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, AN OKLAHOMA LIMITED LIABILITY COMPANY, BRIAN MANCINI AND JONATHAN GIBBON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

REPLY BRIEF

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Yasmeen's Petition demonstrated why this Court should grant review.[1] *First*, in today's Internet-driven economy, a uniform construction of the CDA in accord with its plain meaning, congressional intent, and this Court's principles of federalism presents an important issue of national concern. *Second*, review is needed to resolve disagreement between federal courts of appeal and state courts of last resort regarding the degree of protection the CDA affords website owners and operators for their own negligent and intentional acts. Finally, review is warranted because the Wisconsin Supreme Court's interpretation of the CDA, by providing sweeping protection to website owners and operators for their own negligent and intentional conduct and content, creates a "lawless no man's land" on the Internet – immunizing dangerous conduct that would form the basis of a claim if performed outside of cyberspace, wholly at odds with Congressional intent and the statutory language.

To support its request that this Court not review Yasmeen's case, Armslist misconstrues the issue presented, manufactures a false uniformity among the courts, mischaracterizes Yasmeen's allegations, disregards the statute's plain language and principles of federalism, and ignores the ramifications of this Court not taking this Petition. Nothing in Armslist's opposition changes the fact that there are conflicts among lower courts that only this Court can resolve.

Respectfully, this Court should grant review.

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1. Capitalized terms not otherwise defined herein have the meanings ascribed to them in Yasmeen's Petition for Writ of Certiorari filed July 29, 2019 (the "Petition").

I. Armslist Phrases The Issue Incorrectly

In an effort to sidestep review, Armslist manufactures an issue presented that is not an issue at all, *i.e.*, whether "the CDA permit[s] liability to be imposed under Wisconsin law against the website based on publication of the third-party seller's information." Opposition, i. There is no question that the CDA bars treating a "provider… of an interactive computer service…as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The question posed here is whether the CDA permits a party to seek liability against website owners or operators based ***not*** on the publication of a third-party's information, but for the website owner's or operator's ***own*** conduct in negligently and intentionally designing its site, and for its ***own*** content. *See* Petition, i. The actual question presented makes clear that the Wisconsin Supreme Court's reading of the CDA is contrary to a plain reading of the statute and Congress's intent.

II. The Law Applying The CDA Is Anything But Uniform

Armslist argues that review is unwarranted because the Wisconsin Supreme Court followed the so-called "uniform law construing the CDA." Opposition, 5. Not so. Courts do not uniformly hold that the CDA preempts all state law claims against website owners and operators simply because they host content posted by third parties. As the Petition demonstrates, courts are split on how to treat claims that implicate a website owner's ***own*** conduct and content, regardless of whether such website also hosts third-party content. Petition, 6-29.

Contrary to what Armslist contends, not all courts provide immunity or protection for website owners and operators for their own conduct or content, even where the claims somehow involve the third-party content. Some courts have rejected a "but for" test for CDA immunity, allowing liability for a website operator's own conduct even where the cause of action would not have existed "but for" third-party content. *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) ("It is not enough that third-party content is involved; *Internet Brands* rejected use of a 'but-for' test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content."); *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016).

In addition, as detailed in the Petition, the Washington Supreme Court, the Seventh Circuit and the Ninth Circuit have taken a more narrow approach to the CDA than other courts, including the Wisconsin Supreme Court and First Circuit. *See* Petition, 6-29. Armslist also ignores the fact that the Wisconsin Supreme Court expressly rejected the Washington Supreme Court's opinion in *J.S. v. Village Voice Media Holdings, L.L.C.*, 184 Wash. 2d 95 (2015), creating a clear conflict between state courts of highest resort. Petition, 19-20. Armslist also ignores the conflicting decisions concerning the same website—Backpage.com—from the Washington Supreme Court and First Circuit. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21 n. 5 (1st Cir. 2016); *J.S. v. Village Voice Media Holdings, L.L.C.*, 184 Wash. 2d at 102; Petition, 19-20.[2]

2. These divergent outcomes also confirm that there is nothing "superfluous" about courts' "commentary about the defendant's subjective state of mind." Opposition, 14.

Armslist is wrong in suggesting that because the Wisconsin Supreme Court adopted the material contribution test, its decision is consistent with the Ninth Circuit's decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008). Opposition, 7-8. The Ninth Circuit held that websites "designed to achieve illegal ends[,]" would not be protected by the CDA. *Roommates.com*, 521 F.3d at 1167. Such a holding cannot be reconciled with the Wisconsin Supreme Court's decision that the CDA requires dismissing Yasmeen's claims despite allegations that Armslist intentionally designed its website to facilitate the sale of guns to individuals the law prohibits from possessing firearms. *See* Petition, 21-22.

Armslist's arguments concerning the specific conflicts Yasmeen identifies in the Petition are similarly meritless. Armslist dismisses the conflict between courts regarding whether the CDA creates immunity and, if so, to what extent, on the grounds that "Petitioner never explains how this difference in labeling affected or could ever affect this case." Opposition, 10. But the impact of the distinction between broad immunity to "any cause of action[,]" *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), as opposed to no "'immunity' of any kind[,]" *City of Chicago v. Stubhub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010), is obvious. Moreover, the difference between the decisions of the Wisconsin Court of Appeals, which took a narrow approach to the CDA, and the Wisconsin Supreme Court, which took a broad approach, confirms that the breadth of CDA immunity determined whether Yasmeen's case was permitted or barred, and will affect others similarly if left unresolved. App. A and B. In any event, the relevant question is not, as Armslist suggests,

whether this Court should give *any* effect to the CDA's preemption provision, but rather what is the appropriate scope of that preemption, and does it immunize a website owner or operator for its own negligent or intentional acts.

Regarding what it means to develop content, Armslist asserts that Yasmeen "identifies no conflict in the law" because "[s]he does not identify a single case that has rejected the Ninth Circuit's interpretation of 'development' or of 47 U.S.C. § 230(f)(3)." Opposition, 11. Armslist ignores the underlying issue that courts have not used the same interpretation—the material contribution test—and that no such "test" appears in the statute. 47 U.S.C. § 230; Petition, 16-17; *see also, Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) ("[W]e do not find *Roommates.com* persuasive….").

Even if there could be said to have been a "national consensus" in earlier years construing the CDA, *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 288 (2011), the Petition makes clear that no such consensus exists today. Petition at 6-29. The concurring opinion in *J.S. v. Village Voice Media Holdings, L.L.C.* is instructive on this point:

> Rather than engaging with the plain language, structure, and purpose of Section 230, Backpage.com relies on the opinions of various federal courts to conclude that the statute 'provides broad immunity for publishing content provided primarily by third parties.' The dissent adopts this reading, asserting that it is following the reasoning of a majority of the courts to consider

> the question. The dissent is correct that it is certainly not alone in taking this position—many courts, particularly in the early years after the statute was enacted, followed these early decisions in applying an expansive view of the statute. But it is difficult to reconcile an expansive reading finding 'broad immunity' with the actual language of the statute, which uses specific terms and does not include the words 'immunity' or any synonym. Perhaps recognizing this, the Ninth Circuit Court of Appeals has retreated from its earlier cases relied on by the dissent, joining other circuits in refusing to treat section 230 in providing broad immunity.

184 Wash. 2d at 108-109 (concurring).

Furthermore, there are conflicting court opinions as to when and whether website design is "content," and whether it may be the basis of claims outside the CDA's purview. Petition, 18-19. Armslist is asking this Court to uphold the Wisconsin Supreme Court's ruling that website design can never form the basis of a claim if "neutral tools" are used and/or the design does not contribute materially to the illegality of the third-party content. App. A, 12a-23a. But the CDA's language does not state that website design is immune from liability, and "neutral tools" and "material contributions" are nowhere to be found in the CDA. Nor have all courts adopted the Wisconsin Supreme Court's interpretation. *See* Petition, 15-19.[3]

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3. Despite Armslist's attempt to distract this Court, the name of the website is not the issue, and this case is not about the

Armslist further argues that there can be no conflict regarding the relevance of intent "because the provision on which Armslist relies, 47 U.S.C. § 230(c)(1), contains no 'intent' or 'good faith' requirement." Opposition, 14. However, Armslist merely highlights the shaky ground on which the Wisconsin Supreme Court's decision rests, for Section 230(c)(1) fails to include any reference to "material contribution" or "neutral tools." Petition, 16-17. Armslist cannot have it both ways. The fact that some courts read intent into the statute, while others read material contribution and neutral tools into the statute, while still others do neither, makes clear that courts are confused as to how to properly interpret the CDA and accordingly need guidance from this Court. Petition, 15-22.

There is also nothing "inapposite" about Yasmeen's discussion of the "traditional editorial functions" test. *See* Opposition, 15. The Wisconsin Supreme Court reversed the Wisconsin Court of Appeals' decision, which held that the Wisconsin Circuit Court (and other courts) read language into the CDA that Congress did not include when they apply the "traditional editorial functions" test. App. B, 60a-68a. There is conflict in the courts as to whether this test should be used to interpret what it means to be "treated" as a publisher or speaker. Petition, 22-29.

Moreover, Armslist's discussion of *Stubhub, HomeAway* and *Internet Brands*, misses the point. Opposition, 16. In those cases, the courts take a far narrower view of what it means for a claim to "treat an

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right to bear arms. Opposition, 12-13. The hypothetical website names used in the Petition are simply examples of the kinds of websites that would be allowed to flourish if the Wisconsin Supreme Court's and similar decisions are left unchecked.

interactive service provider as a publisher or speaker of third party content." As the Seventh Circuit put it, Section 230(c)(1) "limits who may be called the publisher of information that appears online. That might matter to liability for defamation, obscenity, or copyright infringement[,]" but it is "irrelevant" to other types of claims. *City of Chicago v. Stubhub!, Inc.*, 624 F.3d at 366. Armslist cannot change the fact that courts take different and inconsistent approaches to what the CDA means for a claim to treat a defendant website operator as a publisher or speaker of third-party content such that CDA protection should be afforded. Petition, 22-29.

III. The Allegations In The Complaint Are About Armslist's Own Intentional And Negligent Conduct And Content

Armslist incorrectly recasts Yasmeen's case as focusing on "the publishing of information provided by private third-party gun sellers." Opposition, 2. However, Yasmeen is not seeking to impose liability on Armslist for publishing information provided by third parties. Rather, she seeks to impose liability based on Armslist's own conduct and content. The word "publish[]" appears only once in the Complaint, and that reference deals not with publishing information provided by third-party gun sellers, but rather to the results of an investigation into Armslist published by *The New York Times*. Complaint ¶ 80. No matter how hard Armslist tries to twist the words in Yasmeen's complaint, the gravamen of her theory of liability is that Armslist negligently and intentionally created, designed and marketed a website and content specifically to attract, facilitate and enable persons who are prohibited from buying firearms to obtain firearms

in violation of federal and state laws. *See* Petition, 2-4. Nothing in the CDA's language indicates that Armslist is immune for such conduct.

The Wisconsin Court of Appeals agreed as much, holding that Yasmeen's "liability theory is not based on treating Armslist as the publisher or speaker of information content created by third-parties." App. B, 61a. Instead, all of Yasmeen's allegations are about Armslist's own bad acts and the content it created for its website. Thus, the Wisconsin Court of Appeals held, correctly, that "the pertinent language in the Act prohibits only theories of liability that treat Armslist as the publisher or speaker of the content of Linn's or Radcliffe's posts on the website, and . . . the complaint here relies on no such theory." App. B, 57a.

IV. The Wisconsin Supreme Court Failed To Consider This Court's Federalism Principles

This case also warrants review because the Wisconsin Supreme Court's decision is inconsistent with this Court's federalism precedent, which required the Wisconsin Supreme Court to narrowly construe the CDA, but which that court ignored. Petition, 29-32. Armslist contends that the Wisconsin Supreme Court's decision does not conflict with this Court's federalism precedent because "[t]he CDA indisputably preempts state-law causes of action" and "[t]he statutory language that this Court considered in cases on which petitioner relies…did *not* expressly preempt state-law causes of action." Opposition, 9. But the "presumption [against preemption] reinforces the appropriateness of a narrow reading" of the "scope" of the preemption even where the statute's "express language"

mandates some degree of preemption, *Cipollone v. Liggett Group*, 505 U.S. 504, 517-18 (1992); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). As the Wisconsin Court of Appeals found, reading the CDA consistent with federalism principles, "Congress limited immunity to a single circumstance: when a theory of liability treats the website creator or operator 'as the publisher or speaker of any information provided by another information content provider.'" App. B, 63a (quoting 47 U.S.C. § 230(c)(1)). Armslist's latter point is simply wrong. *Medtronic, Inc. v. Lohr*, 518 U.S. at 484 ("As in *Cipollone v. Liggett Group, Inc.*...we are presented with the task of interpreting a statutory provision that expressly pre-empts state law.").

Armslist also mischaracterizes the Wisconsin Supreme Court's ruling regarding federalism. The Wisconsin Court of Appeals held that the presumption against preemption and federalism principles dictated an interpretation of the CDA which allowed for Yasmeen's case to move beyond the pleadings stage. App. B, 58a-59a. Faced with this analysis, the Wisconsin Supreme Court reversed the Wisconsin Court of Appeals without addressing or even mentioning either argument, and its decision is plainly contrary to this Court's federalism precedent. App. A. Had the Wisconsin Supreme Court considered the principles of federalism, there would be no basis for its ruling. The fact that most other courts grappling with the CDA have failed to deal with the presumption against preemption and federalism issues—likely because they have not been raised—provides greater reason why this Court should grant review. This Court's federalism precedent should be followed when applying the CDA, particularly where, as here, disregarding these issues results in decisions that are contrary to the plain language of the statute. Petition, 29-35.

V. The CDA Has A Profound Impact On The Everyday Lives Of All And Its Meaning Should Be Resolved

Armslist's silence on the CDA's impact is deafening. As shown by the hundreds of CDA-related cases filed in jurisdictions across the country against companies including Google, Facebook, Amazon, AOL, Yahoo, eBay, Airbnb, Yelp, HomeAway, MySpace, Craigslist, Tripadvisor, Stubhub and Grindr, the CDA implicates some of the most high-profile companies affecting the daily lives of most Americans. The implications of having inconsistent interpretations of the CDA are vast and far-reaching. By way of example, the Third Circuit recently granted a petition for rehearing *en banc* and vacated a decision addressing whether the CDA bars certain product liability claims against Amazon. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (3d Cir. 2019), *reh'g en banc granted, opinion vacated*, 936 F.3d 182 (3d Cir. 2019). If the Third Circuit sitting *en banc* reaches a decision contrary to the one it recently vacated, Amazon will be shielded by the CDA in the Third Circuit, but not in the Fourth Circuit. *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019).

Lower courts across the country are grappling with the inconsistencies in CDA jurisprudence, coming to different conclusions in cases involving claims against the same companies. *Cf. Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 816 S.E.2d 77 (2018) (allowing claim where plaintiffs sought to hold Snapchat liable for creating a filter which plaintiffs' daughter (a third-party) was using, that resulted in her fatal car crash); *Grossman v. Rockaway Twp.*, Docket No. MRS-L-1173-18, 2019 N.J. Super. Unpub. LEXIS 1496 (N.J. Superior Ct. June 10, 2019) (finding *Maynard* "inapposite" in holding that Snapchat was entitled to CDA immunity). Thus, how the CDA is

interpreted is important to clarify the legal landscape for potential defendants across the country.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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