No. 19-153

In the
Supreme Court of the United States

YASMEEN DANIEL, INDIVIDUALLY
AND AS SPECIAL ADMINISTRATOR OF THE
ESTATE OF ZINA DANIEL HAUGHTON,
Petitioner,

v.

ARMSLIST, LLC, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF AMERICAN MEDICAL ASSOCIATION AND WISCONSIN MEDICAL SOCIETY, *AMICI CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

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IDENTIFICATION OF *AMICI CURIAE*[1]

The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. AMA members practice and reside in all states, including Wisconsin. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

The Wisconsin Medical Society (WMS), a constituent association of the AMA, is the largest professional association of physicians, residents and medical students in Wisconsin. Its mission is to improve the health of the people of Wisconsin by supporting and strengthening physicians' ability to practice high-quality patient care in a changing environment.

The AMA and WMS join this brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose

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[1] The parties were given timely notice and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief.

purpose is to represent the viewpoint of organized medicine in the courts.

STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

The Armslist Website

Armslist, the principal defendant, maintains a website known as Armslist.com, which is an online marketplace for the sale and purchase of firearms. (Complaint, ¶12). This website was created, at least in part, to facilitate the sale of guns to persons who are likely to use them to commit crimes, such as persons prohibited from possessing guns by a court restraining order. (Complaint, ¶¶37,42). Although Wisconsin and federal laws prohibit the sale of firearms to certain persons, including those with protection orders against them, Wis. Stat. § 941.29(4); 18 U.S.C. § 922(d), Armslist was designed to evade those laws – and to profit from those evasions. (Complaint, ¶¶42,49-50,53-55,58,67-68).

Private individuals, unlike licensed firearms dealers, are not required to obtain special licensure before selling guns nor are they required to perform background checks on the individuals to whom they sell those guns. Wis. Stat. § 175.35(2); 18 U.S.C. § 922(t); (Complaint, ¶40). Other leading online marketplaces like eBay, Craigslist, Amazon.com, and Google AdWords, all prohibited the sale of firearms on their sites, recognizing the risk that accompanies these types of transactions. (Complaint, ¶¶45-48). Armslist.com, however, designed its site to capitalize on this loophole for private sellers. (Complaint, ¶49).

Rather than following in stride with these other online marketplaces, the Armslist website incorporated features that promoted private seller scofflaws, who sought to sell their firearms illegally, to connect with prohibited buyers who may want to buy those firearms to commit violent acts. Namely, the site design includes: 1) a feature that allows sellers to distinguish whether they are federally licensed firearm dealers or unlicensed, private sellers (Complaint, ¶54(a)); 2) a feature that allows users to flag or delete certain posts, but which does not allow users to flag content as criminal or illegal (Complaint, ¶54(c)) and; 3) a feature that allows visitors to use the site anonymously, without registering an account (Complaint, ¶54(d)). These features do not derive from neutral or innocuous design decisions. They are intended to – and do – facilitate illegal sales. (Complaint, ¶¶50,55,67).

Not surprisingly, Armslist engendered the sought-after results – firearm sales through its website that would otherwise be illegal. (Complaint, ¶68). And, the expected consequences – a disproportionately large number of criminal acts, including murders, have arisen through Armslist promoted firearm sales to prohibited buyers. (Complaint, ¶¶74-81).[2]

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[2] Subsequent to the filing of the complaint in this lawsuit, a handgun sold through an Armslist search was reportedly used to kill Paul Bauer, a Chicago police officer. While some of the chain of custody details are unknown, Armslist facilitated the ability of the shooter, a previously convicted felon, to obtain possession of the murder weapon. Jeremy Gorner et al., *Tracking the 'Baby Glock' that Killed Cmdr. Bauer: A Wisconsin Shop, a Gun Club and a Shadowy Sale on the Internet*, CHICAGO TRIBUNE MAR. 1, 2018,

Zina Daniel Haughton's Murder

For over a decade, Zina Daniel Haughton (hereafter, Zina) was the victim of repeated domestic abuse, including numerous violent acts and threats, at the hands of her husband, Radcliffe Haughton (hereafter, Radcliffe). (Complaint, ¶¶1,24-25,27). On October 18, 2012, following a hearing, a Wisconsin court issued a restraining order against Radcliffe. This order, effective for four years, prohibited Radcliffe from approaching Zina and from possessing a firearm. (Complaint, ¶3).

Notwithstanding the court order and its restrictions, on October 19, 2012, Radcliffe turned to Armslist.com and sought out advertisements from unlicensed sellers. (Complaint, ¶¶88-89). Radcliffe found David Linn, the seller, and purchased a semiautomatic handgun with three high-capacity magazines of ammunition for cash in a car parked in a McDonald's parking lot. (Complaint, ¶94). The seller was not a licensed gun dealer, and he did not check Radcliffe's background or legal status. Rather, he allowed Radcliffe to obtain the gun immediately. (Complaint, ¶¶96-98).

The following day, Radcliffe walked into Zina's workplace and, with the semiautomatic handgun he had purchased, murdered Zina and two of her co-workers. He also wounded four others before taking his own life. (Complaint, ¶7). Zina's daughter, Yasmeen Daniel (hereafter, Yasmeen), was present during the

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https://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-paul-bauer-gun-20180228-story.html.

crime. She witnessed her mother's murder and was injured in the shooting. (Complaint, ¶¶138, 162).

Court Proceedings

Yasmeen, individually and as the special administrator of Zina's estate, sued Armslist (among others) in the Milwaukee County Circuit Court, based on numerous legal theories. She claimed that the Armslist design features were a contributing cause of her injuries. (Complaint, ¶¶134(a),157,165-178,189-192). Armslist moved to dismiss based on 47 U.S.C. § 230(c)(1) of the Communications Decency Act (CDA). The trial court granted this motion under Wis. Stat. § 802.06(2)(a)(6) (failure to state a claim). Yasmeen appealed.

The Wisconsin Court of Appeals reversed, finding that Yasmeen's claims against Armslist were not predicated on its status as a publisher of the online advertisements that led to the illegal sale but instead hinged on the way it had designed its website. Armslist appealed, and the Wisconsin Supreme Court reversed the Court of Appeals decision.

Yasmeen has petitioned this Court for review.

ARGUMENT

The CDA does not immunize Armslist. The statute provides that an internet service provider, such as Armslist, shall not be "treated" as a "publisher or speaker" of information provided by a third person. However, it does *not* define the word "treated," and it does *not* state whether or under what conditions such non-treatment is to result in immunity for the internet service provider. In particular, it does not state whether a website designed specifically to enhance and profit from illegal transactions can escape liability. On these issues, the CDA is silent. This Court should therefore fill the gaps through the accepted rules for resolving linguistic ambiguities in statutes while also envisioning the public policy ramifications of broadly construing the CDA.

I. The Wisconsin Supreme Court Misinterpreted the Communications Decency Act (CDA) By Immunizing The Aiding and Abetting of a Violent Crime Facilitated Through the Internet.

The Wisconsin Supreme Court, brushing off Daniel's claims and prophylactic suggestions as "artful pleading," fundamentally misinterpreted the CDA by providing Armslist with immunity simply because it published a third-party's content. *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 724, 729 (Wis. 2019). As we argue *infra*, it was illogical for the Wisconsin Supreme Court to justify Armslist's intentional design as "a distinction without a difference" for purposes of CDA immunity. *Daniel*, 926 N.W.2d at 723. If this Court condones this logic, a website could perpetuate and

enable illegal activity by categorically allowing third party postings, and allow the internet to become a "lawless no-man's-land" – a result not envisioned by Congress. *Fair Housing Council of San Fernando Valley v. Roomates.Com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (*en banc).*

A. CDA's Selective Immunity Rightly Applies to Legal Actions Claiming Publication Liability, But It Is Misplaced in Legal Actions Asserting the Aiding and Abetting of Violent Crimes.

The Communications Decency Act ("CDA") applies to cases, such as defamation suits, in which a claim is based on an internet provider's status as a common law publisher of the information on its website. Restatement (Second) of Torts § 558 (1977) (Defamation, Elements Stated: "an unprivileged publication to a third party").[3] However, it does not apply to a claim, as here, where the injury arose from activities taken both prior and subsequent to publication. The following rules of statutory construction support this assertion:

First, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon*

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[3] *Amici* do not contend that the CDA applies only to defamation claims, although those suits are its principle targets. Copyright infringement claims would be another candidate for CDA immunity.

Coal Co., Inc., 534 U.S. 438, 448 (2002) (quoting *Russello v. U.S.*, 464 U.S. 16, 20 (1983)); *see also Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1426 (2018).

The CDA provision on which Armslist relies is codified at 47 U.S.C. § 230(c)(1). The very next section provides as follows:

> **(2) CIVIL LIABILITY** No provider or user of an interactive computer service shall be held liable on account of—
>
> **(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> **(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

It is apparent, therefore, that a website provider that takes the actions described in § 230(c)(2) is immune from liability for those actions. However, Congress did not intend that the action described in § 230(c)(1) – publication of material provided by a third party – would necessarily lead to immunity. If that had been the intent, Congress would have said so, just as it did in § 230(c)(2).

For example, CDA § 230(c)(1) might have tracked the language of § 230(c)(2) and said: "No provider or user of an interactive computer service shall be held liable for the publication or speaking of any information provided by another information content provider." Such wording would have resulted in an easier case, but that is *not* what Congress said. "[I]t is [the court's] judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952).

What Congress *did* intend is that publication would sometimes be immunized, as in, *e.g.*, actions for libel, but it would not necessarily be immunized from all causes of action. Under the facts alleged in this case, where the publication is but one piece in an extended series of events, the immunity claim is inapposite.

Second, a court should not interpret a statute in such a way as to reach an implausible or absurd result, even if the more reasonable interpretation requires a modest textual correction. *King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015); *see also* A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (West, ed., 2012) (hereinafter "READING LAW"), Canon 37.

By any reasonable definition of the word, it is apparent that Armslist was the "publisher" of Linn's advertisement. *Black's Law Dictionary* defines "publish" as "distribu[ting] copies (of a work) to the public." Publish, BLACK'S LAW DICTIONARY (10th ed. 2014), *available at* Westlaw.

But, it would be absurd to suggest that, by virtue of the CDA, the publisher of an advertisement cannot legally be deemed a publisher for any and all purposes. The *non-sequitur* would be a rewrite of the English language. It makes far more sense to conclude that CDA § 230(c)(1) means that for some legal purposes an internet provider who publishes third-party content should not be deemed (or "treated" as) a publisher under causes of action that depend on such characterization, but for other purposes the publisher status is irrelevant, and so the internet provider can be held liable. Equivalently, CDA § 230(c)(1) means that for some legal purposes an internet provider can be held liable whether or not the internet provider published material on its website, because the label of "publisher" is beside the point.

The proper construction of CDA § 230(c)(1), then, is that website providers should not bear civil liability for such torts as libel, which are targeted against those whom the law characterizes (and treats) as publishers. *See* Restatement (Second) of Torts § 568 (1977) ("[l]ibel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form, or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words"). However, website providers can be found liable if their publication of third-party content is but one link in a chain of causation that led to an injury arising after the publication. That, of course, is the situation here.

Yes, the trial court correctly found that Armslist exercised "editorial choices that fall within the purview

of traditional publisher functions." R. 148 at 65:19-66:3. Were liability premised on Armslist's status (or "treatment") as a publisher, this suit might fail. But, that is not the case. The suit is premised on Armslist's having deliberately designed its website to facilitate and enable the illegal sale of firearms. Those are far from traditional publisher functions, and the claim of aiding and abetting a murder does not depend on whether Armslist is treated as a publisher.

Third, when a statute is ambiguous, the title and heading may indicate the legislative intent. *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008); READING LAW, Canon 35. The law at issue is entitled "The Communications Decency Act." Immunizing Armslist would do nothing to advance communications decency. In fact, immunization would be an action of indecency.

Moreover, § 230 is captioned "Protection for Private Blocking and Screening of Offensive Material." As will be explained *infra*, the CDA was enacted largely, if not solely, to encourage website owners to police the postings on their websites, without fear that such efforts would open the websites to defamation actions because the screening may have been imperfect. Armslist has not made some, or any, attempts to police its website of offensive material.

Fourth, when Congress explicitly states its statutory purpose, that statement is intended to and should guide judicial construction. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010); READING LAW, Canon 34.

To ascertain whether an internet provider should be treated as a publisher, it is helpful to consider the purposes that motivated the CDA, as set forth in CDA § 230(b). True, as the Wisconsin Supreme Court noted, the CDA is intended to preserve a "vibrant and competitive free market" on the internet. *Daniel*, 926 N.W.2d at 717; *see also*, CDA § 230(b)(2). But, the law serves other purposes, too. Congress has made clear that it seeks "to ensure enforcement of Federal criminal laws to deter and punish … stalking and harassment by means of computer." CDA § 230(b)(5). That is what Radcliffe did here.

Beyond the expression of intent in CDA § 230(b)(5), in April 2018 the CDA was amended by the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017." Under § 2, entitled "Sense of Congress" this law states:

> "[The CDA] was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims" Pub. L. No. 115-164, 132 Stat 1253 (to be codified at 18 U.S.C. § 2421A and 47 U.S.C. § 230)."

The words, "was never intended" are instructive here. As Armslist points out in its earlier briefings, a subsequent Act of Congress often gives meaning to the previously enacted statute it replaces. Armslist Brief to Wisconsin Supreme Court, at 20, *citing* 2B SUTHERLAND STATUTORY CONSTRUCTION (7th ed.) § 49:10 ("Where a legislature amends a former

statute . . . such amendment or subsequent legislation is strong evidence of the legislative intent behind the first statute."). Congress felt it necessary to clarify to the public, and to the courts, that the CDA—enacted, in part, as a statute to protect children from sexually explicit content on the internet—was not intended to protect those who exploit children, sexually, and illegally, via the internet. It passes all logic to suggest that Congress never intended to protect web sites that facilitate unlawful sex trafficking, but Congress nevertheless *did intend* to protect websites that facilitate violent crimes, including murder, through unlawful sales of firearms.

Fifth, a federal statute is presumed to supplement, rather than displace state law. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) ("[courts start] with the presumption that Congress does not intend to supplant state law"); READING LAW, Canon 47. This rule should carry special force here, because Wisconsin law and federal law equally prohibit illegal sales of firearms. It is unlikely that Congress meant to undercut its own criminal laws. If it had, it would have said so clearly, rather than through the ambiguous wording of § 230(c)(1).

Thus, the accepted rules of statutory construction lead to a reasonable interpretation of CDA § 230(c)(1). The statute immunizes internet providers from actions such as libel, where the injury arises contemporaneously with the publication. It does not apply, as here, to actions in which publication is the

biproduct of a pernicious design resulting in injury arising after the publication.

B. Other Courts – and the House Report -- Have Interpreted the CDA as Excluding Immunity for the Aiding and Abetting of Violent Crimes.

Case law interpretations of the CDA are not perfectly uniform. *See* Daniel Petition for Cert. p. 14-29. Nevertheless, the holdings, rationale, and *dicta* of other courts have generally supported *amici*'s interpretation of the CDA. In understanding why Congress enacted the CDA and phrased § 230(c)(1) as it did, it is important to understand *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. Nassau Co. May 24, 1995), and *Zeran v. America Online, Inc.,* 129 F.3d 327 (4th Cir. 1997).

Stratton Oakmont was decided just prior to the passage of the CDA and was therefore based on common law. Prodigy Services Co. (Prodigy) ran a computer bulletin board, which it called "Money Talk" and which encouraged financial news postings. *Stratton Oakmont*, 1995 WL 323710, at *1. Prodigy held itself out as an online service that exercised editorial control over the content of the messages it posted. Stratton Oakmont, Inc. (Stratton) was an investment banking firm.

An anonymous posting on the Prodigy website accused Stratton of various fraudulent and criminal activities. Stratton sued Prodigy for libel, and it moved for partial summary judgment. The principal issue was whether Prodigy should be treated as the

publisher of the website posting (like a newspaper) or whether it should be treated as a distributor (like a book store or a library). If it was to be treated as a publisher, it would be liable for the defamatory posting; if it was to be treated as a distributor, it would not.

The court noted that the critical difference between a publisher and a distributor was that a publisher edits the contents of the material it publishes, whereas a distributor is a "passive conduit" of the material it disseminates. *Id*. at *3. Here, Prodigy had the power to review and edit the postings on its website, and at least at one time it had so held out to the public. *Id*. at *4. Therefore, Prodigy was liable for the defamation claim.

The court also observed that it might be better policy if, for libel actions, computer bulletin boards were deemed passive distributors of information. *Id*. at *5. The fear of liability might induce website operators to abdicate all control over their bulletin boards and thus lose the public benefits that might accrue from self-regulation. It noted, though, that Congress was considering passage of the Communications Decency Act, which might improve upon the common law rules of liability in libel actions against web site operators.

Zeran v. America Online, Inc., 129 F.3d at 327 (4th Cir. 1997), faced claims similar to those in *Stratton Oakmont*, but was decided shortly after passage of the CDA. In holding for AOL, the court stated the following:

> "[Section] 230 precludes courts from entertaining claims that would place a computer service operator in a publisher's role. Thus,

> 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 – are barred." *Id.* at 330.

It continued –

> "Congress enacted §230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. … In line with this purpose, §230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions." *Id.* at 331.

Finally, it said –

> "The terms 'publisher' and 'distributor' derive their legal significance from the context of defamation law. … In this case, AOL is legally considered to be a publisher. Everyone who takes part in the publication ... is charged with publication. Even distributors are considered to be publishers for purposes of defamation law … AOL falls squarely within this traditional definition of a publisher and, therefore, it is clearly protected by § 230's immunity." *Id.* at 332.

Subsequent cases have acknowledged the reasoning in *Zeran* and have recognized (sometimes in dictum) that, while § 230 applies in libel actions, it may not apply in other types of lawsuits. *See Doe v. GTE Corp.*, 347 F.3d 655, 661 (7th Cir. 2003); *Fair Housing Council of San Fernando Valley v. Roomates.Com, LLC*, 521

F.3d 1157, 1175 (9th Cir. 2008) (*en banc)*; *J.S. v. Village Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2015).

Notably, the CDA was enacted as part of the Telecommunications Act of 1996. The House of Representatives Conference Report (No. 104-458) provides the following explanation of what CDA § 230(c)(1) was intended to accomplish and why Congress chose the language it did:

> "[Section 230 of the Communications Act] provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions created serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services."

H.R. Conf. Rep. No. 104-458 at 194 (1996).

Thus, CDA § 230(c)(1) was intended to modify the common law liability of websites for libel actions. The purpose was to facilitate self-monitoring. To suppose

that Congress also intended to give *carte blanche* immunity for other causes of action is unsupportable.

II. Because Gun Violence is a Public Health Crisis, Which Devastates Patients and Physicians, CDA Immunity Should Not Be Misapplied to Frustrate State Laws That Seek to Curb This Scourge.

Public health concerns also favor a narrow interpretation of the CDA. This case sheds light on the crisis arising from firearm violence and the judicial measures that unfortunately allow it to continue. In 2016, more than 38,000 people died from injury by firearms in the United States. CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL C. FATAL INJURY REPORTS, 1999-2015, *available at* https://www.cdc.gov/injury/wisqars/fatal.html. In domestic violence situations, like the one in this case, the presence of a firearm "can increase the risk of homicide for women by as much as 500 percent." Sarah Mervosh, *Gun Ownership Rates Tied to Domestic Homicides, but Not Other Killings, Study Finds,* NY TIMES (Jul. 22, 2019), https://www.nytimes.com/2019/07/22/us/gun-ownership-violence-statistics.html.

The AMA has recommended common sense policies aimed at reducing the impact of this epidemic. Press Release, American Medical Association, *AMA calls gun violence "a public health crisis"* (Jun. 14, 2016) *available at* https://www.ama-assn.org/press-center/press-releases/ama-calls-gun-violence-public-health-crisis. The AMA has also enacted extensive policy on firearm safety and prevention of gun violence.

See AMA Policy H-145.975: *Firearm Safety and Research, Reduction in Firearm Violence, and Enhancing Access to Mental Health Care;* AMA Policy H-145.988: *AMA Campaign to Reduce Firearm Deaths*; AMA Policy *H-145.996 Firearm Availability*; AMA Policy H-145.973: *Firearm Related Injury and Death: Adopt a Call to Action*; AMA Policy H-145.997: *Firearms as a Public Health Problem in the United States – Injuries and Death.*[4]

One AMA policy particularly resonates with this case: H-145.972: *Firearms and High-Risk Individuals, available at* https://bit.ly/2Rl0ELW. With this policy, the AMA calls attention to the established fact that women are often targets of violence from intimate partners and urges enforcement of existing laws to limit access to weapons that can turn these dangerous situations fatal.[5]

The AMA has also called attention to the preventable firearm deaths in households with other high-risk individuals, like those with suicidal ideation, other manifestations of mental illness, or cognitive deficiencies. Suicide is a leading cause of preventable death in the United States and firearms commonly facilitate the most lethal suicide attempts, with nearly

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[4] AMA policies are available at: https://www.ama-assn.org/form/policy-finder.

[5] *See also* Robert A. Gilchick, *The Physician's Role in Firearm Safety*, AMA: REPORT OF THE COUNCIL ON SCIENCE AND PUBLIC HEALTH, *available at* https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/csaph/physician-role-firearm-safety.pdf.

nine out of ten attempts resulting in death. NATIONAL INSTITUTE OF MENTAL HEALTH, SUICIDE, *available at* https://www.nimh.nih.gov/health/statistics/suicide.shtml. In 2015, firearms accounted for almost half of all suicides in the United States. *Id.* And, as many as 60 percent of older people with dementia live in a home with a firearm. ALZHEIMER'S ASSOCIATION, FIREARM SAFETY, *available at* https://www.alz.org/media/Documents/alzheimers-dementia-firearm-safety-ts.pdf. The Alzheimer's Association suggests screening for firearm access as well as keeping firearms locked, with ammunition stored separately. *Id.*

However, it is important to note that individuals with mental illness, when appropriately treated, do not pose an increased risk of violence over the general population. Marie E. Rueve, *Violence and Mental Illness*, 5 PSYCHIATRY 34-48 (2008). Instead, individuals with severe mental illnesses are over 10 times more likely to be victims of violent crime than the general population. MENTAL HEALTH MYTHS AND FACTS, https://www.mental health.gov/basics/mental-health-myths-facts (last visited Aug. 9, 2019). Equating a diagnosis of a mental illness with firearm violence only risks furthering stigma associated with these conditions and distracts from real solutions. *See* Drs. Megan L. Ranney & Jessica Gold, *The Dangers of Linking Gun Violence and Mental Illness,* TIME (Aug. 7, 2019), https://time.com/5645747/gun-violence-mental-illness/?fbclid=IwAR0rc0Hzprc5l5TJ8_p1UvoHVIkzP00H0kV-HRJP1aryw5L0IGCZ4ZIzUYU.

After all, "hatred is not a mental disorder." Joseph P. Williams, *AMA President: Don't Equate Mental Illness With Mass Shootings*, U.S. NEWS & WORLD REP. (Aug. 9, 2019) (quoting current AMA President, Patrice Harris, M.D., M.A.). As Dr. Harris urges, "[w]e must also address the pathology of hatred that has too often fueled these mass murders and casualties." *AMA Responds to Tragic Gun Violence Incidents* (Aug. 4, 2019) *available at* https://www.ama-assn.org/press-center/ama-statements/ama-responds-tragic-gun-violence-incidents. While it is impossible to prevent the pathology fueling domestic abuse perpetrated by men like Radcliffe Haughton, the public and the courts can work to close the loopholes in present gun control legislation that allow such easy, illegal access to a firearm—one such loophole being an overly broad interpretation of the CDA.

Medical associations, like the AMA, can and will continue to present common sense gun control recommendations aimed at eliminating preventable firearm deaths. However, these efforts are fruitless when creatively designed websites foster an internet black-market that encourages unregulated gun sharing invisible to enacted law. It is beyond reason that one CDA provision, aimed at claims like defamation, functions to insulate enablers of this epidemic from responsibility. There is no reason why a gun marketplace should escape liability by acting as a 24/7 gun show catering to prohibited gun purchasers, simply because sellers post their firearm ads online. Ann Daniels, *The Online Gun Marketplace and The Dangerous Loophole in The National Instant*

Background Check System, 30 J. Marshall J. Info. Tech. & Privacy L. 757, 759 (2014).

Furthermore, and too often, the kneejerk reaction to doing something about this crisis is to claim that America's firearm violence problem is insurmountable and that criminals and other high-risk individuals will find a way to undermine any law or public health effort, no matter how well-tailored. This approach does not resonate with the medical community. Physicians routinely tackle cancer, chronic diseases, and the opioid epidemic. They demand better because they do better for their patients, often with higher hurdles and worse odds, every day. And "[a] renewed focus on firearm safety, prevention and enforcing existing gun laws would go a long way toward saving lives." Nick Wing and Erin Schumaker, You Can't Understand The Brutal Reality Of Gun Violence Until You Hear It From Doctors, HUFFPOST (Dec. 26, 2018, 9:31 AM), https://www.huffpost.com/entry/doctors-gun-violence-this-is-our-lane_n_5c1c1203e4b08aaf7a86a67b (quoting Dr. John Fildes, Director of the Trauma Center at University Medical Center in Las Vegas who treated patients after the Las Vegas music festival shooting on Oct. 1, 2017).

The do-nothing approach to firearm violence is particularly unacceptable to physicians because, alongside grieving family and community members, physicians and the healthcare teams they lead bear the emotional weight of firearm violence. After all, it is the trauma surgeon who must tell the grief-mad mother that her four-month old infant has died from a gunshot wound to the head. Laleh Gharahbaghian, *Gun violence is a public health issue: One physician's story*, SCOPE,

Dec. 12, 2018, https://scopeblog.stanford.edu/2018/12/12/gun-violence-is-a-public-health-issue-one-physicians-story/.

Physicians carry these invisible scars into their day-to-day lives. As Dr. Gharahbaghian recounted, "[s]everal months ago, when my own 4-month old baby cried, I re-lived that resuscitation — it was a trigger. The face, the cry, and the mother's broken heart would enter my thoughts. I wrote this . . . as a way of mending my own invisible wounds." *Id*.

Dr. Gharahbaghian's account was one of thousands of responses to the recent social media movement, #ThisisOurLane[6], which expressed the personal, but common tragedy of losing patients to preventable firearm violence.[7] Medical professionals have written

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[6] On November 6, 2018 the American College of Physicians published a position paper on firearm injuries and death. Renee Butkus, et al., *Reducing Firearm Injuries and Deaths in the United States: A Position Paper from the American College of Physicians*, 169 ANN. INTERN. MED. 704-7 (2018). The National Rifle Association (NRA) responded to this publication via Twitter, stating: "Someone should tell self-important anti-gun doctors to stay in their lane." *See* https://twitter.com/NRA/status/1060256567914909702. Seeing this response, thousands of physicians and other healthcare workers promptly responded, tagging their posts with the hashtag, #ThisisOurLane. This movement has since served as an outlet for the physician and wider medical community to share the impact of gun violence on medicine with the public.

[7] *See* Laurel Wamsley, *After NRA Mocks Doctors, Physicians Reply: 'This Is Our Lane'*, N.P.R., Nov. 11, 2018, https://www.npr.org/2018/11/11/666762890/after-nra-mocks-doctors-physicians-reply-this-is-our-lane

op-eds, policy statements, and position papers for decades, but the public has failed to understand the toll repeated, preventable tragedy takes on physicians. *See* Jillian Banner, *1 Million Americans Will Be Shot in the Next Decade*, THE ATLANTIC (Jul. 11, 2019), https://www.theatlantic.com/video/index/593707/trauma-doctors/?utm_source=twitter&utm_medium=social&utm_campaign=share (quoting Dr. Mallory Williams, "I see more gunshot wounds as a trauma surgeon here in the United States per week than I did when I was serving in Kandahar, Afghanistan."). Physicians not only repair the wounds of this epidemic, but they bear the toll it takes on their colleagues and the profession. Between burnout and compassion fatigue, medical professionals must find new ways to process the "vicarious trauma" they experience to prevent dropping out of their field or becoming apathetic. Mara Gordon, *How Doctors And Nurses Cope With The Human Toll Of Gun Violence*, NPR (Nov. 14, 2018, 1:17 PM), https://www.npr.org/sections/health-shots/2018/11/14/667802408/how-doctors-and-nurses-cope-with-the-human-toll-of-gun-violence

The #ThisIsOurLane hashtag symbolizes much more than a social media trend. It is a culmination of the frustration over the human harm of preventable gun violence that is too personal to physicians and the patients they treat. It is no longer acceptable to ask "how did this happen?" after the fact:

> "It is time for more than a discussion. Surely there is, in our collective power, some more concrete way to address the public health crisis that is gun access. We can no longer allow one

> mother after another to know the pain of losing a child to senseless gun violence. We remain haunted by their screams."

Peter T. Masiakos, M.D., & Cornelia Griggs, M.D, *The Quiet Room*, 377 N. Eng. J. Med. 2411-12 (2017). Applying a reasonable, textually and historically based interpretation of the CDA in this case would be a step taken toward addressing this crisis.

CONCLUSION

Amici's reading of the CDA, which allocates protection for those the legislative history intended, while also catering to the public health emergency, is derived from sound legal and public health grounds. No competent statutory interpretation could permit one clause, which does not mention immunity, from barring claims against any actor, so long as they act on the internet. Yasmeen Daniel pleaded sufficient facts to put Armslist on notice of its negligent online behavior, and the petition for certiorari should be granted.

Respectfully submitted,

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