appeal stated that under such a system of nonliability, “ISPs will not bother to screen their content at all because they will never be subject to liability,” notwithstanding the evidence of seven years since *Zeran*, in which ISPs have implemented a variety of content screening mechanisms. *Barrett*, 114 Cal. App. 4th at 1403 (quoting Sewali K. Patel, Note, *Immunizing Internet Service Providers from Third Party Defamation Claims: How Far Should Courts Go?*, 55 Vand. L. Rev. 647 (2002)). If instead, the court reasoned, liability were imposed for “neglecting to monitor information or failing to remove objectionable content,” providers would have a strong incentive to regulate content. *Barrett*, 114 Cal. App. 4th at 1403.

level of knowledge to trigger liability. Monitoring network activity, as Prodigy did in *Stratton Oakmont*, provides greater knowledge of network content and increases the possibility that the provider or user has “reason to know” of the defamatory nature of messages published on its service. Providers and users who monitor content expose themselves to liability premised on constructive knowledge of material they have reviewed but failed to remove.<sup>17</sup> Given that monitoring increases exposure to liability, rational Internet providers and users faced with the Court of Appeal’s new distributor liability standard will abandon content monitoring efforts, choosing instead to turn a blind eye. Otherwise, providers who monitor, in accord with congressional intent, could be held liable for failing to screen all content originating from a user, or forum, or particular conversation, once monitoring efforts revealed that a particular forum or user was likely to generate defamatory messages. Providers of an online discussion forum, for example, could face liability under the constructive knowledge standard for defamatory messages posted to the forum, merely on the basis of previous accusations against a particular poster or perhaps even the contentious nature of the topics discussed. To protect themselves from liability based on a user’s prior history, providers could restrict access to the forum, barring any individuals previously accused of defamation. Providers are far more likely, however, to avoid liability by minimizing their knowledge of the posting history of individual users, reducing or eliminating self-regulatory efforts. This Hobson’s choice defeats congressional intent.

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<sup>17</sup> As discussed above and below, even without monitoring providers and users may come to possess information that could contribute toward constructive knowledge through subpoenas for subscriber information or through notice of allegedly defamatory material.

Legal liability of the kind created by the Court of Appeal's interpretation of § 230 is unnecessary to spur providers and users to monitor and regulate the objectionable content Congress sought to address.<sup>18</sup> The absence of liability, coupled with market pressure, motivates providers to discover and remove the kind of objectionable material targeted by Congress.

Over 70 commercially available programs currently enable users to monitor and filter content on a variety of interactive computer services, including the World Wide Web, email, instant messaging, Usenet, and peer-to-peer networks. *Tools for Families*, at [http://kids.getnetwise.org/tools/tool\\_result.php3?display\\_start=1](http://kids.getnetwise.org/tools/tool_result.php3?display_start=1). In addition, most major Internet service providers, among them AOL, MSN, and SBC, offer parental controls designed to block objectionable material and monitor the online activities of children. *Child Safety Options Offered by Leading ISPs*, at <http://kids.getnetwise.org/tools/isoptions>. The commercial availability of these automated filtering tools demonstrates that market pressure alone is a fully effective means of advancing self-regulation of objectionable content, notwithstanding the Court of Appeal's disbelief.

The court's conclusion that tort liability is necessary to achieve Congress' desired policy is mistaken. Congress wanted providers to monitor content, and it understood that private monitoring efforts would not materialize unless the potential liability resulting from such activities was removed. The passage of § 230, and its consistent interpretation, have yielded a wealth of self-regulatory efforts to protect children from

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<sup>18</sup> It is important to remember that while Congress' concern was protecting minors from obscenity online, to do this it explicitly overruled *Stratton Oakmont*—a defamation case. Thus, while its goal may have been relatively narrow, Congress made a policy decision to use an expansive immunity in order to effectuate what it viewed as a critical goal.

objectionable content. Rather than face an uncertain standard of liability, providers and users will choose to suspend their self-regulatory efforts.<sup>19</sup> The Court of Appeal's interpretation will upset the market incentives established in § 230 and undermine Congress' goal of encouraging self-regulation. The Court of Appeal's concern that non-liability would hinder the goals of self-regulation flies in the face of both reason and reality, and stems from its failure to consider Congress' objective in enacting § 230.

**D. Liability Premised Upon Actual or Constructive Knowledge Creates Unchecked Incentives for Immediate Removal of Content Upon Notice and Restricts the Free Exchange of Ideas in the Online Environment.**

The application of distributor liability poses a grave threat to the vibrant, online marketplace of ideas that Congress sought to protect. Under the distributor liability standard, providers and users notified of allegedly defamatory material are subject to liability if they fail to respond appropriately. Three courses of action are open to a provider or user notified of allegedly defamatory material: ignore the notification, conduct an investigation into the merits of the claim, or remove the material at issue. Under the Court of Appeal's imposition of distributor liability, providers will not ignore notifications because, by doing so, their liability would increase markedly. Further, a policy that ignored all notifications

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<sup>19</sup> This disincentive also applies to human monitoring, which is required to screen for defamation. While automated filters can assist in screening pornographic and offensive material, only human investigation can detect defamation because of its dependence on the truth of particular facts. Monitoring efforts that go beyond automated filters and require human intervention and oversight, such as actions taken by message board moderators or bloggers to police content, could give rise to liability premised on actual or constructive knowledge. Such monitoring activities would cease under a constructive knowledge regime—precisely the opposite outcome sought by Congress.

would overlook strong market forces that demand responsible content monitoring. A policy of investigation is equally unlikely because the factual and legal inquiries necessary to make such a determination would result in substantial investigation costs.<sup>20</sup> As one commentator explains, “providers are usually ill equipped to evaluate whether a given statement is in fact defamatory.” Ian C. Ballon, *E-Commerce and Internet Law: Treatise with Forms* 42.06 [2] (2003). Because providers are liable from the moment of notification under the Court of Appeal’s decision, the time required to conduct an investigation increases the potential liability providers face. As Ballon advises, removal of content should occur “as soon as practicable both to limit [] potential exposure and to avoid unnecessary litigation.” *Id.*

Given the incentives created by the Court of Appeal’s reading of § 230, the only reasonable course of action is to immediately remove the allegedly defamatory statements without regard to the merits of the notification or the nature of the speech in question. While the costs of investigation, in terms of both actual expenditures and increased liability, are considerable, providers and users face no significant costs associated with removing allegedly defamatory material. Removal requires neither factual inquiry nor legal expertise. With the material at issue specified in the notification, the provider is left with only the simple task of removing it from its servers.

The absence of legal liability for removing content further compounds the potential for abuse of removal policies. Section 230(c)(2) shields providers from liability for their removal of content “whether or not

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<sup>20</sup> The imposition of liability on the basis of constructive knowledge poses a further threat to individual users and moderators. While these users are particularly ill-prepared to conduct expensive inquiries into legal and factual matters, because of their personal interaction with the messages they publish, they are at greater risk for liability.

such material is constitutionally protected.” The private censorship of speech, constitutionally protected or otherwise, subjects the provider to no liability. As a result, the already high likelihood of removal of protected speech increases.

The Court of Appeal, following *Zeran*’s critics, claimed excessive removal of speech “would not likely be tolerated by the market.” *Barrett*, 114 Cal. App. 4th at 1405 (quoting David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147 (1997)). Further, the Court of Appeal contended that the difficulty in prevailing in a defamation suit will lessen the impact of its novel interpretation of § 230 on Internet speech. Both arguments lack merit.

Faced with a standard of liability for online defamation nearly identical to the rule announced by the Court of Appeal, the trade association for Internet service providers in the UK recommends the adoption of policies that mandate immediate removal on notice. In the United Kingdom, in order to avoid liability, providers of third party content must show that they “did not know, and had no reason to believe, that what he did caused or contributed to the publication of a ‘defamatory statement.’” Defamation Act 1996, Ch. 31, s. 1 (Eng.). In response, the ISPA UK advises its members to expeditiously remove allegedly defamatory material in order to avoid liability. According to its Compliance Guidance Scheme for Online Defamation “[t]here is almost never a good business reason” to leave such a statement up after receiving notice even though “the law is . . . open to abuse as users may claim that any statement they do not like is defamatory.” ISPA UK, Compliance Guidance Scheme for Online Defamation, at [http://www.ispa.org.uk/html/legal\\_forum/compliance%20guidance%20scheme/040506%20Defamation.html](http://www.ispa.org.uk/html/legal_forum/compliance%20guidance%20scheme/040506%20Defamation.html). The ISPA UK recommends this policy



despite the provider's potential liability for removing content, a safeguard explicitly removed by § 230(c)(2).<sup>21</sup>

Under the system of liability imposed by the Court of Appeal, “removal upon notice” will become a standard industry practice. Because content creators have no legal remedy for the removal of their speech, providers have little reason to subject themselves to distributor liability for failing to immediately remove allegedly defamatory material upon notice. Providers will adopt similar liability-minimizing policies, creating an industry-standard procedure and leaving consumers with no opportunity to shop with their feet. The market envisioned by *Zeran*'s critics simply will not exist.

Providers will avoid liability for publication by complying blindly with all notices without fear of legal action from the speaker or competition

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<sup>21</sup> Even with procedures for alleged wrongdoers to challenge claims about content, legal mechanisms that encourage removal upon notice appear to reduce the availability of protected expression. Section 512(c) of the Digital Millennium Copyright Act 17 U.S.C. § 512 provides safe harbor immunity from copyright infringement claims to providers that “respond[] expeditiously to remove, or disable access to” allegedly infringing material upon receiving notification. 17 U.S.C. § 512(c)(1)(C). The statute requires notices to include specific information and to contain a statement, signed under penalty of perjury, that the information in the complaint is accurate and that the complaining party has authority to act on behalf of the allegedly injured party. In addition, the statute requires that the alleged infringer be notified of the removal of material, and establishes a process through which the alleged infringer can easily provide a “counter-notification” to challenge the claim and force the accuser to obtain a court order to permanently remove the content at issue. Despite the DMCA's safeguards for content, it appears to significantly stifle online speech. Research conducted by the Chilling Effects Clearinghouse concludes that counter-notifications are exceedingly rare, despite the deficiency of one-third of the § 512 notices in the research sample. Jennifer M. Urban, *Section 512 of the DMCA: Fair Process or Chilling Effect?* at [http://cfp2004.org/special/Chillingeffects\\_JM\\_Urban.ppt](http://cfp2004.org/special/Chillingeffects_JM_Urban.ppt).

from other providers. This automatic content removal procedure presents an easy target for abuse by those who wish to silence protected speech.<sup>22</sup> By submitting a bad-faith claim of defamation to a provider, an individual can ensure the removal of constitutionally protected speech, abusing the policy created by the court's rule as a tool for asserting a heckler's veto.

Finally, the difficulty in prevailing in a defamation suit offers no hope for lessening the harms visited upon protected speech. Regardless of the likelihood of a judgment against a provider or the amount of potential damages, the costs of litigation are significant. Even merit-less suits present substantial costs. As the Supreme Court explained, “[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to ‘steer . . . wider of the unlawful zone,’ and thus ‘create the danger that the legitimate utterance will be penalized.’” *Time v. Hill*, 385 U.S. 374, 389 (1967) (citations omitted). Providers will comply with

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<sup>22</sup> Researchers who compared the effect of UK and US law on speech concluded that the ISP in the UK, that faces liability equivalent to that found by the Court of Appeal, “has a high propensity to remove a website without careful examination of the content.” Christian Ahlert, Chris Marsden and Chester Yung, *How ‘Liberty’ Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation* 26, at <http://pcmlp.socleg.ox.ac.uk/liberty.pdf>. After posting John Stuart Mills’ *On Liberty*, a work well within the public domain, the researchers sent a demand letter to the ISP hosting the site claiming copyright infringement and demanding removal. Within one day, the non-infringing speech was removed. The lack of procedural protections and the exposure to liability steer Internet service providers to expeditiously remove content. “Under this arrangement ISPs have to assume the role of judge, jury and enforcer at the same time. They not only have to make a judgment whether a website is illegal, or not, on the merits of the evidence gathered by themselves (something that directly contravenes basic principles of due process), but they also have to behave as enforcing agents with executive powers.” *Id.* at 27.

demands for content removal as a matter of policy in order to avoid the high costs of litigation.

Because the Court of Appeal questioned Congress' commitment to preserving the Internet as a forum for free and uninhibited debate, it failed to properly consider the toxic effect of distributor liability on online speech. The system of incentives created by the court's rule, in concert with the lack of countervailing pressures, will undoubtedly result in the elimination of protected speech. Under the court's liability regime, upon receiving notice of an allegedly defamatory statement the provider or user will immediately remove the content in question, regardless of the veracity of the claim or the constitutional protection afforded the content. The economics are dispositive. Removing content is free—it is easily and simply accomplished, and carries absolutely no risk of liability. Preserving content comes at the price of upfront factual investigation, and under the Court of Appeal's decision, legal analysis and uncertain liability.

## **II. The Court of Appeal's Abandonment of the Well-Settled Interpretation of § 230 Is Grounded in a Flawed Reading of Legislative Silence and a Lack of Understanding of the Contours of Defamation Law.**

### **A. The Court of Appeal's Departure from the Standard Interpretation of § 230 Adopted by All Other Courts Creates Unnecessary Conflict.**

The Court of Appeal's decision rejects the consistent interpretation of § 230 by four federal circuits, district courts in four other circuits, and numerous state courts. Prior to the Court of Appeal's decision, every federal and state court to address the issue has followed the Fourth Circuit's decision in *Zeran* that found § 230 to establish a broad immunity for online

publishers of third party content.<sup>23</sup> *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (holding that § 230 “overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law”); *Green v. America Online (AOL)*, 318 F.3d 465, 469, 471 (3d Cir. 2003) (affirming dismissal of a lawsuit seeking to hold AOL liable for, *inter alia*, failing to remove messages posted to a chat room after plaintiff faxed AOL notice claiming they were defamatory); *Ben Ezra, Weinstein, and Co., Inc. v. America Online Inc.*, 206 F.3d 980, 983, 986 (10th Cir. 2000) (refusing to hold AOL liable for third-party content that remained after AOL had notice because “we agree with the Fourth Circuit’s decision in *Zeran*” that section 230 “specifically proscribes” imposing notice-based liability); *Patentwizard, Inc. v. Kinko’s, Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001); *Smith v. Intercosmos Media Group, Inc.*, U.S. Dist. LEXIS 24251, \*2, 9, 10-11 (E.D. La. 2002); *Morrison v. America Online, Inc.*, 153 F. Supp. 2d 930, 934 (N.D. Ind. 2001); *Blumenthal v. Drudge*, 992 F. Supp. 44, 51-52 (D.D.C. 1998); *See Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831, 833 n.10 & 835 (2002); *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 692, 695 n.3, & 696-97 (2001); *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1012-17 (Fla. 2001); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 38-41 (Wash. App. 2001); *Doe One v. Oliver*, 755 A.2d 1000, 1003-04 (Conn. Super. 2000); *Barrett v. Fonorow*, 799 N.E.2d 916, 922-26 (Ill. App. 2003) (holding, under facts nearly identical to the case under review, that § 230 provides immunity regardless of knowledge of the defamatory nature of the material); *Sabbato v. Hardy*, 29 Media L. Rptr. 1860-62, 2000 Ohio App. LEXIS 6154 (Ohio App. 2000). Where numerous federal courts, including the Ninth Circuit, have unanimously interpreted a federal

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<sup>23</sup> To date, the only other case excluding secondary publishers from protection under § 230 was the Court of Appeal’s decision in *Grace v. eBay Inc.*, 120 Cal. App. 4th 984 (2004).

statute, a state court should be leery of adopting an alternative interpretation. To do so in this case will undermine well-established federal law, unsettle businesses that rely on this uniform and consistent interpretation, and invite forum shopping.

### **B. The Court of Appeal’s Use of Legislative Silence Is Flawed.**

To justify its abandonment of the unanimous precedent supporting the *Zeran* interpretation of § 230, the Court of Appeal resorted to a novel twist on the “dog that didn’t bark” line of reasoning.<sup>24</sup> Unable to find direct support for its cramped reading of § 230, the Court of Appeal pointed to the absence of an explicit congressional rejection of the standard of liability applied *but not satisfied* in the *Cubby* case. The Court of Appeal concluded that Congress’ silence on *Cubby* evidenced a congressional intent to retain the secondary publisher (distributor) standard of liability. This conclusion is simply unjustified. As the Supreme Court explained, “Congressional silence lacks persuasive significance.” *Brown v. Gardner*, 513 U.S. 115, 121 (1994).

Divination of congressional intent on the basis of legislative silence is particularly inappropriate in this instance. The *Cubby* court imposed no liability on CompuServe. Congress, therefore, had neither the need nor the opportunity to overrule *Cubby*. On these facts, congressional silence on the *Cubby* case is entirely unremarkable.<sup>25</sup>

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<sup>24</sup> The “dog that didn’t bark” is a reference to Arthur Conan Doyle’s story the Adventure of the Silver Blaze, in which the fact that the dog didn’t bark is an important clue identified by Sherlock Holmes. Holmes concludes from this non-invent that the dog knew the intruder.

<sup>25</sup> The Court of Appeal’s inappropriate use of legislative silence may be explained in part by the court’s reliance on a number of law review notes that make similarly unsupportable claims regarding the implications of Congress’ silence regarding the standard applied in *Cubby*. *Barrett*, 114

The legislative discussion around the adoption of § 230 further challenges the Court of Appeal’s use of legislative silence. During the floor debate, Rep. Cox, the co-author of § 230, characterized the *Cubby* decision as symptomatic of the failure of traditional standards of liability to remain applicable in the then-emerging online environment. 141 Cong. Rec. H8460. Congress itself has shown no doubt about its own congressional intent. The House Committee on Energy and Commerce, in 2002, explicitly endorsed *Zeran* and its progeny.

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** (citations omitted; ***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.

*Report on the Dot Kids Implementation and Efficiency Act of 2002*, H.R. Rep. No. 107-449 (2002) (emphasis added).

Nearly half of the 57 members of the 107th Congress’ Commerce Committee served on that same committee when Congress passed § 230. Notably, Rep. Cox was still a member and spoke in support of the system of liability in the Dot Kids Act: “[It] tracks exactly language that I wrote with Senator Wyden into the Internet Freedom and Family Empowerment Act—language that was upheld by the Supreme Court when the rest of CDA got struck

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Cal. App. 4th at 1395 n.8 (citing Annemarie Pantazis, Note, *Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 Wake Forest L. Rev. 531 (1999), Sewali K. Patel, Note, *Immunizing Internet Service Providers from Third Party Defamation Claims: How Far Should Courts Go?*, 55 Vand. L. Rev. 647 (2002); David Wiener, Comment, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 Santa Clara L. Rev. 905 (1999)).

down, that I think is the right way to go here.” Dot Kids Name Act of 2001: Hearing on H.R. 2714 Before the Subcomm. on Telecommunications and the Internet of the Comm. on Energy and Commerce, 107<sup>th</sup> Cong. 63 (2001) (statement of Rep. Cox, Member, House Comm. on Energy and Commerce). While reliance on subsequent history can be risky, in instances such as this, where the sponsor of the legislation confirms an interpretation of the legislation consistent with prior legislative history, the benefit outweighs the risk. *County of Wash. v. Gunther*, 452 U.S. 161, 194 n.6 (1981) (5-4 decision) (Rehnquist, J. dissenting) (explaining “that does not mean that such subsequent legislative history is wholly irrelevant, particularly where, as here, the sponsor of the legislation makes a clarifying statement which is not inconsistent with the prior ambiguous legislative history.”).

In addition, Congress has revisited the issue of how best to protect children from objectionable online content several times, providing ample opportunities to correct the *Zeran* interpretation. See Children’s Online Protection Act of 1998, 47 U.S.C. § 231; Children’s Internet Protection Act 2000, Pub. L. No. 106-554. It has not done so. Far from supporting the Court of Appeal’s novel interpretation, the scant legislative history supports the well-established broad interpretation adopted in *Zeran*.

**C. The Court of Appeal’s Interpretation of § 230, In Light of the Existing State of the Law, Turns Congress’ Effort to Address a Pressing Problem into Near Meaningless Legislation.**

The Court of Appeal’s decision renders § 230 virtually superfluous in light of the existing state of defamation law, in direct contradiction of Congress’ explicitly stated desire to affect meaningful change. Decades prior to the enactment of § 230, a distinguished line of U.S. Supreme Court

cases firmly established most, if not all, of the protections the Court of Appeal’s re-interpretation of § 230 “creates.” See *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985). Under the Court of Appeal’s interpretation, § 230 offers only minor revisions of the standard of liability in a small subset of defamation cases. Assuming congressional knowledge of the legal backdrop against which it legislated, the Court of Appeal’s interpretation of § 230 conflicts with Congress’ objective of recasting the law of defamation online.

Congress perceived the availability of objectionable content to children as an imminent and pressing concern requiring decisive action. As Rep. Cox explained when he introduced the legislation “what we want are results. We want to make sure we do something that actually works. Ironically, the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.” 141 Cong. Rec. H8460. In response to this massive disincentive, Congress crafted § 230 as a wholesale redrafting of defamation law in the online context, one that would create new protections for defendants, and thus encourage self-regulation.

Congress’ decision to rewrite the law of defamation requires this Court to assume the legislature’s cognizance of the firmly established state of the law at the time of § 230’s enactment. As the Supreme Court has explained, courts “take it as a given” that Congress legislates with awareness of the relevant precedent and existing state of the law. *Astoria Fed. Sav. & Loan Ass’n. v. Solimino*, 501 U.S. 104, 108 (1991).

At the time Congress adopted § 230, common law protected defamation defendants from liability in many suits. In suits brought by public figures or public officials, the Court required the plaintiff to prove actual malice, the knowing or reckless disregard of the falsity of a



statement, on the part of the alleged defamer. *Sullivan*, 376 U.S. at 280. The Court later required actual malice in cases brought by private figure plaintiffs arising out of issues of public concern if punitive or presumed damages were sought. *Dun*, 472 U.S. at 761. Defamation suits not subject to the actual malice standard are limited to those brought by private individuals seeking actual damages or arising out of issues of private concern. With few exceptions, this minute subset of defamation cases is governed by the negligence standard, which imposes a duty of reasonable care on defendants with regard to the truth of their publications.<sup>26</sup>

If § 230 imposes the secondary publisher (distributor) standard of liability, Congress accomplished almost nothing. By interpreting § 230 to retain distributor liability, the Court of Appeal's reading offers no additional protection for providers and users in cases where actual malice is required. Plaintiffs who are unable to show that the defendant "knew or had reason to know" necessarily fail to prove actual malice. If the immunity provided under the court's reading of § 230 is to have any impact, its effect must be on those cases subject to the negligence standard.<sup>27</sup> However, under the Court of Appeal's reading, the standard of

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<sup>26</sup> The Court's decisions have not foreclosed the possibility that defamation suits brought by private individuals over matters of private concern could be governed by strict liability. In practice, however, states have almost universally adopted the negligence standard. In California, for example, "a private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice . . . to recover presumed or punitive damages. *Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711, 747 (1989). The negligence standard in non-actual-malice cases is largely a product of state common law rather than a clear holding of the United States Supreme Court.

<sup>27</sup> The impact of the Court of Appeal's reading is further limited by the adoption of standards of liability in private party defamation suits other than negligence in many states. Alaska, Colorado, Indiana, and New Jersey required actual malice in all such cases at the time § 230 was enacted. New

liability in such cases remains unchanged because the negligence standard and the duty of care created under the actual or constructive knowledge standard are one and the same. By interpreting § 230 to impose liability where the user or provider has “reason to know” of the nature of the statements before liability can attach, the court’s reading fails to raise the hurdle for the defamation plaintiff. A defendant who is negligent with regard to his publication is necessarily one with “reason to know” of its falsity. The only instances in which the Court of Appeal’s reading would provide any additional protection are the exceedingly rare instances where a strict liability standard may apply.<sup>28</sup> Under the Court of Appeal’s construction of the statute, Congress’ work was meaningless.

The *Zeran* reading, which accords the term publisher its traditional legal meaning, effects the sweeping change Congress sought. Given the state of defamation law, it is no surprise that Congress chose language that provided broad immunity for all types of publishers. Congress specifically did not distinguish between the range of actors and varying levels of liability involved in the act of publishing.<sup>29</sup> Congress chose to protect all

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York required an intermediate level of fault, defined as “gross irresponsibility.” Other states such as Texas, Kansas, and Illinois required actual malice in all suits arising out of public concern brought by private plaintiffs regardless of the damages sought.

<sup>28</sup> At the time Congress enacted § 230, courts in only two states had adopted strict liability in defamation suits involving private figures and private matters in post-*Gertz* decisions. *Denny v. Mertz*, 106 Wis. 2d 636 (1982); *Rupert v. Sellers*, 408 N.E.2d 671 (NY 1980); See *50-State Survey*, Libel Defense Resource Center (12th ed. 1995-96).

<sup>29</sup> The common law recognizes three distinct categories of publishers, each requiring an appropriate level of knowledge in order for liability to attach. W. Page Keeton, *Prosser and Keeton on The Law of Torts* § 113 (5th ed. 1984). Parties who exhibit authorial and editorial control over their publications, termed “primary publishers,” traditionally face strict liability for defamation whereas “conduits,” such as telegraph companies, who exert little if any control over the material they publish, were traditionally

publishers—a term of art that encompasses any party who takes part in or contributes to the transmission of a defamatory statement about another to a third party. W. Page Keeton, *Prosser and Keeton on The Law of Torts* § 113 (5th ed. 1984) § 113. While common law distinguishes between types of publishers and imposes varying degrees of liability, by using the term “publisher,” Congress did not.

The prevailing reading of § 230 significantly extends the protections for online publishers by establishing immunity for the publishers of third party content regardless of their level of knowledge, achieving significant alterations of defamation law in cases subject to both the negligence standard and the actual malice requirement. This interpretation is consistent with the text and legislative history and is the only plausible construction given Congress’ desire to significantly alter the state of defamation law.

## CONCLUSION

In creating § 230, Congress sought to balance two competing interests—the desire to protect children from objectionable content online, and the preservation of the Internet as a platform for free expression. To do so, Congress removed the barriers to private monitoring posed by the application of defamation law to the Internet. Congress had good reason for choosing to extend blanket immunity to providers and users for content created by third parties. By encouraging self-regulatory efforts, Congress believed it could protect children from material deemed inappropriate by

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immune from liability for publication of third party defamation. Publishers that exert an intermediate level of control over the content they publish, such as libraries and newsvendors, are deemed “secondary publishers” or “distributors” and are liable for their publication of third party content only if they knew or had reason to know of its defamatory nature. *Id.* at § 113, 811. While varying degrees of liability apply to different types of publishers, all are included in the class of publishers.

their parents while avoiding unnecessary and unacceptable restrictions on Internet speech. The Court of Appeal's analysis sidelines the interests Congress chose to protect, seeking instead to retool § 230 to meet the court's judgment about how best to protect the interests of defamation victims on the Internet.<sup>30</sup>

The Court of Appeal's limited interpretation of § 230 immunity, because it both discourages self-regulation and encourages the restriction of protected speech, is at odds with the policy objectives Congress sought to achieve through the statute. Immunity for all providers and users of third party content ensures that self-regulatory efforts continue and that unnecessary removal will not threaten protected expression. This Court should return to the sensible and widely accepted approach embodied in *Zeran*, and overrule the anomalous interpretation of § 230 provided by the Court of Appeal.

Respectfully submitted,

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Deirdre K. Mulligan  
Calif. State Bar No. 218804  
Samuelson Law, Technology &  
Public Policy Clinic  
Boalt Hall School of Law  
University of California  
346 Boalt Hall (North Addition)  
Berkeley, CA 94720  
(510) 642-0499  
*Counsel of Record*

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<sup>30</sup> Congress accounted for the importance of preserving causes of action for libel online by excluding "information content providers," those responsible for creating content, from § 230 immunity. 47 U.S.C. 230(c)(1). In doing so, Congress avoided sanctioning a "total sacrifice of the competing value served by the law of defamation." *Barrett*, 114 Cal. App. 4th at 1398 (quoting *Gertz*, 418 U.S. at 341).

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of the California Rules of Court Rule 29.1(c)(1).

Exclusive of the exempted portions in California Rules of Court Rule 29.1(c)(3), the brief contains 13,004 words.

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Deirdre K. Mulligan  
Calif. State Bar No. 218804  
Samuelson Law, Technology &  
Public Policy Clinic  
Boalt Hall School of Law  
University of California  
346 Boalt Hall (North Addition)  
Berkeley, CA 94720  
(510) 642-0499  
*Counsel of Record*

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## APPENDIX

*This brief is submitted on behalf of:*<sup>31</sup>

Professor Keith Aoki  
Philip H. Knight Professor  
University of Oregon School of Law

Professor Ann Bartow  
University of South Carolina School of Law

Professor Irene Calboli  
Marquette University Law School

Professor Eric B. Easton  
University of Baltimore School of Law

Professor Eric Goldman  
Marquette University Law School

Professor Raymond Ku  
Associate Director, Center for Law, Technology and the Arts  
Case Western Reserve University School of Law

Professor Malla Pollack  
University of Idaho, College of Law

Professor David G. Post  
Temple Law School

Professor Jennifer M. Urban  
Director, Intellectual Property Clinic  
University of Southern California

Professor Eugene Volokh  
University of California- Los Angeles

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<sup>31</sup> All institutions are listed for purposes of identification only. Each of the signatories have joined the brief in their individual capacity, and their views do not necessarily represent the views of their employers.