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August 10, 2018

Presiding Justice Jim Humes
Associate Justices Sandra L. Margulies, Robert L. Dondero, Kathleen M. Banke
California Court of Appeal, First Appellate District, Division 1
350 McAllister Street
San Francisco, California 94102

Re: *Twitter, Inc. v. Superior Court*, First Appellate District, Division 1, Case No. A154973

Letter of Amicus Curiae Internet Association in Support of Twitter, Inc.'s Petition for Writ of Mandate

Dear Presiding Justice and Associate Justices of the Court of Appeal:

Internet Association seeks leave of this Court to submit this letter in support of Twitter, Inc.'s petition for a writ of mandate and immediate review of the San Francisco Superior Court's decision in *Taylor v. Twitter, Inc.*, Superior Court Case No. CGC-18-564460.[1]

Internet Association ("IA") has a clear and direct interest in this matter. IA is the only trade association that exclusively represents leading global Internet companies on matters of public policy. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open Internet.[2]

Several amici curiae, including some of the world's most popular online service providers, have filed a letter asking this Court to grant Twitter's petition for a writ of mandate. *See* Exhibit A (Letter of Amici Curiae Facebook, Inc., Glassdoor, Inc., Google LLC, letgo, A Medium Corporation, Oath Inc., Reddit, Inc., Snap Inc., Thumbtack, Inc., TripAdvisor LLC, and Yelp Inc. in Support of Petition for Writ of Mandate (Aug. 8, 2018)). IA fully supports the arguments in that letter and joins those amici in urging this Court to grant Twitter's petition.

The Superior Court's decision undermines providers' authority to engage in responsible self-regulation and protect their users' experiences; infringes providers' First Amendment rights to administer their platforms; and threatens to chill online speech. As a result, the decision is likely to discourage innovation, inhibit economic growth, and make the Internet a less diverse and less vital marketplace of ideas. It should not be allowed to stand.

[1] No counsel for a party wrote this letter in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this letter. No person other than the amicus curiae or its counsel made a monetary contribution to fund the preparation or submission of this letter.
[2] A list of IA's members is available at https://internetassociation.org/our-members/.

For these reasons, IA urges this Court to grant Twitter's petition for a writ of mandate, reverse the Superior Court's decision, and "promote the continued development of the Internet and other interactive computer services," as Congress intended. 47 U.S.C. § 230(b)(1).

Very truly yours,

James G. Snell
PERKINS COIE LLP
Counsel for Internet Association

Cc: See attached Certificate of Service

Exhibit A

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August 8, 2018

Presiding Justice Jim Humes
Associate Justices Sandra L. Margulies, Robert L. Dondero, Kathleen M. Banke
California Court of Appeal, First Appellate District, Division 1
350 McAllister Street
San Francisco, California 94102

Re: *Twitter, Inc. v. Superior Court*, First Appellate District, Division 1, Case No. A154973

Letter of Amici Curiae Facebook, Inc., Glassdoor, Inc., Google LLC, letgo, A Medium Corporation, Oath Inc., Reddit, Inc., Snap Inc., Thumbtack, Inc., TripAdvisor LLC, and Yelp Inc. in Support of Petition for Writ of Mandate

Dear Presiding Justice and Associate Justices of the Court of Appeal:

The amici identified above seek leave of this Court to submit this letter in support of Twitter, Inc.'s petition for a writ of mandate and immediate review of the San Francisco Superior Court's decision in *Taylor v. Twitter, Inc.*, Superior Court Case No. CGC-18-564460.[1]

The Superior Court held that the provision in Twitter's terms of service describing Twitter's right to remove content and suspend accounts on its platform—a right protected by both the federal Communications Decency Act and the First Amendment—may be "unconscionable" and hence unlawful under California's Unfair Competition Law. That ruling is wrong and unprecedented. It should not be allowed to stand.

First, the Superior Court's decision calls into question whether service providers, like amici, have the authority to enforce their terms of service by banning users who violate them. Providers should be able to enforce their terms of service and standards in ways they deem appropriate for their users and their platforms. Indeed, as outlined below, the law not only allows providers to exercise such editorial discretion, it encourages them to do so. Thus, merely restating the editorial discretion accorded to providers under the law cannot possibly be unlawful, as the Superior Court suggested, and amici should not be penalized for providing notice to users about the very discretion that the law permits. And the Superior Court's error should be immediately corrected. If providers cannot exercise editorial control over their platforms, then they cannot protect their platforms or their users' experiences on those platforms. The result: fewer citizens will choose to speak online and the Internet will become a less vibrant and diverse forum of ideas.

[1] No counsel for a party wrote this letter in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this letter. No person other than the amici curiae or their counsel made a monetary contribution to fund the preparation or submission of this letter.

Second, by limiting service providers' discretion to determine who may use their platforms, the Superior Court's decision infringes providers' First Amendment rights. Indeed, as this case shows, the Superior Court's decision threatens to turn the First Amendment on its head by forcing providers to provide a platform for speech that violates their terms of service and community standards, potentially driving even more users away from providers' services. That constitutional error should also be immediately corrected by this Court.

Third, by holding that it may be unconscionable and hence unlawful to reserve the right to exercise editorial discretion, the Superior Court's decision opens the door to lawsuits seeking to evade the broad immunity that Congress conferred on providers under the Communications Decency Act ("CDA"), 47 U.S.C. § 230. Under the Superior Court's reasoning, a plaintiff who is unhappy about a provider's editorial decision (e.g., to block or allow certain content) need only artfully recast her claim as a challenge to the terms of service articulating the provider's legal right to make that decision, instead of directly challenging the decision itself. Such a tactic, held the Superior Court, is sufficient to plead around the CDA and draw the provider into a "costly and protracted legal battle[]" about its editorial decisions—which is exactly what Congress sought to avoid when it enacted the CDA. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008). This is not a speculative concern. Already, two copycat lawsuits have been filed against Twitter invoking the reasoning of the Superior Court. More are sure to follow if the decision is allowed to stand.

The California Supreme Court recently overturned an appellate court decision that would have had similarly grave consequences for online speech and the service providers that enable it. *See Hassell v. Bird*, 420 P.3d 776, 792 (Cal. 2018). This Court should do the same and overturn the Superior Court's decision here. Accordingly, amici urge this Court to grant Twitter's petition.

Interest of Amici Curiae

Facebook, Inc. ("Facebook") provides a free Internet-based social media service that gives more than two billion people the power to build community and bring the world closer together. People use Facebook to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them. Facebook's headquarters are in Menlo Park, California.

Glassdoor, Inc. ("Glassdoor") operates www.glassdoor.com, an online jobs and recruiting marketplace in which employers are anonymously rated and reviewed by employees and job seekers on important characteristics like culture, career advancement, work-life balance, the job interview experience, and benefits. Glassdoor combines a vast array of user-generated content with available job listings to help people seeking employment make better, more informed decisions about where they work. Glassdoor's headquarters are in Mill Valley, California.

Google LLC's ("Google") mission is to organize the world's information and make it universally accessible and useful. Google offers a wide variety of web-based products and services, including Search, Gmail, Google+, Drive, Docs, Maps, YouTube, and Blogger. Google's headquarters are in Mountain View, California.

letgo is a free marketplace to buy and sell locally. Available through letgo.com and a mobile app that has been downloaded by more than 100 million people, letgo uses image recognition and other technology to make it easy for users to list and find secondhand goods, real estate, and services. letgo has offices in New York and Barcelona.

A Medium Corporation ("Medium") provides an online publishing platform where people can read, write, and discuss the ideas of the day. Medium's ecosystem champions thoughtful discourse and a network that connects users with long-form writing by leaders, thinkers, entrepreneurs, artists, and journalists. More than 60 million people visit Medium each month and Medium grows by more than 140,000 new posts each week. Since 2012, tens of millions of people have spent more than seven millennia reading together on Medium. Medium's headquarters are in San Francisco, California.

Oath Inc. ("Oath"), a subsidiary of Verizon, is a values-led company committed to building brands people love. A global leader in digital and mobile, Oath reaches one billion people around the world with a dynamic house of media and technology brands that include Yahoo, AOL, HuffPost, and Tumblr, among many others. Oath has multiple office locations in California.

Reddit, Inc. ("Reddit") operates the reddit.com platform, which is a collection of thousands of online communities attracting over 300 million monthly unique visitors that create, read, join, discuss, and vote on conversations across a myriad of topics. Reddit is based in San Francisco, California.

Snap Inc. ("Snap") operates the mobile application Snapchat, one of the world's leading camera and messaging applications. Snapchat lets users talk with their closest friends via photos and videos that they create on the application. The app also empowers users to learn about what's happening in the world and view original shows and other video content from leading publishers. Snap's headquarters are in Santa Monica, California.

Thumbtack, Inc. ("Thumbtack") is a local services marketplace platform where customers can find service professionals in nearly 1,000 categories, and professionals can find customers whose projects match their skills. Thumbtack has hundreds of thousands of active service professional users in the United States and helps facilitate millions of projects per year. Customer reviews of service professionals are a critical part of trust on the platform. Thumbtack's headquarters are in San Francisco, California.

TripAdvisor LLC ("TripAdvisor") owns and operates a portfolio of leading online travel brands. TripAdvisor, its flagship brand, is the world's largest travel site, and its mission is to help people around the world plan, book, and experience the perfect trip. TripAdvisor accomplishes this by, among other things, aggregating millions of travelers' reviews and opinions about destinations, accommodations, activities and attractions, and restaurants worldwide, thereby creating the foundation for a unique platform that enables users to research and plan their travel experiences. TripAdvisor's platform also enables users to compare real-time pricing and availability for these experiences as well as to book hotels, flights, cruises, vacation rentals, tours, activities and attractions, and restaurants. TripAdvisor has an office in California.

Yelp Inc. ("Yelp") connects people with local businesses. Yelp's users have contributed over 155 million cumulative reviews of almost every type of local business, written by people using Yelp to share their everyday local business experiences, giving voice to consumers and bringing "word of mouth" online. During the first quarter of 2018, approximately 30 million unique mobile devices accessed Yelp via the Yelp app, approximately 74 million unique visitors visited Yelp via desktop computer, and approximately 70 million unique visitors visited Yelp via mobile website on a monthly average basis. Yelp's headquarters are in San Francisco, California.

Like Twitter, amici are service providers who encourage robust expression in their online communities subject to carefully circumscribed limits. The Superior Court's decision undermines providers' ability to regulate their platforms and protect their users' experiences; deprives providers of their own free speech rights; and blesses an unlawful end run around the CDA's broad immunity that is likely to trigger a flood of litigation targeting providers' lawful exercise of their editorial discretion.

The Superior Court's Decision

The facts here are simple. Twitter suspended plaintiffs' accounts pursuant to its terms of service, which prohibit accounts belonging to or affiliated with violent extremist groups. Plaintiffs sued Twitter based on that editorial decision, asserting that Twitter violated the California Constitution, the California Unruh Civil Rights Act, Cal. Civ. Code § 51, et seq., and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200. Twitter filed a demurrer, arguing that plaintiffs' claims were barred by the CDA and the First Amendment and, further, that plaintiffs failed to adequately plead their claims.

The Superior Court correctly sustained Twitter's demurrer in part and dismissed plaintiffs' claims under the California Constitution and the Unruh Act, holding that they were barred by the CDA. The Superior Court, however, wrongly overruled Twitter's demurrer as to the UCL claim. The Superior Court held that plaintiffs stated a claim under the UCL's "unlawful" prong by alleging that Twitter's terms of service, which state that Twitter may suspend accounts "at any time for any or no reason," were unconscionable. The Superior Court also held that plaintiffs stated a claim under the UCL's "fraudulent" prong by alleging that

Twitter's rules and public statements, which emphasize Twitter's commitment to "free speech," misled plaintiffs into believing that Twitter would not suspend their accounts. Finally, the Superior Court rejected Twitter's argument that the CDA and the First Amendment barred plaintiffs' UCL claim entirely.

Why Appellate Review Is Critical

The Superior Court abused its discretion in at least two ways, both of which undermine free speech on the Internet and threaten to cause a ripple effect that will impact other similarly situated companies and millions of consumers.

First, the Superior Court erred in holding that the CDA did not bar plaintiffs' UCL claim. Under the CDA, Twitter is immune from suit for exercising its editorial discretion—which may include removing content and disabling accounts that violate its policies. *See, e.g.*, *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526, 526 (9th Cir. 2017) (affirming dismissal under the CDA where, as here, the plaintiff sought to hold the provider liable for "blocking [plaintiff's] online content"); *Riggs v. MySpace, Inc.*, 444 F. App'x 986, 987 (9th Cir. 2011) (CDA immunized "decisions to delete [plaintiff's] user profiles"); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009) (explaining that "removing content is something publishers do"); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1124 (N.D. Cal. 2016) (explaining that "the decision to furnish an account, or prohibit a particular user from obtaining an account, is itself publishing activity" subject to CDA immunity) (citation omitted), *aff'd*, 881 F.3d 739 (9th Cir. 2018); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 573 (Cal. Ct. App. 2009) ("At its core, [plaintiffs] want [Twitter] to regulate what appears on its Web site. . . . That type of activity—to restrict or make available certain material—is expressly covered by section 230.").

Plaintiffs argued, and the Superior Court agreed, that the CDA was inapplicable here because plaintiffs' UCL claim is supposedly based on the language of Twitter's terms of service and Twitter's statements about its editorial policies, not Twitter's actual editorial decisions. But Twitter's terms of service, and its statements about its editorial policies, simply reflect the legal regime under which Twitter operates. Thus, holding Twitter liable for informing its users that it may exercise editorial discretion is no different than holding Twitter liable for exercising that discretion. The CDA and case law interpreting it prohibit both. *See Roommates.com*, 521 F.3d at 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.").

Courts routinely reject such artful pleading in the CDA context, and the Superior Court should have rejected it here. *See Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (refusing to "open the door to such artful skirting of the CDA's safe harbor provision"); *Hassell*, 420 P.3d at 789 (rejecting "creative pleading" meant to evade CDA immunity). This Court should confirm that providers are immune from claims, like plaintiffs' UCL claim, that are nothing more than thinly disguised challenges to providers' editorial discretion.

Second, the Superior Court erred in holding that the First Amendment did not bar plaintiffs' UCL claim. The gravamen of plaintiffs' UCL claim is that it is unlawful and fraudulent for Twitter to embrace the general principle of freedom of expression while reserving the right to suspend users' accounts and otherwise exercise its discretion to remove or block content on its platform. Under the First Amendment, however, a provider plainly has the right to decide what its users may publish and not publish on its platform, which necessarily includes deciding *who* may publish on its platform. *See La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (collecting cases). At the hearing on Twitter's demurrer, the Superior Court "respectfully disagree[d]."[2] But that foundational legal principle is not reasonably subject to dispute. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 575 (1995) (First Amendment protects the "choice of material [that]—whether fair or unfair—constitute[s] the exercise of editorial control and judgment") (citation omitted); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 440 (S.D.N.Y. 2014) (claims against website based on website's editorial decisions "violate[d] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message") (citation omitted).[3]

Allowing these errors to stand will have immediate and significant consequences, especially considering that many of the world's most popular service providers are headquartered in California.

Most service providers—like Twitter—reserve in their terms of service the right to remove content, and to suspend or terminate user accounts, at the providers' discretion. Again, those provisions merely reflect the editorial discretion afforded to providers under federal law. It therefore makes little sense to hold, as the Superior Court did, that such common provisions may be "unconscionable" and may even expose many providers to liability.

Moreover, by suggesting that such common provisions may be unlawful, the Superior Court's decision calls into question providers' broad authority to ban users who abuse their services, violate their terms, threaten other users, or otherwise harm their platforms. Undermining that authority will frustrate one of Congress's principal goals in enacting the CDA: encouraging service providers to engage in responsible self-policing of user-generated content. *See, e.g.*, *Barrett v. Rosenthal*, 146 P.3d 510, 522-23 (Cal. 2006) (In enacting the CDA, "Congress contemplated self-regulation, rather than regulation compelled at the sword point of tort liability."); *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (explaining that an "important purpose of [the CDA] was to encourage service providers to self-regulate the dissemination of offensive material over their services").

[2] Petitioners' Appendix, Ex. 22 at 1357 (Transcript of Oral Argument) (June 14, 2018).

[3] As explained in Twitter's Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief (at 38-54), the Superior Court committed other legal errors as well. Those errors also counsel in favor of issuing the writ.

In addition, if providers cannot exclude certain users, then providers will not be able to protect their other users' experiences on their platforms. Many users may simply abandon those platforms as a result. Thus, ironically, the Superior Court's decision would have the effect of chilling online speech, not protecting it. That would serve no First Amendment interest. To the contrary, it would thwart Congress's other principal goal in enacting the CDA: "promot[ing] the continued development of the Internet and other interactive computer services" and "preserv[ing] the vibrant and competitive free market that presently exists for the Internet." 47 U.S.C. § 230(b)(1), (b)(2); *see also Zeran*, 129 F.3d at 331 (explaining that the CDA was enacted, in part, to "maintain the robust nature of Internet communication" and "keep government interference in the medium to a minimum").

Equally important, the Superior Court's decision undermines providers' First Amendment rights to administer their platforms, which include enforcing "rules of the road" about who may use those platforms. Indeed, the Superior Court refused to accord *any* First Amendment protection to Twitter's editorial choice, as embodied in its terms of service, to exclude groups associated with racism and violent extremism.

That is a remarkable departure from settled law, under which providers like Twitter and amici have a fundamental First Amendment right to limit what is said and who may speak on their platforms. *See, e.g.*, *Hurley*, 515 U.S. at 573 ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.") (internal quotation marks and citations omitted); *La'Tiejira*, 272 F. Supp. 3d at 991 (affirming "Facebook's First Amendment right to decide what to publish and what not to publish on its platform"); *cf. Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1075 (S.D. Cal. 2012) (rejecting claims in part because "Facebook has a right to control its own product, and to establish the terms with which its users, application developers, and advertisers must comply in order to utilize this product"). Indeed, taken to its logical conclusion, the Superior Court's decision could expose service providers to liability for removing a wide range of problematic and potentially dangerous content from their platforms, including terrorist content, pornographic content, and hate speech. That result could further chill online speech by driving users away from such platforms.

Lastly, the Superior Court's decision is likely to open a Pandora's box of litigation burdens and claims of liability against providers. The Superior Court correctly applied the CDA in sustaining Twitter's demurrer to the first and second causes of action, thereby confirming that plaintiffs cannot seek relief against a service provider based on the provider's decision to remove objectionable content. But the Superior Court erred in holding that plaintiffs can evade the broad scope of CDA immunity through artful pleading—in this case, by reframing their challenge to Twitter's decision to suspend accounts as a challenge to Twitter's terms, which allow Twitter to suspend accounts. Again, this attack on Twitter's *articulation* of its editorial discretion is no different than an attack on its *implementation* of that editorial discretion. Both are immune under

the CDA. *See Roommates.com*, 521 F.3d at 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.").

Just like the end run around the CDA that was rejected in *Hassell*, the end run sanctioned by the Superior Court in this case "subvert[s] a statutory scheme intended to promote online discourse and industry self-regulation." *Hassell*, 420 P.3d at 792. If allowed to stand, it is likely to trigger more lawsuits aimed at holding providers liable for their editorial policies and decisions, including their decisions to suspend accounts that violate their policies. Indeed, already two copycat lawsuits have been filed against Twitter invoking the Superior Court's reasoning.[4] Unless this Court steps in now and corrects the Superior Court's errors, more copycat lawsuits are likely to follow. That is precisely the opposite of what Congress intended when it enacted the CDA.

For these reasons, amici urge this Court to grant Twitter's petition for a writ of mandate, reverse the Superior Court's decision, and protect the free speech rights of users and providers.

Very truly yours,

James G. Snell
PERKINS COIE LLP
Counsel for Amici Curiae

Cc: See attached Proof of Service

[4] *Kimbell v. Twitter, Inc.*, No. 4:18-cv-04144-PJH, Complaint (N.D. Cal. July 11, 2018) (Dkt. 1); *Brittain v. Twitter, Inc.*, Amended Complaint, No. 2:18-cv-01714-DGC (D. Ariz. June 26, 2018) (Dkt. 13).

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2018, I electronically filed the foregoing **Letter of Amicus Curiae in Support of Petition for Writ of Mandate** with the Clerk of the Court for the California Court of Appeal, First Appellate District, Division 1, by using the Electronic TrueFiling system. I further certify that a true and correct copy of the foregoing was furnished through the Electronic TrueFiling system to the following:

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I further certify that a copy of the foregoing **Letter of Amicus Curiae in Support of Petition for Writ of Mandate** was delivered via U.S. Mail to:

Clerk of the Court
Superior Court of California, County of San Francisco
400 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 10, 2018, at Palo Alto, California.

/s/ James G. Snell
James G. Snell