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August 15, 2016

Honorable Tani Gorre Cantil-Sakauye, Chief Justice,
& Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

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AUG 15 2016

CLERK SUPREME COURT

Re: Hassell v. Yelp, Inc., No. A143233
Amicus Letter on Behalf of California-based Internet Platforms
in Support of Petition for Review No. S235968

To the Chief Justice and Associate Justices of the California Supreme Court:

I write on behalf of the California-based Internet platform GitHub, Inc. ("GitHub"), in order to inform this Court of the significant issues and unintended effects raised by the First Appellate District Court of Appeal's decision ("Decision") in the matter of Hassell v. Bird (No. A143233) and to urge it to grant Yelp, Inc.'s Petition for Review. This Decision misapplies Section 230 of the Communications Decency Act of 1996 ("Section 230")¹ and in doing so threatens to gravely impact the many thousands of platforms, including amicus GitHub, and their users, who depend on it. Because the effect of this Decision will reverberate far beyond the bounds of this case, review is warranted pursuant to Cal. Rules of Court 8.500(b)(1) in order to restore consistency between state and federal law and to ensure that this important statutory protection remains in place and effective.

I. Review should be granted because this Decision stands to harm many other platforms, including amicus GitHub.

Based in San Francisco and employing upwards of 600 people, GitHub is an Internet platform that enables communities of users to upload, store, and collaboratively develop software projects.² These software projects can range from small projects of a few files to enterprise-scale multi-million file applications. While these projects typically involve computer code written in various programming languages, many also incorporate databases or other textual and graphical material. GitHub-hosted software projects are often applications designed for computers or mobile devices, but they can also contain the material underpinning entire website deployments. GitHub is additionally used to develop other sorts of non-software community-created digital projects where the collaboration tools provided by the GitHub platform can be valuable to that effort.

¹ 47 U.S.C. § 230.

² See <https://github.com/about> ("We're supporting a community where more than 15 million people learn, share, and work together to build software.").

Regardless of the scale or scope of the project, however, the key aspect to each and every one of them is that they are all generated by GitHub's users – not GitHub itself. Because GitHub intermediates so much user-generated content, GitHub is heavily dependent on the statutory protection of Section 230 to be able to provide its platform services to these users. As described in further detail below, Section 230 provides critical legal protection for platforms by making clear that only the users who have created content put on a platform can face legal consequence for it and *not* the platform. Without this protection platforms would face incalculable legal risk for the content they intermediate, which would either cause them to cease to be available as platforms or be forced to overly censor the rich universe of online content they have up to now been able to support. GitHub therefore urges this review in order to correct the Decision, which misapplied Section 230, and to restore this critical platform protection.

II. Review should be granted because the Decision undermines the legal certainty Internet platforms like GitHub rely on.

Section 230 provides crucial protection for Internet companies like GitHub. Its protective language is simple but powerful, declaring that only the people who post content online are responsible for it, not the providers of the platforms where they post it. This certainty has allowed many successful companies in California and throughout the United States to grow and create jobs because, as companies providing platforms where massive global online communities can communicate and share content, they have not had to fear the enormous and crippling potential legal risk they would otherwise be exposed to if they could be held liable for any of the vast amount of user-generated content they intermediate.³

Section 230 has shielded platforms from these costs, and the benefits of it having done so cannot be overstated: over the last twenty years, this statutory protection has allowed every United States-based transformative online community to grow and flourish. It has fueled innovation across many different industries: consumer reviews, community auctions, consumer-to-consumer marketplaces, ride and home sharing, blogging, micro-blogging, citizen journalism, social networks for sharing everything from cat videos to source code, and even grassroots political movements. Or, in the case of GitHub, platforms that enable complex digital projects, large and small, to be collaboratively developed by users dispersed throughout the world.

None of these innovations would have been possible without Section 230 creating the legal environment where it would be safe to invest in imagining, and then providing, these sorts of services. Without Section 230 platform providers would have instead found themselves pressured to permit fewer services to fewer people, censor more content, or be deterred from being platforms for user-provided content altogether, if they could not be assured of their immunity from legal consequence for it.

The Decision significantly challenges this assurance, however, because, by binding Yelp to an injunction related to content that another has provided, an injunction for which Yelp would be sanctioned if it were

³ See *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (citing *Stratton Oakmont* regarding the sheer volume of content that platforms intermediate.)). It should also be noted that it is not only costly for a platform to be held liable for content others provide. Even if the platform is ultimately exonerated, just having to defend the lawsuit can be financially crippling, particularly if it might have to face a lawsuit for even a small percentage of the content they carry. *Id.* at 1175 (“[Section 230 was designed] to protect websites not merely from ultimate liability but from having to fight costly and protracted legal battles.”).

to disobey, the Decision announced that platforms can, in fact, be held legally responsible for the content that others have provided. Such a holding directly contradicts the plain language of the statute and in doing so undermines the legal certainty platforms must be able to rely on to provide their content-enabling services. For this reason GitHub urges this Court to grant the Petition for Review.

III. Review should be granted because, if left to stand, the Decision will harm the public, who also depends on this statutory protection to keep their content from being wrongfully censored.

Instead of liability Section 230 purposefully gives platform providers the editorial discretion to curate the content on their platforms without having to fear the expense post-hoc judicial scrutiny over their editorial decisions. This freedom allows platform providers to focus on providing the best content to their users and minimize the worst. But by imposing a sanction on Yelp's editorial choices, the Decision undermines this framework and consequently leaves platforms less able to protect their users on either front.

Like Yelp, GitHub's goal is to make sure that its users have access to useful and reliable information. Ordinarily market forces will hold both of us to this standard: for example, Yelp has every incentive to remove false or misleading reviews, and GitHub is similarly motivated to remove from its platform content that it considers harmful. At the same time, if either platform deleted content too freely, it would undermine the trust that users have in them, particularly if it led users to believe either platform could be easily manipulated by intermeddlers, such as disgruntled business-owners who want to remove true but unflattering reviews, in the case of Yelp, or others who have often tried to force otherwise legitimate content off of GitHub's systems. Particularly in the case of GitHub, where a deletion demand could target entire software projects or websites, it is absolutely critical that it not be put in a position where it could be forced to delete content where such deletion could result in the destruction of entire businesses and livelihoods.⁴

The fact that in this case the deletion order came after a default judgment provides no assurance that abusive censorship will not occur if platforms are to be bound by these orders. In this case, Yelp had made the decision that the challenged content was useful to its users, as should have been its right as the platform hosting it. A default judgment to the contrary, where claims and defenses have not been aired, does not give the platform or the general public any real confidence that the one-sided allegations presented by the plaintiff were correct, and letting one override the platform's decision makes it too easy for unanswered specious claims to result in censorship of legitimate material.

Yet that is exactly the sort of censorship the Decision opens the floodgates for. Should it be allowed to stand, future litigants will be able to easily target whatever platform-hosted content happens to prompt their ire, regardless of whether they have any legitimate legal claim against it, and use the California courts to do it.⁵ According to the roadmap set forth by this Decision, all they will need to do is (1) name a

⁴ This concern exists regardless of whether the platform is prompted to delete content by a court order or forced to do so proactively on its own due to the pressure to minimize their risk exposure, which would be significantly heightened without Section 230's protections.

⁵ Given the size of California's economy and the influence of California law, this dangerous new precedent has the potential to spread to other jurisdictions as well. See Paul M. Schwarz, *Balancing Privacy and Opportunity in the Internet Age* (Dec. 12, 2013), <http://paulschwartz.net/wp->

defendant that is difficult to locate and/or unlikely to respond to a complaint filed against them in California;⁶ (2) *not* name the platform provider in the lawsuit because it would be dismissed pursuant to Section 230; (3) present one-sided facts and argument to obtain a default judgment against the absent defendant; and (4) obtain an injunction that binds the non-party platform provider to remove the defendant's posts because platforms would then be forced to censor content or face liability via contempt sanctions.

If allowed to stand the Decision would strip platforms like GitHub of their ability to protect their users and their content and thus undermine the trust and value the public has looked to them to provide. Such a precedent would mark a radical departure from the settled law of the past twenty years that has allowed platforms like GitHub and their communities of content-developing users to thrive. For this reason this Court should review this Decision to ensure that user-generated content can remain as protected as it was before now.

IV. Review is warranted because the Decision contradicts Section 230's express provisions.

As the previous sections explained, if the Decision is allowed to stand, there will be deleterious effects to platforms and the online content they enable, effects that according to the policy goals codified in the statute itself that Section 230 was designed to avoid.⁷ Thousands of Internet platform providers will now be at risk for frivolous and predatory lawsuits because the threat of an injunction and contempt sanctions still strikes at the heart of Section 230's core provision insulating providers from liability for user-provided content.⁸ The First Appellate District court went to great lengths to try to differentiate the injunction (or "removal order") from a finding of damages liability for the defamatory statement, but it is a distinction without a difference. The court's injunction, ordering Yelp to delete content created by its user, imposes a risk of contempt sanctions for Yelp if it does not comply. At its essence, the injunction creates a direct legal consequence for a platform arising from content that was created by another person. The plain language of the statute and countless cases make clear that Section 230 stands to protect a platform from suffering direct legal consequence arising from a third party's content.⁹ Review should be granted to correct how the Decision deviates from this precedent.

content/uploads/2013/12/201312_schwartz_cal_assembly_testimony.pdf (discussing the "California Effect" on the Internet due to California's impact on the industry, changes in law in California have a profound effect nationally and globally).

⁶ Trying to target such a defendant is not as difficult as it might at first seem. Online communities are frequently geographically dispersed and semi-anonymous. It can be hard to prove who the real person is on the other side of an Internet account. If there is a strategic advantage to not actually knowing, crafty plaintiffs can be expected to avoid making a true effort to identify and serve the defendant. But even when the identity of a defendant is discoverable there can be other reasons why defendants may not defend their content, including that they may not have the resources or knowledge necessary to fight back.

⁷ See 47 U.S.C. § 230(a) and (b).

⁸ "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (setting forth this prohibition).

⁹ This Court itself has recognized the important role Section 230 plays in protecting platforms. See *Barrett v. Rosenthal*, 40 Cal.4th 33 (2006). Other cases in California courts have similarly upheld Section 230's protection for platforms. See, e.g., *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561 (2009); *Gentry v. eBay, Inc.*, 99 Cal.App.4th

The Decision is further problematic in how it conflicts with Section 230's additional statutory language pre-empting state law. Because Section 230 prevents a platform from being named as a defendant in a lawsuit about user-generated content it should always be a non-party to any lawsuit about that content. Federal courts have recognized their limited jurisdiction to enforce injunctions on non-party platforms under facts similar to those present here.¹⁰ Although California courts operate under different rules for enforcing injunctions against non-parties, those rules are still constrained by Section 230, which specifically preempts *any* state law, including rules of procedure, from interfering with its operation.¹¹ Review by this Court is therefore warranted to resolve how California procedural law on injunctions can be interpreted consistently with this federal statutory preemption.

V. Conclusion

While this Decision may at first seem to be narrow and applicable only to a discrete set of facts relating to a single review on a single platform, the effect of the Decision will not be so limited. Amicus GitHub therefore respectfully asks this Court to grant review and correct the error made by the courts below in order to make California law consistent with federal law and to prevent the severe harm that this error will have on GitHub and similarly situated platforms and the public interest they serve.

Respectfully submitted,



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816 (2002). In terms of defamation. Congress enacted section 230(c)(1) in part to respond to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), that had found a platform liable for third-party content posted on its message boards. See *Batzel v. Smith*, 333 F. 3d 1018, 1026-30, (9th Cir. 2003) (summarizing the statutory history of Section 230 and its underlying policy goals).

¹⁰ *Blockowicz v. Williams*, 630 F. 3d 563, 566-570 (7th Cir. 2010) (holding that federal rule on injunctions could not apply to non-parties without a showing that they were actively working in concert with the defendant).

¹¹ "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

Proof of Service

Hassell v. Yelp, Inc. (Bird) – No. S235968

Court of Appeal Case No. A143233, San Francisco Superior Court Case No.: CGC-13-530525

I declare at the time of service I was over 18 years of age and not a party to this action. My address is 150 Harbor Drive #2477, Sausalito, California, 94965.

On **August 15, 2016**, I served the following document:

**AMICUS LETTER ON BEHALF OF GITHUB, INC. IN SUPPORT OF YELP, INC.'S
PETITION FOR REVIEW**

By US Postal Service first-class mail, placed in the mail for delivery in San Francisco, on:

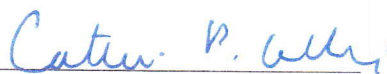
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Clerk of the Court Superior Court of California, County of San Francisco 400 McAllister Street San Francisco, CA 94102 Case No.: CGC-13-530525	Clerk of the Court California Court of Appeal, First District 350 McAllister Street San Francisco, CA 94102 Case No. A143233

By personal service, on:

Clerk of the Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

[California Supreme Court Case No. No. S235968]

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **August 15, 2016**, at San Francisco, California.


Catherine R. Gellis