Supreme Court of Wisconsin

YASMEEN DANIEL, ET AL.
Plaintiffs-Respondents

v.

ARMSLIST, LLC, ET AL.
Defendants-Petitioners

Petition for Review of a Decision by the Court of Appeals of Wisconsin,
District One
Appeal No. 2017AP344

After a Decision by the Circuit Court for Milwaukee County
The Honorable Glenn H. Yamahiro
Case No. 2015CV8710

BRIEF OF AMICUS CURIAE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

Counsel for Amicus Curiae CCIA

PERKINS COIE LLP
Andrew T. Dufresne
Wisconsin Bar. No. 1081409
1 East Main Street, Suite 201
Madison, Wisconsin 53700
Telephone: (608) 663-7492
Facsimile: (608) 663-7499
ADufresne@perkinscoie.com

Of Counsel

WILSON SONSINI GOODRICH & ROSATI PC
Brian M. Willen
Jason B. Mollick
1301 Avenue of the Americas,
40th Floor
New York, New York 10019
Telephone: (212) 999-5800
Facsimile: (212) 999-5899
bwillen@wsgr.com
jmollick@wsgr.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

For 20 years, online service providers have relied upon an established and developed body of law interpreting Section 230 of the federal Communications Decency Act ("Section 230" or the "CDA"), which delineates the extent to which they can or cannot be responsible for the content and activities of third-party users. The Court of Appeals, however, broke with decades of case law interpreting the CDA as a broad immunity, and instead adopted a so-called "plain language interpretation" which gave it free license to ignore virtually every other court that has interpreted the same statutory language. P-App 001-024 ("Ruling") ¶ 3. Although CCIA takes no position here on whether Defendants ultimately fall within Section 230, this Court's review is needed to ensure that the proper interpretation of this vital immunity applies in this case and in other cases involving online service providers in this State.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH VIRTUALLY EVERY COURT IN THE UNITED STATES THAT HAS APPLIED THE CDA

A. Congress Determined That Traditional Standards of Publisher and Distributor Liability Should Not Apply in the Internet Context

The CDA "immunizes providers of interactive computer services against liability arising from content created by third parties." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014). Section 230(c)(1) mandates that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Subject to limited exceptions not applicable here, the statute expressly bars any state law claims that run afoul of this directive, providing that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

"Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Zeran v. Am. Online, Inc.*, 129 F.3d 327,

330 (4th Cir. 1997). Congress understood that if online service providers were subject to traditional publisher or distributor liability simply because third-party information is posted to, or accessible through, their services, they would be forced to investigate each and every notice of potentially unlawful content. "Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context." *Id.* at 333. "[A]bsent federal statutory protection, interactive computer services would essentially have two choices: (1) employ an army of highly trained monitors to patrol (in real time) each chatroom, message board, and blog to screen any message that one could label defamatory, or (2) simply avoid such a massive headache and shut down these fora. Either option would profoundly chill Internet speech." *DiMeo v. Max*, 433 F. Supp. 2d 523, 529 (E.D. Pa. 2006), *aff'd*, 248 F. App'x 280 (3d Cir. 2007).

B. Section 230 Immunizes Online Service Providers from Claims Arising from Content Posted by Third-Parties

"Both state and federal courts around the country have generally interpreted Section 230 immunity *broadly*, so as to effectuate Congress's policy choice … not to deter harmful online speech through the … route of imposing tort liability on companies that serve as intermediaries for other

parties' potentially injurious messages[.]" *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 288 (2011) (emphasis added; citations omitted; collecting cases). While defamation is the prototypical claim associated with Section 230, countless courts have interpreted the CDA to establish a broad (but not unlimited) immunity against "*any* cause of action that would make service providers liable for information originating with a third-party user of the service." *Jones*, 755 F.3d at 406-07 (emphasis added; citations omitted; collecting cases). As the Ninth Circuit explained in *Barnes v. Yahoo!, Inc.*:

> [M]any causes of action might be premised on the publication or speaking of what one might call "information content." A provider of information services might get sued for violating anti-discrimination laws, for fraud, negligent misrepresentation, and ordinary negligence, for false light, *or even for negligent publication of advertisements that cause harm to third parties*. Thus, what matters is not the name of the cause of action … what matters is whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of content provided by another.

570 F.3d 1096, 1101-02 (9th Cir. 2009) (emphasis added; citations omitted).

Under this standard, virtually every court to have interpreted the CDA has held that Section 230 bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial

functions—such as deciding whether to publish, withdraw, postpone or alter content" that they did not themselves create. *Zeran*, 129 F.3d at 330; *accord, e.g.*, *Jones*, 755 F.3d at 407 (immunizing a service provider's exercise of "traditional editorial functions" goes to the "core" of Section 230); *see also, e.g.*, *Universal Commc'ns. Sys. v. Lycos, Inc.*, 478 F.3d 413, 418-22 (1st Cir. 2007) (barring claim that website's registration process and link structure prompted third-party postings in violation of Florida securities law); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1120-29 (N.D. Cal. 2016) (barring claim that Twitter contributed to unlawful acts committed by persons who created accounts on its service); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1164-65 (N.D. Cal. 2017) (barring claim that Google violated federal statute by permitting third-parties to post videos inciting unlawful conduct on its YouTube service); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 155-58 (E.D.N.Y. 2017) (barring various tort claims that Facebook allowed third-parties to use its platform to post offensive content); *Herrick v. Grindr, LLC*, No. 17-CV-932 (VEC), 2018 U.S. Dist. LEXIS 12346, at *11-23 (S.D.N.Y. Jan. 25, 2018) (barring claims that features of web-based dating application failed to prevent plaintiff from being harassed by other users).

C. The Court of Appeals Misapplied Section 230 in This Case

1. The Decision Below Misinterprets the CDA as a Narrow Immunity That Cannot Protect the "Design and Operation" of a Website

The Court of Appeals engaged in an idiosyncratic interpretation of Section 230, finding only a "narrow scope of immunity" applied directly to user communications themselves. Ruling ¶¶ 27, 34, 42, 47 & n.5. The Court discarded Section 230 in this case because Plaintiffs do not (in the Court's view) "seek to hold Armslist liable for publishing another's information content. Instead, the claims seek to hold Armslist liable for its own alleged actions in designing and operating its website in ways that caused injuries to Daniel," i.e., by "facilitat[ing] illegal firearms purchases" between third-parties communicating on the Armslist site. *Id.* ¶¶ 3, 51-52.

This logic has been rejected by every court to have considered it. Courts consistently hold that "Section 230(c)(1) is implicated not only by claims that *explicitly* point to third party content but also by claims which, though artfully pleaded to avoid direct reference, *implicitly* require recourse to that content to establish liability or implicate a defendant's role, broadly defined, in publishing or excluding third party communications." *Cohen*, 252 F. Supp. 3d at 156 (emphasis added) (barring claims that Facebook

"contributed to" unlawful conduct committed by persons who signed up for accounts and posted content on its service, because "Facebook's role in publishing [third-party] content is thus an essential causal element of the claims"); *see also*, *e.g.*, *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009) (rejecting argument that CDA does not cover a website's "conduct" in facilitating the posting of unlawful confidential telephone information, "rather than for the content of the information," because ultimately the website "would not have violated the FTCA had it not 'published' the confidential telephonic information"); *Fields*, 217 F. Supp. 3d at 1118 (barring claims that Twitter provided "material support" to third-parties who signed up for accounts on its service and used it to incite violence, because "no amount of careful pleading can change the fact that, in substance, plaintiffs aim to hold Twitter liable as a publisher or speaker of [third-party's] hateful rhetoric"); *Gonzalez*, 282 F. Supp. 3d at 1164-65 (rejecting argument that "provision of material support" to third-parties who engage in violent activity "does not depend on the characterization of Google as the publisher or speaker" of third-party content, because "[t]his argument essentially tries to divorce [a third-party's] offensive content from the ability to post such content").

Virtually without exception, Section 230 has been held to govern claims that "address the structure and operation of the [defendant's] website, that is, [defendant's] decision about how to treat postings. Features such as these, which reflect choices about what content can appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions." *Doe v. Backpage.com, LLC*, 817 F.3d 12, 16-17, 21 (1st Cir. 2016) (barring claim that defendant structured website to facilitate unlawful transactions); *Dyroff v. Ultimate Software Grp., Inc.*, No. 17-cv-05359-LB, 2017 U.S. Dist. LEXIS 194524, at *18-19 (N.D. Cal. Nov. 26, 2017) (rejecting plaintiff's attempt to "plead around § 230(c)(1) immunity by basing their claims on the website's tools, rather than the website operator's role as a publisher of the third-party content"); *Herrick*, 2018 U.S. Dist. LEXIS 12346, at *17-18, *20 ("Herrick's claim that Grindr is liable because it failed to incorporate adequate protections against impersonating or fake accounts is just another way of asserting that Grindr is liable because it fails to police and remove impersonating content…. [T]hese features (or the lack of additional capabilities) are … exactly the sort of 'editorial choices' that are a function of being a publisher."); *Lycos*, 478 F.3d at 422 ("Lycos's decision not to reduce

misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting."); *Fields*, 217 F. Supp. 3d at 1124 ("Twitter's decisions to structure and operate itself as a platform ... reflect choices about what [third-party] content can appear on [Twitter] and in what form. Where such choices form the basis of a plaintiff's claim, section 230(c)(1) applies.") (citations omitted); *Gonzalez*, 282 F. Supp. 3d at 1166 (Google immunized from claim that "functionality" of its YouTube service "enhance[d] [third-party's] ability to conduct [unlawful] operations"); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256-58 (4th Cir. 2009) (defendant immunized from claim that "structure and design of its website" facilitated tortious content); *Cohen*, 252 F. Supp. 3d at 156-57 ("[D]ecisions as to the 'structure and operation' of a website ... fall within Section 230(c)(1)'s protection[.]").

Here, as plaintiffs did in the cases cited above, the Court of Appeals tried to divorce the "design and operation" of Defendants' website from claims based on the content posted on that website by third-parties. But the allegations in this case exemplify the logical fallacy of that distinction. Plaintiffs' theory is that an online service "is liable for designing and

operating its website in a way that encouraged prohibited sales." Ruling ¶ 35. Its "features" allegedly enabled third-party users to connect and communicate with one another on Defendants' website. *Id.*; *see also id.* ¶ 13. The seller posted an advertisement *on the site*, and the buyer reached out to and conversed with the seller *on the site*. *Id.* ¶ 19. As such, Plaintiffs are seeking to hold a website liable for its role in *facilitating communications between users of that site*. *Id.* Without those communications, there could be no claim against the website operators.

At bottom, then, Plaintiffs' claims are premised on the notion that a website did not do enough to stop users from posting advertisements that may result in unlawful sales. Such allegations seek to hold an online service liable, in a direct way, for the choices it made about what user-generated information should or should not appear on its site, and in what form. But Section 230 applies to any such claims that "can be boiled down to the failure of an interactive computer service to edit or block user-generated content that it believes was tendered for posting online, as that is the very activity Congress sought to immunize by passing the section." *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1172 n.32 (9th Cir. 2008).

2. The Court of Appeals Should Have, But Did Not, Apply the "Material Contribution Test" to Determine Whether Defendants are "Information Content Providers" Under the CDA

Section 230 immunity is not unlimited. "[A]n interactive computer service that is also an 'information content provider' of certain content is not immune from liability arising from publication of that content." *Accusearch*, 570 F.3d at 1199. Accordingly, instead of discarding CDA immunity outright based on a false distinction between a website's "content" and "design," the Court of Appeals should have—but did not—follow established law to determine whether Defendants are themselves "information content provider[s]" and therefore "responsible, in whole or in part" for creating or developing unlawful activity on their site. 47 U.S.C. § 230(f)(3).

Under the well-established "material contribution" test, "a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct." *Roommates.com*, 521 F.3d at 1167-68. Importantly, however, a "material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of allegedly illegal

content. ***Rather, it means being responsible for what makes the displayed content allegedly unlawful.***" *Jones*, 755 F.3d at 410 (emphasis added).

The service must have contributed to the illegality *intentionally*, such as in *Roommates.com* where the defendant (which had been sued for soliciting discriminatory information from users in violation of the Fair Housing Act) "designed its system to use allegedly unlawful criteria so as to limit the results of each search, and to force users to participate in its discriminatory process." 521 F.3d at 1167. By contrast, merely "providing neutral tools to carry out what may be unlawful or illicit searches does not amount to 'development' for purposes of the immunity exception." *Id.* at 1169.

For example, in *FTC v. Accusearch*, the Tenth Circuit held that "a service provider is 'responsible' for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content." 570 F.3d at 1199. The court held that the defendant, which had actively solicited and paid for confidential telephone records to be posted and sold on its website, was "not 'neutral' with respect to generating offensive content; on the contrary, its actions were *intended* to generate such content." *Id.* at 1201 (emphasis added).

Courts around the country have applied these principles in a variety of circumstances, including in cases where the "design and operation" of a website has allegedly facilitated an unlawful transaction between users of that service. *See, e.g.*, *Dyroff*, 2017 U.S. Dist. LEXIS 194524, at *28 ("Ultimate Software's functionalities are neutral tools that do not transform Ultimate Software into an 'information content provider,' *even if the tools were used to facilitate unlawful activities on the site*. Ultimate Software's policy about anonymity may have *allowed* illegal conduct, and the neutral tools *facilitated* user communications, but these website functionalities do not 'create' or 'develop' information, even in part.") (emphasis added; citations omitted); *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 717-18 (Wash. 2015) ("It is important to ascertain whether in fact Backpage designed its posting rules to induce sex trafficking to determine whether Backpage is subject to suit under the CDA ….") (citing *Roommates.com*).

While CCIA takes no position here on the outcome of the "material contribution" test when properly applied to the facts of this case, the Court of Appeals departed from established law by rejecting Section 230 simply because, in its view, Plaintiffs do not seek to hold Defendants responsible

for the specific content posted by their users. The Court's failure to apply the "material contribution" test misunderstood the CDA's important immunity, broke with two decades of consistent case law, and threatens to substantially erode the protections that Section 230 provides to all service providers in Wisconsin and throughout the United States—not just Defendants.

II. AT MINIMUM, THE DECISION BELOW CREATES A CONFLICT OF LAW WITH STATEWIDE AND NATIONWIDE IMPLICATIONS

At minimum, there is no question that a stark conflict of law merits review by this Court. Indeed, the Court of Appeals itself admitted that its idiosyncratic reading of Section 230 conflicts with authority throughout the country. The Court acknowledges "case law that effectively construes the Act to provide 'broad immunity' for claims that rest on allegations of activities by creators and operators of websites that those courts deem to be 'publishing' activities," but ultimately concludes that those cases "do not, in our view, come to grips with the plain language in the Act." Ruling ¶¶ 34, 36, 48-51.

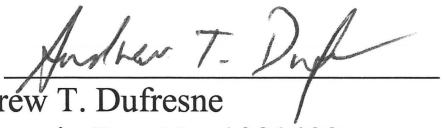
Even the cases the Court considered "persuasive" do not support its analysis. The Court cherry-picked dicta from those opinions, but ignored

their ultimate analyses and outcomes. *See id.* ¶¶ 45-46. For instance, the Court relies heavily upon a *concurring* opinion in *J.S. v. Village Voice Media Holdings*, even though the *majority* endorses and applies the "material contribution" test to allegations that an online service facilitated unlawful transactions between users. 359 P.3d at 717-18. It also invokes *Barnes*, which found that a defendant's contractual promise to remove content may waive the CDA safe harbor, but otherwise endorsed a broad immunity covering "a publisher's traditional editorial functions," such as "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." 570 F.3d at 1101-02.

CONCLUSION

The ruling below stands alone amongst decades of established case law and creates a significant loophole in Section 230. The practical consequence is that countless plaintiffs with creative lawyers will come to Wisconsin to exploit that loophole, to pursue claims against online service providers that have consistently been understood as prohibited in every other state. This Court should review it.

Dated: June 4, 2018

By: 

Andrew T. Dufresne
Wisconsin Bar. No. 1081409
PERKINS COIE LLP
1 East Main Street, Suite 201
Madison, Wisconsin 53700
Telephone: (608) 663-7492
Facsimile: (608) 663-7499
ADufresne@perkinscoie.com

Counsel for Amicus Curiae CCIA

Brian M. Willen
Jason B. Mollick
WILSON SONSINI GOODRICH & ROSATI, PC
1301 Avenue of the Americas,
40th Floor
New York, New York 10019
Telephone: (212) 999-5800
Facsimile: (212) 999-5899
bwillen@wsgr.com
jmollick@wsgr.com

Of Counsel

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,990 words.

Dated: June 4, 2018

Andrew T. Dufresne

Counsel for Amicus Curiae CCIA

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated: June 4, 2018

Andrew T. Dufresne

Counsel for Amicus Curiae CCIA

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2018, I caused a copy of this brief to be served upon each of the following parties via FedEx as follows:

QUARLES & BRADY LLP
Joshua D. Maggard
(State Bar No. 1010075)
Eric J. Van Schyndle
(State Bar No. 1076063)
411 East Wisconsin Avenue
Suite 2400
Milwaukee, WI 53202

REED SMITH LLP
Brian A. Sutherland
(*pro hac vice* pending)
101 Second Street, Suite 1800
San Francisco, CA 94105

MANATT, PHELPS & PHILLIPS, LLP
Jacqueline C. Wolff *(pro hac vice)*
Arunabha Bhoumik *(pro hac vice)*
Samantha J. Katz *(pro hac vice)*
7 Times Square
New York, NY 10036

BRADY CENTER TO PREVENT GUN VIOLENCE LEGAL ACTION PROJECT
Jonathan E. Lowy *(pro hac vice)*
Alla Lefkowitz *(pro hac vice)*
840 First Street, NE, Suite 400
Washington, D.C. 20002

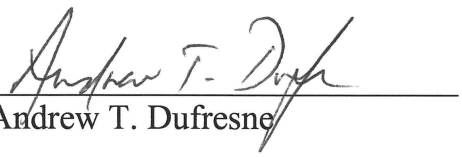
CANNON & DUNPHY
Patrick O. Dunphy
(State Bar No. 1016947)
Brett A. Eckstein
(State Bar No. 1036964)
P.O. Address:
594 North Barker Road
P.O. Box 1750
Brookfield, WI 53008

CHAPIN & ASSOCIATES
John A. Griner
(State Bar No. 1019322)
13935 Bishops Dr., Ste. 250
Brookfield, WI 53005

FUCHS & BOYLE SC
John F. Fuchs
(State Bar No. 1016712)
13500 Watertown Plank Rd., Ste. 100
Elm Grove, WI 53122

DEVINE HAHN SC
Thomas M. Devine
(State Bar No. 1017536)
Anthony P. Hahn
(State Bar No. 1032819)
840 Lake Ave., Ste. 300
Racine, WI 53403

Dated: June 4, 2018



Andrew T. Dufresne

Counsel for Amicus Curiae CCIA