UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-36189

CECILIA L. BARNES,

Plaintiff-Appellant,

v.

YAHOO!, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge
D.C. No. CV-05-00926-AA

BRIEF OF PUBLIC CITIZEN, CENTER FOR DEMOCRACY AND TECHNOLOGY, CITIZEN MEDIA LAW PROJECT, AND ELECTRONIC FRONTIER FOUNDATION AS AMICI CURIAE IN SUPPORT OF YAHOO'S PETITION FOR REHEARING

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MISCELLANEOUS

Public Citizen, Center for Democracy and Technology, Citizen Media Law Project, and Electronic Frontier Foundation file this brief as amici curiae to support Yahoo!'s Petition for Rehearing, urging the Court to modify its opinion to revise dicta that do not affect the judgment. Dictum in Part II of the Court's opinion directs district courts not to allow defenses under section 230 of the Communications Decency Act to be raised on a motion to dismiss. This dictum is not only contrary to the Court's precedent, but threatens significant mischief, both by throwing the Court's precedents into question and by forcing immune providers of interactive computer services to defend tort suits on the merits while they wait for district courts to decide motions for judgment on the pleadings. A second dictum apparently states that section 230(c)(1) only limits state law claims, again contrary to Circuit precedent. Either the panel or the en banc Court should revise the relevant parts of the opinion.[1]

INTEREST OF AMICI CURIAE

The interest of amici is shown in the accompanying motion for leave to file.

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[1]It is not clear whether a Petition for Rehearing, which has the effect of staying the mandate, applies to a request to amend an opinion in a manner that does not affect the disposition of the case. But no other provision in the Federal Rules of Appellate Procedure of the Court's Local Rules expressly addresses such a request. In any event, the Court possesses inherent power to amend its opinion, particularly where, as here, the request would not require either a delay or a recall of the Court's mandate.

ARGUMENT

A. A Section 230 Defense Can Be Raised on a Motion to Dismiss.

Part II of the opinion, pages 5317 to 5318, reads as follows:

> Although the district court dismissed this case under Rule 12(b)(6), section 230(c) provides an affirmative defense. *See Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003). The assertion of an affirmative defense does not mean that the plaintiff has failed to state a claim, and therefore does not by itself justify dismissal under Rule 12(b)(6). *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant."). Neither the parties nor the district court seem to have recognized this, but Yahoo ought to have asserted its affirmative defense by responsive pleading, which is the normal method of presenting defenses except for those specifically enumerated in Rule 12(b). Fed. R. Civ. P. 8(c)(1), 12(b) ("How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required."). It might then have sought judgment on the pleadings under Rule 12(c).
>
> However, this oversight deprives us neither of subject matter nor appellate jurisdiction, as this docket remains an appeal from a final decision of the district court in a diversity case. *See* 28 U.S.C. §§ 1291 and 1332(a)(1). This being so, as a matter of judicial economy we decline to "fuss[ ] over procedural niceties to which the parties are indifferent." *GTE Corp.*, 347 F.3d at 657. We hasten to clarify, all the same, that section 230 *is* an affirmative defense and district courts are to treat it as such.

Although the appellate briefs are not posted online, counsel for Yahoo! has advised that the issue was not briefed. Moreover, the recording of the oral argument on the Court's web site reveals that, although questions about the issue

were directed to both sides at oral argument, both were taken by surprise. Both expressly agreed that the motion to dismiss would properly be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure if, indeed, there was a valid defense under section 230, although apparently they had not researched the question and, hence, did not have the luxury of citing authority such as the treatise and cases discussed below.

Well-settled law in this Court and elsewhere supports the position taken by the parties in this respect, and contradicts the statement in the opinion that, as an affirmative defense, section 230 "ought to have [been] asserted . . . by responsive pleading [followed by a motion for] judgment on the pleadings under Rule 12(c)." A plaintiff can plead itself out of court by including allegations in the complaint showing that its claims are subject to an unassailable affirmative defense. When a plaintiff does this, the complaint is subject to dismissal pursuant to Rule 12(b)(6). 5A Wright & Miller, *Fed. Prac. & Proc.: Civil 2d* § 1357, at 348-349 (1990) ("The complaint is subject to dismissal under Rule 12(b)(6) when its allegations indicate the existence of an affirmative defense [so long as] the defense clearly appear[s] on the face of the pleading."). In such cases, the complaint is said to have a "built-in defense": "A complaint containing a built-in defense usually is vulnerable to a motion to dismiss for failure to state a claim upon which relief can

be granted." 5 Wright & Miller, *supra*, § 1226, at 209. This Court stated the general rule, citing Wright & Miller, in *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984) (per curiam): "Ordinarily affirmative defenses may not be raised by motion to dismiss, but this is not true when, as here, the defense raises no disputed issues of fact." Similarly, in *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1219 (9th Cir. 1990), the Court ruled that "[f]or a complaint to be dismissed because the allegations give rise to an affirmative defense 'the defense clearly must appear on the face of the pleading.'" (citing Wright & Miller).

Although we have not identified any Ninth Circuit cases applying this rule in the context of a section 230 defense, as courts did in *Universal Communication Systems v. Lycos*, 478 F.3d 413, 416, 425 (1st Cir. 2007), and *Green v. America Online*, 318 F.3d 465, 468 (3d Cir. 2003), many of this Court's decisions have followed this approach with respect to other defenses. For example, *Scott v Kuhlmann*, *supra*, 746 F.2d at 1337-1378, affirmed dismissal based on the affirmative defense of res judicata, which defendants had raised on a Rule 12(b)(6) motion to dismiss, even though the lower court had dismissed under Rule 12(b)(1) for lack of subject-matter jurisdiction. *See also McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1097-1098 (9th Cir. 2004) (some damages claims dismissed under Rule 12(b)(6) based on collateral estoppel).

Likewise, the Court has upheld Rule 12(b)(6) dismissals when the running of the statute of limitations appeared on the face of the complaint, *Guerrero v. Gates*, 357 F.3d 911, 915, 919 (9th Cir. 2004); *Lehman v. United States*, 154 F.3d 1010, 1012, 1014-1015 (9th Cir. 1998); *Ledesma v. Jack Stewart Produce*, 816 F.2d 482, 484 n.1 (9th Cir. 1987). In several other cases, the Court addressed timeliness under Rule 12(b)(6) and reversed dismissal only because the allegations of the complaint did not make clear whether equitable tolling could apply on the facts of the case. *Supermail Cargo v. United States*, 68 F.3d 1204, 1206-1208 (9th Cir. 1995); *Waller v. Blue Cross of California*, 32 F.3d 1337, 1341 (9th Cir. 1994). *But see Guerrero v. Gates*, *supra* (affirming dismissal based on limitations, despite equitable tolling argument); *Hernandez v. City of El Monte*, 138 F.3d 393, 401-402 (9th Cir. 1998) (affirming dismissal of one claim under Rule 12(b)(6), rejecting claim of equitable tolling, but making the dismissal without prejudice and reversing dismissal of a second claim). Similarly, the Court has repeatedly addressed a variety of immunity defenses under Rule 12(b)(6), including sovereign immunity, *Graham v. FEMA*, 149 F.3d 997 (9th Cir. 1998), prosecutorial immunity, *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1172 (9th Cir. 2007), qualified immunity, *Center for Bio-Ethical Reform v. Los Angeles County Sheriff Dept.*, 533 F.3d 780, 786, 793-794 (9th Cir. 2008); *Serrano v.*

Francis, 345 F.3d 1071, 1081 (9th Cir. 2003); *Jensen v. City of Oxnard*, 145 F.3d 1078, 1082 (9th Cir. 1998); *Metro Display Advertising v. City of Victorville*, 143 F.3d 1191, 1194-1196 (9th Cir. 1998), state action immunity under the antitrust laws, *Nugent Hydroelectric v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 432-435 (9th Cir. 1992), and Eleventh Amendment immunity. *Hydrick v. Hunter*, 500 F.3d 978, 985 (9th Cir. 2007); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1184 (9th Cir. 2003); *Pena v. Gardner*, 976 F.2d 469, 472-473 (9th Cir. 1992).

Although Part II of the panel opinion is dictum, it creates uncertainty about whether previous holdings of the Court that permit an affirmative defense to be raised in a motion to dismiss in other contexts would control if the issue comes up in a future section 230 case. At the very least, the presence of this strong dictum in the panel opinion may well cause confusion in lower courts. After all, only an en banc Court can overrule a previous holding. Indeed, this Court — unlike the other circuits — requires a panel that is confronted with conflicting precedent to call for en banc treatment of the issue.[2]

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[2] Every other circuit that has addressed this issue holds that a panel confronted with conflicting circuit precedent must follow the earlier case, because the later panel lacked authority to overrule the earlier one, even if unknowingly. *Compare Atonio v. Wards Cove Packing Co.,* 810 F.2d 1477, 1478 (9th Cir. 1987) (en banc), *with United States v. Rivera*, 365 F.3d 213, 213 (3d Cir. 2004) ("This Circuit has long held that if its cases conflict, the earlier is the controlling authority and the latter is ineffective as precedents."); *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004)

Moreover, the Court has previously indicated that considered statements about legal issues that relate to the questions before the Court are binding precedents regardless of whether they are in fact necessary to the disposition. *Barapind v. Enamoto*, 400 F.3d 744, 751 and n.8 (9th Cir. 2005) (*en banc*). At first blush, Part II of the opinion would seem to be a considered statement about a legal issue, but the panel did not state that it was overruling extensive Circuit precedent on this point. It is doubtful that *Barapind* would allow a panel that does not discuss previous circuit precedent to control future panels, especially where the issue was not even briefed. Moreover, even after *Barapind*, one panel said that "dicta" are not binding on a subsequent panel, *Jada Toys v. Mattel*, 518 F.3d 628,

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("[W]e have made it clear that, as to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions."); *United States v. Wheeler*, 322 F.3d 823, 828 n.1 (5th Cir. 2003) ("[W]here two previous holdings or lines of precedent conflict, the earlier opinion controls and is the binding precedent in the circuit"); *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 822 (6th Cir. 2000) ("[W]e must defer to a prior case when two panel decisions conflict."); *Hiller v. Oklahoma ex rel. Used Motor Vehicle & Parts Comm'n*, 327 F.3d 1247, 1251 (10th Cir. 2003) (explaining that when panel opinions are in conflict, "we are obligated to follow the earlier panel decision over the later one"); *Walker v. Mortham*, 158 F.3d 1177, 1188-89 (11th Cir. 1998) ("[W]hen circuit authority is in conflict, a panel should look to the line of authority containing the earliest case, because a decision of a prior panel cannot be overturned by a later panel."); *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1579 (Fed. Cir. 1989) ("Where conflicting statements such as these appear in our precedent, the panel is obligated to review the cases and reconcile or explain the statements, if possible. If not reconcilable and if not merely conflicting dicta, the panel is obligated to follow the earlier case law which is the binding precedent.").

633 (9th Cir. 2008); other judges of this Court have said that *Barapind* significantly altered that traditional rule. *Irons v. Carey*, 506 F.3d 951 (9th Cir. 2007) (Kleinfeld, J, dissenting from denial of rehearing en banc). To avoid this uncertainty, and to avoid the need for en banc consideration given how burdensome such consideration is, the panel should remove this section of the opinion.

If, however, the Court desires to revisit the issue en banc, amici will seek leave to file a brief urging that the Court's many previous holdings are correct, for several reasons. First, the two authorities cited in the panel's opinion to support its dictum do not, in fact, support the proposition that an affirmative defense cannot be raised on a motion to dismiss under Rule 12(b)(6). First, the panel cited the language of Rule 12(b): "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required." But this language does not limit affirmative defenses to responsive pleadings, as opposed to motions to dismiss, but simply requires that defenses be raised in a responsive pleading **if it is required**, and no responsive pleading is "required" if a motion to dismiss is granted. Moreover, this Court has held that an affirmative defense may be raised in **either** a motion to dismiss or a responsive pleading. *Livingston School Dist. Numbers 4 and 1 v. Keenan*, 82 F.3d 912, 917 n.5 (9th Cir. 1996). The panel also

cited *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), which held that a complaint may not be dismissed for failure to plead the presence of a bad purpose to avoid qualified immunity. *Gomez* does not bar Rule 12(b)(6) dismissal based on qualified immunity when the basis for qualified immunity appears on the face of the complaint. And, indeed, as discussed above, the Court has repeatedly recognized that the affirmative defense of qualified immunity may be raised on a motion to dismiss – indeed, even the **denial** of such a motion to dismiss is appealable notwithstanding the final decision rule. *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993).

The analogy to Rule 12(b)(6) dismissals based on immunity defenses is particularly apt here because, like those defenses, section 230 provides an immunity from **suit** and not just an immunity from **liability**. Section 230(e)(3) provides, "**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." (emphasis added). Consequently, courts describe section 230 as providing an immunity from suit. *E.g.*, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 983, 986 (10th Cir. 2000). From the perspective of online speakers who use the services of web hosts like Yahoo!, that immunity from suit is needed because, all too often,

those who are subject to lawful criticism seek to suppress that speech by suing (or threatening to sue) online service providers that have no direct stake in the speech, in the hope that the burden of having to defend against litigation will induce the service providers to exercise their discretion to take down the speech. Typically, the profits that a service provider makes from allowing users or customers to post any given content is much less than the cost, not only of defending against suit, but indeed of making individualized judgments about risks that would be entailed in defending against any particular suit.

Only by providing immunity that protects the online provider from the burdens of litigation can the law make it commercially reasonable for the online provider to refrain from immediately taking any challenged speech offline. The *en banc* Court recognized this crucial point when it said, in *Fair Housing Council of San Fernando Valley v. Roommates.com,* 521 F.3d 1157, 1175 (9th Cir. 2008), that "section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles."

In that regard, although, as discussed at oral argument, a Rule 12(c) motion for judgment on the pleadings would be decided on the same standard as a Rule 12(b)(6) motion, there is a significant practical difference that makes it crucial to make the defense available under Rule 12(b)(6). In some districts, the filing of an

answer triggers the duty to conduct a scheduling conference and to make initial disclosures, after which the parties are permitted to begin discovery. If the defendant moves to dismiss, however, the time for discovery is generally deferred until the motion to dismiss is denied and the defendant is required to answer. The result, in the estimation of amici, will be that many online service providers will be less willing to host controversial speech, especially when that speech might offend a plaintiff that can afford counsel to file suit over the speech.

To be sure, there are examples of loathsome and outrageous speech being posted online, as in this case. But in our view — and more importantly, in Congress' view — the solution is not to impose liability on the intermediaries through whose interactive facilities the speech is transmitted. Depriving those intermediaries of the ability to move to dismiss claims brought in contravention of their section 230 immunity disserves the statutory scheme, and is not simply inconsistent with the Federal Rules.

Moreover, the ability to move to dismiss based on section 230 immunity is a substantial protection that will frequently be useful to online service providers like Yahoo! because the fact that the defendant is a provider of an interactive computer service will, in our experience, normally be disclosed in the complaint. In this case, paragraph 3 of the Complaint disclosed this fact. Even if the plaintiff hides

the ball by not disclosing the interactive nature of the site where allegedly actionable speech was posted, it has long been established in this Circuit, as in other circuits, that "when the plaintiff fails to introduce a pertinent document as part of his pleading, the defendant may introduce the exhibit as part of his motion attacking the pleading." *Branch v. Tunnell*, 14 F.3d 449, 453-454 (9th Cir. 1994). *Accord*, *Sgro v. Danone Waters of North America*, 532 F.3d 940, 943 n.1 (9th Cir. 2008); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-706 (9th Cir. 1998). Consequently, in our experience, the availability of a motion to dismiss as a means of securing the prompt dismissal of a case based on section 230 immunity provides a significant tool for online service providers who are sued — or threatened with suit — based on speech posted by their users.

Finally, as Wright & Miller reflects, *supra* page 3, other circuits that have addressed the issue hold that affirmative defenses can be raised on a motion to dismiss under Rule 12(b)(6), so long as the defense is established by the complaint (or, indeed, by documents attached to or referenced in the complaint). The Court should not lightly depart from the settled law in all the other circuits in this regard.

Accordingly, both because the language of the Federal Rules, the language of the statute, and the well-established precedent contradict the dictum in the

panel's opinion, and because the dictum will lead to results that offend the objectives that Congress sought to further by adopting section 230, we respectfully urge the Court to revisit Part II of its opinion and, indeed, to delete it.

B. Section 230 Creates Immunity from Federal Law as Well as State Law Claims.

The opinion contains a second piece of dictum about section 230 that is squarely contrary to controlling Ninth Circuit precedent, although this issue is not raised in Yahoo!'s petition for rehearing. On page 5320 of its opinion, after discussing section 230(e)(3), the Court says as follows: "[S]ubsection (c)(1) **only** protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, **under a state law cause of action**,[4] as a publisher or speaker (3) of information provided by another information content provider." (emphasis added). Footnote 4 reads: "Section 230(e) also refers to the Amendment's effect on several federal laws, but those laws are not relevant to this case." The dictum in the text, coupled with footnote 4's reference to the impact of section 230(e) "on several federal laws," apparently implies that subsection (c)(1) does not provide any protection from liability under federal law.

Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008) (*en banc*), makes any such reading of the statute untenable.

In *Roommates*, the en banc court expressly held that section 230(c)(1) protects the provider of an interactive computer service from liability under the Fair Housing Act (at least to the extent that the provider is not responsible for the development of the content in question). *Id.* at 1173-1175. *Accord Chicago Lawyers' Comm. for Civil Rights Under Law v. Craigslist*, 519 F.3d 666, 671 (7th Cir. 2008). Because the opinion's dictum quoted in bold type above is at least implicitly contrary to an en banc decision, as well as the plain language of the statute, the Court should delete that language from the opinion as well.

CONCLUSION

The Court should revise its opinion in the ways suggested above.

Respectfully submitted,

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I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached brief as amici curiae in support of petition for panel rehearing or in the alternative for rehearing en banc is: (check applicable option):

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/s/ Paul Alan Levy
Paul Alan Levy

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Courts of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this date.

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/s/ Paul Alan Levy
Paul Alan Levy

May 21, 2009