

Case No. S122953

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

STEPHEN J. BARRETT, et al.

Plaintiffs and Appellants,

v.

ILENA ROSENTHAL,

Defendant and Respondent.

**REPLY BRIEF ON THE MERITS
OF PETITIONER ILENA ROSENTHAL**

After a Decision by the Court of Appeal
First Appellate District, Division Two
[Appellate No. A096451]

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INTRODUCTION

In an answering brief littered with misstatements of both fact and law – as well as lengthy and improper digressions into matters this Court did not undertake to review – Respondent Terry Polevoy offers no credible basis for affirming the Court of Appeal’s erroneous conclusion that Petitioner Ilena Rosenthal is not entitled to immunity under Section 230 of the federal Communications Decency Act. Indeed, Respondent offers no authority whatsoever to support his position regarding notice-based liability, save two now-depublished California Court of Appeal opinions – the decision below, and the decision in *Grace v. eBay, Inc.*, in which this Court has now granted review.¹ Aside from referencing the unsound reasoning of those depublished decisions and making conclusory assertions unsupported by reasoned argument or authority, Respondent does not even attempt to explain why this Court should reject the conclusion reached in every published decision to have considered the scope of Section 230 immunity that the statute bars imposition of notice-based liability.

Nor does Respondent provide any reasonable grounds for finding that Rosenthal does not qualify as a “user” protected by Section 230. There is no dispute that Rosenthal employed the Internet – *i.e.*, “use[d] ... interactive computer services,” 47 U.S.C. § 230(c)(2) -- to facilitate the

¹ 4 C.D.O.S. 6539 (July 22, 2004), *rev. granted*, 4 C.D.O.S. 9203 (Case No. S 127338, Oct. 13, 2004), referenced hereafter as “*Grace Slip Op.*”

distribution of another party’s content. As the two courts that have addressed “user” immunity have held on the basis of the plain language of the statute, Section 230 fully protects such a party from liability.² Indeed, as both the answering brief and the law review article informally submitted to the Court illustrate, an interpretation of Section 230 that excludes users like Rosenthal from the statute’s protection – whether on the basis of a narrow definition of the term “user” or by introducing distinctions between different classes of users – cannot be reconciled with the statute AS Congress enacted it.³

² See *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003); *Barrett v. Fonorow*, 799 N.E.2d 916, 923-24 (Ill. App. 2003).

³ As set forth in Rosenthal’s Motion to Strike, filed herewith, Rosenthal respectfully requests that the Court strike and/or disregard Respondent’s brief to the extent that it contains (1) matters outside the scope of the issues specified in the order granting review, *see* CRC 29(a)(1); and (2) statements regarding the factual and/or procedural history of this case that are unsupported by citation to the record. CRC 14(a)(1)(C). Rather than waste the Court’s time with a lengthy response to such extraneous matters, Rosenthal merely notes the following: (1) Contrary to Respondent’s repeated assertions, there is no evidence in the record that Rosenthal reposted Bolen’s article multiple times after Barrett wrote to her claiming the article contained false statements, *see* Appellants’ Appendix (“AA”) at 74-85; (2) Issues relating to the applicability of the anti-SLAPP statute, Code of Civ. Proc. § 425.16, have already been correctly decided in Rosenthal’s favor based on the record, and Respondent did not challenge the Court of Appeal’s resolution of the issue by filing a petition for review; (3) Contrary to Respondent’s mischaracterization of the record, both the trial court and the Court of Appeal considered and rejected Respondent’s and his co-plaintiff Barrett’s claims that statements other than the single statement at issue here were actionable; and (4) the issue of whether Rosenthal acted with malice is not before this Court, and Respondent’s unsubstantiated allegations regarding the independent conduct of other parties is, in any case, irrelevant to that issue. In the event the Court

I.

**SECTION 230 DOES NOT PERMIT THE IMPOSITION OF
NOTICE-BASED LIABILITY ON INTERNET INTERMEDIARIES**

Respondent does not even attempt to address Rosenthal’s arguments demonstrating that the plain meaning, legislative history and policy objectives of Section 230 all dictate that the statute provides absolute immunity to Internet intermediaries for the republication of third-party content and prohibits the imposition of noticed-based or “distributor” liability. *See* Opening Brief on the Merits (“OBM”) at 12-31. He does not, for example, dispute that a secondary publisher (sometimes known as a distributor) is merely a type of publisher, and must, therefore be encompassed by the statute’s prohibition on treating an Internet intermediary as a “publisher.” *See* OBM at 20-21. Nor does he offer any justification for why this Court should reject the construction of Section 230 that Congress explicitly endorsed when it enacted a related statute two years ago.

Instead, Respondent purports to defend the Court of Appeal’s contrary holding by simply referencing the Court of Appeal’s own flawed reasoning regarding the survival of notice-based liability under Section 230. *See* Opening Reply Brief of Respondent/Appellant (“answering brief” or “AB”) at 1. In addition, Respondent argues that the Court of Appeal was

decides to consider any of these additional matters, Rosenthal requests an opportunity to address them in a supplemental brief.

correct to disregard the conclusions of every other court to have addressed this issue because, according to Respondent, (1) those decisions did not actually analyze the issue; and (2) barring his claim against Rosenthal would violate his purported constitutional right to sue for libel and undermine what Respondent erroneously claims is Congress' sole policy objective. Respondent's arguments are not only wrong as a matter of logic, but would, if accepted, subvert Congress' actual purposes in enacting Section 230.

A. Respondent's Inability To Articulate A Reasoned Justification Aptly Illustrates That The Court of Appeal Was Not Justified In Breaking With Unanimous Precedent Endorsed By Congress Holding That Section 230 Confers Absolute Immunity On Internet Intermediaries

In the face of the unanimous weight of authority holding that Section 230 makes no distinction between “publishers” and “secondary publishers” (*i.e.*, distributors) when it prohibits treating those who disseminate other parties' content as “publishers,” Respondent asserts that the Court of Appeal was not obliged to follow *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), and the numerous other precedents that followed it -- including decisions in the Ninth Circuit and seven other federal circuits -- because they made no “serious effort to analyze § 230.” AB at 1, 25.

As a review of *Zeran* and the other relevant authorities clearly demonstrates, the conclusions reached in those cases regarding notice-based liability under Section 230 were carefully reasoned and, in most cases,

outcome determinative holdings. In *Zeran*, for example, where the plaintiff alleged that AOL should be held liable as a distributor with notice, the court offered a reasoned explanation based on the language of the statute and the relevance of that language in the context of the common law of libel:

“Congress has indeed spoken directly to the issue [of notice-based distributor liability] by employing the legally significant term ‘publisher,’ which has traditionally encompassed distributors and original publishers alike.” 129 F.3d at 334; *see also* OBM at 16-18 (citing the numerous cases analyzing the same issue and following *Zeran*). Accordingly, these decisions are fully entitled to deference by state courts. *Etcheverry v. Tri-Ag Service, Inc.*, 22 Cal. 4th 316, 320-21 (2000) (federal court decisions on questions of federal law are “entitled to great weight” and should be followed “where [they] are both numerous and consistent”) (internal citation omitted).

Respondent’s bare conclusory assertion that such analysis is not a “serious effort” is not well taken, particularly since Congress has made clear that *Zeran* and its progeny correctly interpreted and applied Section 230. *See* H. Rep. 107-449 at 13 (2002). As discussed in Rosenthal’s opening brief, a report accompanying a statute incorporating Section 230 immunity for additional entities stated that “The courts have correctly interpreted Section 230(c),” and cited as examples several decisions, including *Zeran*, holding that the statute protects Internet intermediaries

whether or not they have notice. *Id.*; *see also* OBM at 18. Respondent simply ignores this strong evidence of Congress' intent in enacting Section 230. *See Lowe v. Securities & Exchange Commission*, 472 U.S. 181, 222 (1985) (subsequent legislative history is evidence of legislative intent).

B. Respondent's Heavy Reliance On The Now-Depublished *Grace* Decision Only Underscores The Utter Lack Of Authority Supporting The Decision Below

Respondent suggests that the decision by one additional panel of the Court of Appeal concurring in the instant panel's analysis of Section 230 somehow transforms the otherwise anomalous conclusion reached below into a mainstream or authoritative construction of a federal statute. *See, e.g.*, AB at 14. Respondent's reliance on *Grace* is misplaced for at least three reasons. *First*, this Court has now granted eBay's petition for review in *Grace* and specifically designated the reach of Section 230 as the issue it will review.⁴ As a result, the *Grace* decision is now depublished and may not be cited or relied on. *See* CRC 976(d); *Quintano v. Mercury Casualty Co.*, 11 Cal. 4th 1049, 1067, n.6 (1995).

Second, the *Grace* court's discussion of Section 230 -- which simply tracks the same flawed reasoning of the panel below that Rosenthal has addressed and refuted in her opening brief -- constitutes mere dicta because the Court of Appeal ultimately ruled in eBay's favor on a separate and independent ground. *See Grace* Slip. Op. at 18-19 (holding that eBay's

⁴ *See* 4 C.D.O.S. 9203 (Oct. 13, 2004).

user agreement barred plaintiff's claim). As Respondent himself notes, AB 1 & 25, only statements necessary to a decision may be relied on as precedent. *See Western Landscape Construction v. Bank of America Nat'l Trust & Savings Ass'n*, 58 Cal. App. 4th 57, 61 (1997)).

Finally, even if this Court had not granted review in *Grace*, and even if Section 230 immunity had been a dispositive issue in that case, one Court of Appeal panel's decision to follow in the questionable tracks of a lone state court decision interpreting federal law does not alter the fact that *every other* federal and state decision to consider whether notice-based liability survived Section 230 has held that it did not. Like the decision below, *Grace* is poorly reasoned and fails to give proper deference to the federal courts' unanimous interpretation of this federal statute. *See Etcheverry*, 22 Cal. 4th at 320-21; *accord Rohr Aircraft Corp. v. County of San Diego*, 51 Cal. 2d 759, 764 (1959).

C. Contrary To Respondent's Outlandish Claim, Congress Has Authority Under The Supremacy Clause To Limit The Reach Of State Libel Laws

One of the few contentions regarding the scope of Section 230 Respondent actually attempts to explain in the answering brief is his claim to possess a constitutional right to bring a libel claim against Rosenthal that somehow trumps federal statutory restrictions on libel claims against parties who merely distribute another party's content online. *See AB* at 14-15, 26-30. This argument is fatally flawed.

Respondent's premise – that he enjoys a constitutional right to sue for libel – is simply incorrect. As Respondent inadvertently acknowledges, the legal right to defend one's reputation is a creature of state common and/or statutory law. *See, e.g.*, AB at 26 & 28 (citing Cal. Civil Code § 43). Contrary to Respondent's bare assertion, none of the authorities he cites either characterize or treat the interest in protecting one's reputation as one of constitutional dimension sufficient to limit the reach of a federal statute.⁵ In fact, pursuant to the Supremacy Clause of the United States Constitution, art. VI, cl. 2, state libel laws must give way to conflicting federal law. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 283-84 (1954) (federal Constitution limits states' power to award damages for libel); *see also, e.g., White v. Davis*, 108 Cal. App. 4th 197, 206 (2002) (ordering state to make payments required by federal statutes notwithstanding appropriations requirements in the California constitution).⁶

⁵ *See* AB at 14-15, 26, 28, 29-30. Respondent's authorities merely note that society's interest in protecting individuals' reputations through state laws is important. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-58 (1985) (referring to the states' "strong and legitimate" interest in protecting private individuals through state defamation laws); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (discussing interests underpinning state libel laws); *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (explaining that the federal constitutional law "limits the protections afforded by the law of defamation"); *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 858-60 (1986) (discussing state libel laws).

⁶ Moreover, Respondent's argument proves too much. If Congress were constitutionally foreclosed from placing limits on individuals' right to pursue libel claims, then Section 230's restriction on suits against intermediaries who never receive notice would also be invalid.

Finally, Respondent fails to recognize that Section 230 leaves plaintiffs free to sue and obtain awards against the authors of allegedly libelous statements, who are liable not just for their own publication but for any “reasonably foreseeable” republication by another party as well. *See, e.g., Shively v. Bozanich*, 31 Cal. 4th 1230, 1243 (2003); 5 Witkin, Summary of Cal. Law (9th ed. 1988), Torts, § 478, p. 562. In fact, that is just what Respondent is doing in his pending case against Tim Bolen, the author of the statement Rosenthal forwarded to two newsgroups. Thus, Respondent should not be heard to argue that his right to sue for libel has been violated by Congress’ decision to draw a bright line between “information content providers” who “creat[e] or develop[.]” content and intermediaries who only disseminate such content.⁷

D. Respondent Misconstrues The Purposes Of Section 230, Thereby Obscuring The Very Real Threat To Congress’ Goals Posed By Imposing Notice-Based Liability In Cyberspace

As the Ninth Circuit and several other courts have explained, a careful examination of the legislative history and express language of the

⁷ As noted in Rosenthal’s opening brief, OBM at 25, n.16, Respondent is simply wrong to argue that the distinction Congress drew between “information content providers” and intermediaries who facilitate online distribution leaves people vulnerable to libelous attacks by the so-called “clever libeler.” *See* AB at 15 & 28. If a party enlists another person to post libelous information online so that others may republish it, the enlisting party will still be subject to liability as an “information content provider” based on his having developed the content. *See, e.g., Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D. D.C. 1998) (“Section 230 does not preclude joint liability for the joint development of content”); *accord Ben-Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 985 n.4 (10th Cir. 2000).

statute shows that Congress intended Section 230 to advance the twin goals of (1) encouraging “the unfettered and unregulated development of free speech on the Internet,” and (2) removing disincentives for Internet providers and users to “self-police the Internet for obscenity and other offensive material.” *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003); *see also, e.g., Zeran*, 129 F.3d at 334; OBM at 2-3, 14-15, 26-29. These two interests are set forth explicitly in the statute’s findings and policy provisions, *see* 47 U.S.C. § 230(a)(1), (a)(3) & (b)(1)-(4), and are also reflected in the complementary but separate protections conferred by subsection 230(c)(1), which protects Internet providers and users against liability for affirmative acts of online republication, and subsection 230(c)(2), which protects such parties against liability for removing or restricting access to content. If Congress had only intended to encourage intermediaries to remove content, it could have accomplished that goal with subsection 230(c)(2) alone. Instead, Congress chose to immunize acts of republication as well, in order to preserve and promote a robust marketplace of ideas.

Nonetheless, relying on a generalized citation to a 126-page section of the legislative history and a selective quotation from one subsection of the statute, Respondent asserts that Congress’ only objective in enacting Section 230 was to protect Internet users from being exposed to “malicious material” online. AB at 29. Then, having taken this myopic view of

Congress' intent, he ignores the myriad ways in which notice-based liability would actually undermine Congress' efforts to encourage the screening of content while preserving free speech on the Internet.

As explained in the opening brief, OBM at 28, the Court of Appeal's onerous "knew or should have known" standard would actually discourage the very monitoring and screening Congress sought to encourage. For example, a service provider or website operator that actively polices its chatrooms or bulletin boards (like Prodigy in *Stratton Oakmont, Inc. v. Prodigy Services, Co.*, 23 Med. L. Rptr. 1794, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995)), will likely be exposed to information about the relationships, past conduct and motives of the participants -- as well as to postings complaining that statements in other postings are untrue.⁸ Under a "knew or should have known" standard, merely having such information could potentially expose the intermediary to liability. Thus, if Section 230 were construed to allow the imposition of notice-based liability, only an intermediary who does not actively monitor other parties' content (like the defendant in *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)), would be assured of immunity, and Congress' efforts to ensure that

⁸ In fact, the statement that gave rise to the plaintiff's claim in *Grace v. eBay* was itself a message posted in eBay's "Feedback Forum" in which a seller challenged the plaintiff's statements about the seller. *Grace Slip Op.* at 4. The issue of whether eBay might have had actual or constructive knowledge based on the seller's charges did not arise in the case both because the seller did not sue over plaintiff's original postings, and because eBay does not police or remove content from the Feedback Forum. *See id*

intermediaries would not be penalized for exercising editorial control over other parties' content would be futile.

The reimposition of notice-based liability in cyberspace would also lead to censorship by intermediaries whose only realistic option upon receipt of notice would be to remove the challenged content. *See* OBM at 26-28. Absent Section 230 immunity, if an intermediary does not remove challenged content, it will be required to conduct a detailed and costly investigation of every single complaint it receives to determine whether the allegations are well-founded, and, even if satisfied that the content is not libelous, marshal evidence to substantiate its view in the event of litigation. It is simply unrealistic to expect that intermediaries – whether they are corporate service providers or individual users like Rosenthal who moderate and participate in newsgroups and listservs – will be able to undertake such investigations every time they receive a complaint. Thus, the Court of Appeal's rule treating notice as the trigger for liability "once again puts ISP's [as well as all other intermediaries] in the business of determining whether challenged content should really be removed, and in so doing, allows for an Internet-wide heckler's veto on speech." Jenal, J., *When is a User Not a "User"? Finding the Proper Role for Republication Liability on the Internet*, 24 Loyola Ent. L. Rev. 453, 470-71 (2004) (hereafter, "*Jenal*").

II.

SECTION 230 IMMUNIZES ALL PARTIES WHO USE THE INTERNET TO DISTRIBUTE OTHER PARTIES' ONLINE CONTENT AND DOES NOT PERMIT DISTINCTIONS AMONG SUCH USERS

“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1761 (2004). Applying this basic rule of statutory construction, the phrase “user of interactive computer services” in Section 230 must be construed to include any party who employs (as opposed to provides) interactive computer services in connection with the handling of other parties’ content, just as Rosenthal did when she forwarded Bolen’s letter to two newsgroups. *See also Halbert’s Lumber, Inc. v. Lucky Stores*, 6 Cal. App. 4th 1233, 1238 (1992) (undefined statutory terms should be given their “ordinary, everyday meaning”).

Such a definition is the only one that accords with the plain meaning of the statute, as was recognized by the two courts that have addressed “user” immunity under Section 230. *See Batzel* 333 F.3d at 1031 (holding that website operator who reviewed, edited and published third-party content in a newsletter he distributed through a listserv was a “user” under §230 (c)(1)); *Barrett*, 799 N.E.2d at 923-24 (holding that individual sued for posting messages authored by Tim Bolen to a website was protected as a “user” under § 230); *see also OBM* at 33-35. It is also the only one that

accords with Congress' policy of protecting "the unfettered ... development of free speech on the Internet," *Batzel*, 333 F.3d at 1027-28. Indeed, excluding individuals like Petitioner who serve as information conduits would necessarily diminish the "diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. § 230 (a)(1) & (3), that mark the Internet as "'the most participatory form of mass speech yet developed,'" *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (internal citation omitted).

A. Respondent's Illogical Contention That Section 230 Immunity Is Reserved For Users Who Only Receive Or Remove Other Parties' Content Cannot Be Squared With The Plain Language Of The Statute, Which Accords Protection To All "Users"

Although conceding that the term "user" is not defined in Section 230, Respondent nonetheless rejects the plain meaning of this term. Instead, he suggests that because the statute makes reference elsewhere to Internet users' receipt of and/or ability to remove information, Congress must have intended its reference to "user" in subsection 230(c)(1) to be limited to parties whose sole activity is to receive or remove content. AB at 30-31. Given that subsection 230(c)(1) provides immunity to both providers and users for republishing other parties' content, Respondent's reasoning defies logic. If "users" were defined by the fact that they did not disseminate other parties' content, there would be no need to immunize them from liability for republication. Thus, Respondent's narrow definition, which overlooks subsection 230(c)(1), must be rejected. *See*

Duncan v. Walker, 533 U.S. 167, 174 (2001) (statutes should be construed so that “no clause, sentence, or word shall be superfluous, void, or insignificant”) (internal citation omitted).

B. A User Who Distributes Another Party’s Online Content Is Never Not A “User” Under Section 230

By extending immunity to “users” without restricting the meaning of that term in any way, Congress foreclosed interpretations of Section 230 that segregate users into sub-classes and deny immunity to some. For this reason, it is impossible to carve out certain categories of users from Section 230 without doing violence to the statute’s plain meaning and purposes.

Respondent’s attempt to distinguish between “innocent” users entitled to immunity and other, unprotected users on the basis of whether or not they disseminate other parties’ content is a case in point. AB at 32. Conceding that the only way a “user” could lose her Section 230 immunity is by acting as an “information content provider,” Respondent argues that merely disseminating another party’s content is sufficient to transform a user into an “information content provider.” *Id.* But if that were the case, then providers such as AOL, Yahoo! and eBay, one of whose primary functions is to disseminate others’ content, would also have to be treated as “information content providers” unprotected by Section 230 immunity, and the *Stratton Oakmont* rule Congress enacted Section 230 to overrule would again be the law. Respondent’s effort to segregate “active” from “passive” users on the basis of whether or not they remove third-party content after

receiving notice of its libelous character fares no better. AB at 33-35. As discussed above in Section I, Section 230 bars notice-based liability for all intermediaries, providers and users alike.

The law review article informally submitted to the Court offers a further illustration of why Respondent’s misguided effort to deprive Rosenthal of Section 230 immunity must be rejected.⁹ In advocating that Section 230 be rewritten to incorporate a distinction between protected “moderators” and unprotected “posters,” the article only underscores how ill-advised and unworkable it is to try to exclude a user like Petitioner – or, for that matter, any user – from the statute’s blanket prohibition on holding any “user” liable for republishing another party’s online content.

The article’s classification system fails as a reasonable construction of the statute for at least four reasons. *First*, like Respondent, the author offers no justification for disregarding the “ordinary meaning” of “the language employed by Congress.” *Engine Mfrs. Ass’n.*, 124 S. Ct at 1761. Though acknowledging that the term “user” “encompass[es] a broad continuum” of different Internet users, including “posters,” *Jenal* at 475,

⁹ *See Jenal*, 24 Loyola Ent. L. Rev. 453-82. The Court’s docket indicates that this article, which was sent in by the Articles Editor at the Loyola Entertainment Law Review on August 12, 2004, has only been received and not filed by the Court, and it is not cited in Respondent’s papers. Nonetheless, Rosenthal addresses the author’s proposal to rewrite Section 230 here because it serves as a useful example of how attempts to carve out certain classes of “users” from Section 230’s protections inevitably conflict with both the plain meaning and legislative intent of the statute.

477 & 480, he nonetheless urges that the meaning of “user” should be “refine[d]” because, he contends, the dictionary meaning of “user” (“one who uses”) offers no “meaningful guidance.” *Id.* at 475. But neither the Ninth Circuit, the Illinois Court of Appeals nor the trial court in this case had any trouble interpreting or applying this straightforward term according to its “ordinary meaning.” *See Batzel*, 351 F.3d at 1031; *Barrett*, 799 N.E.2d at 923-24; AA at 135.

Second, like the unworkable distinction between active and passive users addressed in the opening brief, OBM at 35-39, the distinction the article draws between “moderators” and “posters” cannot be squared with Section 230 or with the practical realities of Internet communications. According to the article, the protected “moderator” category should include anyone who operates “a forum in cyberspace ... where third parties can contribute content to be published to the Internet,” and such users are entitled to Section 230 immunity because (1) they supposedly all receive “mass submissions,” and (2) they are “charged with processing the submissions of others.” *Jenal* at 479-80. But Congress did not make users’ immunity contingent on any particular threshold volume of content or on whether a user has committed “to provide a forum for others.” Moreover, the author fails to account for the “moderator” who gets very little traffic, or the user who, though designated a “poster” because she is not operating a newsgroup or listserv, nonetheless becomes known as an information hub

and receives large volumes of email intended, like Bolen's letter here, "to be published to the Internet." *Id.* at 479.¹⁰ Nor is there any guarantee that a user who does not happen to operate a website or other formalized venue has not held herself out as or become understood to be an effective facilitator of content dissemination. In fact, Rosenthal, who is both a moderator of and active participant in several newsgroups and listservs, played just such a role. *See* OBM at 6-8.

Third, underlying the author's analysis is his erroneous contention that Congress only intended to protect passive hosts of other parties' content and not parties who exercise or have the ability to exercise editorial control over such content. *Jenal* at 466 (opining that AOL was a publisher of the content at issue in *Blumenthal v. Drudge*, 992 F. Supp. 44 (D. D.C. 1998) because it exercised editorial control over the Drudge report). But this is precisely the type of line-drawing Congress sought to eliminate when it overruled *Stratton Oakmont* by enacting Section 230. *See* OBM at 14-15 (detailing legislative history). As Congress recognized, making the risk of liability contingent on editorial control would only discourage monitoring

¹⁰ Contrary to the author's casual assertion that "users like Rosenthal are not confronted with the burden problem," *id.* at 470, the record shows that Rosenthal is an individual who receives and forwards to newsgroups and listservs thousands of messages in a given year. *See* Slip Op. at 2-3. While it may be feasible for a party in her position to review these messages briefly in order to determine their relevance to a particular forum, given the volume of messages she receives and the complexity (particularly for a layperson) of investigating and analyzing whether a given message is libelous, it would not be reasonable to expose her to liability based on the assumption that it was somehow feasible for her to screen for libel.

and screening because such activities are themselves an “exercise of a publisher’s traditional editorial functions” *Zeran*, 129 F.3d at 330.

In any case, whether measured by the own mistaken view of Congress’ intent or by Congress’ actual objectives, the author’s “moderator”/“poster” distinction fails to achieve any useful purpose. As the article acknowledges, many “moderators” -- like the defendant in *Batzel* who operated a website and listserv -- regularly review and edit the submissions they receive and distribute. *Jenal* at 479. Thus, depriving so-called “posters” of immunity for selecting which content to distribute only penalizes them for doing just what protected moderators (and providers) may do – without in any way advancing Congress’ policies.¹¹

Finally, because the author’s categories are so ill-defined, rewriting Section 230 along the lines the he recommends would lead inevitably to the type of uncertainty that produces a chilling effect on speech – a result that even the author acknowledges is undesirable. *Id.* at 472. If volume makes all the difference, the editor of an online newsletter who receives very few

¹¹ It should be noted here that contrary to the author’s dire predictions, granting immunity to Rosenthal would not entitle a party who uploads and distributes material from a CD-ROM to immunity from any liability arising out of that material. *Jenal* at 469. Rosenthal merely transmitted the unedited contents of a message sent to her online by its author. Moreover, Section 230 only protects intermediaries from liability for disseminating information provided by “another information content provider,” and “information content provider” is defined as one who creates or develops information “provided through the Internet.” 47 U.S.C. § 230(f)(3). Thus, it appears that a party who, like the author’s hypothetical uploader, disseminates content that was not provided “through the Internet” would not be protected.

contributions could not be sure of his entitlement to immunity. If, on the other hand, if exercising editorial judgment makes all the difference, *id.* at 466 & 480, then no intermediary, whatever its role (“provider,” “moderator” or “poster”) is ever assured that Section 230 will offer protection. Because it was precisely this type of uncertainty Congress sought to eliminate when it enacted Section 230, the article’s invitation to “refine” the term “user” must be rejected as an invitation to revise – and thereby undermine – Section 230’s fundamental structure and purpose.

CONCLUSION

Petitioner Ilena Rosenthal respectfully requests that the Court reverse the decision below because the Court of Appeal’s unreasonably narrow construction of Section 230 represents an unwarranted departure from the overwhelming weight of authority and contravenes the statute’s text and stated purposes, and because Rosenthal, like all Internet providers and users who republish another party’s online content, is fully entitled to immunity under the statute.

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PIPER RUDNICK LLP

CALIFORNIA ANTI-SLAPP PROJECT

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