

No. \_\_\_\_\_

In the  
**Supreme Court of the United States**

DAWN L. HASSELL and HASSELL LAW GROUP,  
P.C.,

*Petitioners,*

v.

YELP, INC.,

*Respondent.*

On Petition for Writ of Certiorari to the  
California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Section 230 of the Communications Decency Act, 47 U.S.C. § 230 *et seq.*, which precludes holding certain interactive computer services “liable” for content posted by users, bars plaintiffs from obtaining an injunction enforcing a valid final judgment against a non-party who controls the posting of tortious and unprotected content?

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## INTRODUCTION

The Internet has allowed tens of millions of ordinary Americans to broadcast content to a world-wide audience, using platforms created by major corporations whose business models allow them to profit immensely from the dissemination of such content. While this has had a revolutionary effect on public discourse, democratizing the dissemination of ideas, it also has allowed traditionally unprotected speech to reach a much, much larger audience.

For two decades, Section 230 of the Communications Decency Act, 47 U.S.C. § 230 *et seq.* (hereinafter “Section 230”) has supplied the legal framework governing suits against the aggregators of user content. Section 230 prohibits holding such aggregators “liable” for user content and treating aggregators as the “publisher or speaker” of such user content. Section 230 has consistently been interpreted by the lower courts to bar suits for damages against aggregators for publishing or distributing user content.

However, Section 230 does not define “liability”. In this case, the California Supreme Court held that not only does Section 230 protect interactive computer services from being sued and/or held liable for user content, but actually prohibits courts from taking any action under state law that would require such content to be removed, even where the posting of the content is entirely unlawful. Under the California Supreme Court’s reasoning, state courts cannot enter any order requiring the removal of revenge porn, or the most intimate and private information, or child

pornography, or true threats from an interactive computer service. Nor can a state court require that defamatory speech be taken down by such a service, no matter how blatant and injurious it might be.

Petitioners, an attorney and her law firm, were the subject of a targeted campaign of defamation by a disgruntled former client. The client, Ava Bird, posted a series of negative reviews containing numerous false statements of fact on Respondent's *yelp.com* website, a famous, highly popular Internet site aggregating consumer reviews of local businesses.

Petitioners, mindful of Section 230's bar on direct suits against companies such as Respondent, sued Ms. Bird for defamation in state court, seeking damages and injunctive relief. Ms. Bird refused to appear and Petitioners took her default and proved up their claim in a court hearing. Because Ms. Bird was intransigent and likely judgment-proof, Petitioners sought to enforce her judgment with an injunction that required Respondent, who clearly aided and abetted Ms. Bird and acted in concert with her by hosting and not removing her posts, to remove them.

The trial court granted the injunction, and then heard and denied a motion by Respondent to vacate the injunction, which made various arguments including that Section 230 barred the extension of any injunction to Respondent. Respondent appealed to the California Court of Appeal, which rejected its arguments, and then to the California Supreme Court, which ruled 4-3 that Respondent was entitled to relief solely based on Section 230 immunity.

The California Supreme Court decision creates a conflict with federal circuit and district court decisions which hold that (1) Section 230 applies only to bar the imposition of liability, and is not a blanket immunity from any legal process; and (2) Section 230 does not bar injunctive relief.

This is a case of crucial importance. Section 230 is a monumentally important statute which this Court has not yet construed (and which scholars have contended has a much narrower scope than it has been given by the federal courts), and the California Supreme Court's decision, if allowed to stand, would limit victims of unlawful, unprotected speech on the Internet to often-ineffective remedies against often judgment-proof defendants. They would have no effective means of obtaining the only result which can stop the bleeding—the removal of the damaging material from the Internet so that it does not continue to do harm.

This Court should grant the petition and hear Petitioners' case.

#### OPINIONS BELOW

The opinion of the California Supreme Court (Pet. App. 53a) is reported at 5 Cal. 5th 522, 420 P.3d 776, 234 Cal.Rptr.3d 867. The opinion of the California Court of Appeal (Pet. App. 6a) is reported at 247 Cal.App.4th 1336, 203 Cal.Rptr.3d 203. The trial court's unreported decision can be found at Pet. App. 2a.

#### JURISDICTION

The basis of jurisdiction in the trial court is Cal. Const. Art. VI § 10.

The California Supreme Court issued its decision in this matter on July 2, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a), because the California Supreme Court's decision was based entirely on a question of federal law, the interpretation of 47 U.S.C. § 230.

LIST OF PARTIES TO UNDERLYING CASE AND  
CORPORATE DISCLOSURE STATEMENT

Petitioners/Plaintiffs Dawn Hassell, an individual, and Hassell Law Group, P.C., a professional corporation with no subsidiaries or parent companies.

Respondent Yelp, Inc., a corporation.

Defendant Ava Bird, an individual, who defaulted in the trial court and who was not a party in the appeals.

FEDERAL STATUTE INVOLVED

47 U.S.C. § 230.

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the

availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No 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.

(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).[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to

the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

### STATEMENT OF THE CASE

Petitioners Hassell Law Group and attorney Dawn Hassell, the plaintiffs below, represented Ava Bird, the defendant below, in a personal injury case for less than a month in the summer of 2012. During that time, Bird, was largely nonresponsive to communications from Petitioners even though Petitioners were working on her behalf and in negotiations with the liability insurer. After these

communication difficulties, Petitioners withdrew from representation on September 13, 2012.

Respondent Yelp hosts *yelp.com*, an online directory of businesses that permits users to post comments and rank businesses. Respondent sells paid advertising to businesses that runs alongside the user comments.

Respondent's online directory is akin to a neighborhood bulletin board: *Yelp.com* permits third parties to post anonymous, unvetted, and unedited comments to the directory. Comments can be removed by the reviewer. In addition, Respondent states that it may remove reviews for violating its Terms of Service or Content Guidelines such as "writing a fake or defamatory review." In addition, Respondent uses an undisclosed algorithm to highlight or hide certain reviews.<sup>1</sup>

After Petitioners terminated their representation of Bird due to Bird's failure to communicate, Bird

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<sup>1</sup>"Crowdsourced forums, such as online reviews, ratings, and comments – through sites such as Yelp, Google, and Amazon – are driving differentiation and have a powerful and lasting impact on everyday life. In the case of online reviews, in San Francisco, a half-star upgrade to a restaurant's rating leads to an increase in the likelihood to sell out reservations." Wes Gerrie, *Say What You Want: How Unfettered Freedom of Speech on the Internet Creates No Recourse for Those Victimized*, 26 *Catholic U. J. L. & Tech.* 1, 3 (2018).

wrote a defamatory post on *yelp.com* that seriously and measurably harmed Petitioners' business. The post, under the moniker "Birdzeye B.," gave Hassell one star of an available five stars, and contained malicious and false statements such as "dawn hassell made a bad situation much worse for me," "the hassell group didn't speak to the insurance company either," "nor did they bother to communicate with me, the client or the insurance company AT ALL", and that Hassell indicated "the insurance company was too much for her to handle." Hassell attempted to contact Bird by phone to discuss the posting, but she failed to return the call, and then e-mailed Bird requesting the removal of the defamatory statements.

Bird responded by email the next day, stating, among other things, that "you deserve the review I have given you on yelp," and "you will have to accept the permanent" review. Even though in her Yelp post, Bird had stated that Hassell had not communicated with her or with the insurance company, Bird's email to Hassell admitted that there were multiple email communications with Hassell and that Hassell had contacted the insurance company multiple times. Bird also refused to remove the post stating that she posted it to "be a lesson to you," threatened to have a friend post another bad review, and stated that she "giggled at the thought" of a defamation suit and would "be happy to present the evidence to the judge..." She concluded the email with "fuck you Dawn Hassell" in all capital letters.

Days later, Bird posted another defamatory review under the moniker "J.D." Hassell understood that Bird was "J.D." because Hassell never represented a

client with the initials J.D., and because the post used similar language to the “Birdzeye B” post. In addition, the posting was from Alameda, where Bird was served, and it was Birdzeye B’s first ever post on *yelp.com*.

Petitioners filed suit in California Superior Court against Bird on April 10, 2013, seeking damages and injunctive relief. Bird was served on April 17, 2013. On April 29, 2013, Bird updated her original post with a new post, stating that “Dawn Hassell has filed a lawsuit against me over this review. She has tried to threaten, bully, intimidate, harrass [sic] me into removing the review!”

On May 13, 2013, Petitioners’ counsel sent Respondent’s General Counsel a letter enclosing the file-stamped Complaint and explaining that Petitioners expected Respondent “will cause these two utterly false and unprivileged reviews to be removed as soon as possible.”

Bird failed to appear and on June 20, 2013, Petitioners requested entry of default. Petitioners’ requested default was entered on July 11, 2013. Bird never moved to vacate the default. During the pendency of the default proceedings, Bird did make a request to the San Francisco Bar Association to mediate her dispute with Petitioners; in response, Petitioners proposed settlement of the matter if Bird removed the defamatory Yelp posts and agreed not to post any further defamatory reviews. Bird never responded to the proposal and no mediation was held.

On January 14, 2014, the trial court held a prove-

up hearing on Petitioners' request for entry of judgment on the default. Petitioners presented evidence of the falsity of Bird's statements on *yelp.com*, Bird's admissions that she made them, and her repeated refusals to take them down.

At the conclusion of the hearing, the trial court found that Petitioners had proven their case, and entered judgment for Petitioner for \$557,918.85, and a permanent injunction against Bird enjoining her publication of the defamatory statements. The trial court also entered an injunction providing that Respondent, acting in concert with Bird to publish the statements, must remove them from *yelp.com*.

Respondent was served with the January 14, 2014 order, declined to remove the defamatory posts, and four months later, on May 23, 2014, moved to vacate the default judgment on the grounds that its constitutional rights were violated and that the injunction improperly held Respondent liable and treated Respondent as a publisher under Section 230. Pet Appx. 16a-17a. On September 29, 2014, the trial court denied Respondent's motion in its entirety, stating that Respondent could be subjected to an injunction on theories that Respondent was an aider and abettor and acted in concert with Bird. Pet. Appx. 2a *et seq.*

Respondent duly noticed an appeal and raised its Section 230 argument, among others, in the appeal. The California Court of Appeal affirmed in relevant part, rejecting both Respondent's state law and constitutional arguments against the entry of an injunction, and its Section 230 argument as well. Pet.

Appx. 6a *et seq.* “[P]rotection against third party liability is the foundation of [Section 230] immunity. As we have pointed out, Hassell did not allege any cause of action seeking to hold Yelp liable for Bird’s tort. The removal order simply sought to control the perpetuation of judicially declared defamatory statements.” Pet Appx. at 50a. The Court of Appeal ordered the trial court to narrow the injunction on remand but otherwise affirmed.

The California Supreme Court granted review, on July 2, 2018, reversed the Court of Appeal on the sole ground that Section 230 barred any injunction governing Respondent. Pet. Appx. 53a *et seq.* The Court, in a plurality opinion, held that the trial court, by enjoining Respondent as an aider and abettor, treated Respondent as the publisher of Bird’s defamatory statements and held Respondent “liable” for them in violation of Section 230. Pet. Appx. 98a. Justice Kruger concurred on the same ground, forming a four justice majority for the Section 230 holding. Pet. Appx. 119a. There was no adequate and independent state ground, adopted by a four justice majority, for the decision in Respondent’s favor.

#### REASONS FOR GRANTING THE WRIT

“Section 230 defines Internet culture as we know it...” ACLU, *Communications Decency Act Section 230*, at <https://www.aclu.org/issues/free-speech/internet-speech/communications-decency-act-section-230>. “The impact of Section 230 cannot be overstated.” Andrew Bolson, *The Internet Has Grown Up, Why Hasn’t the Law? Reexamining Section 230 of the Communications Decency Act*, The Privacy

Advisor (Aug. 27, 2013), at <https://iapp.org/news/a/the-internet-has-grown-up-why-hasnt-the-law-reexamining-section-230-of-the/>.

Section 230 has two provisions which set out the scope of its immunity. First, under a section headed “Protection for ‘Good Samaritan’ blocking and screening of offensive material”, the statute provides 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”.<sup>2</sup>

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<sup>2</sup>Commentators have pointed out that Section 230 was originally intended to protect Internet sites which engaged in their own content filtering and removal of inappropriate material from being held to be “publishers” who are liable for user content that they failed to remove. See Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility? Lessons from the DMCA Applied to Online Defamation*, 25 Cardozo Arts & Ent. L. Rev. 237, 247 *et seq.* (2007) (discussing Section 230 as a congressional response to *Stratton Oakmont Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Supr. May 24, 1995)); Ryan J.P. Dyer, *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 Seattle U. L. Rev. 837, 840 (2014) (same). There is no record of any congressional intent to immunize all Internet publishers under all circumstances; however, courts interpreting Section 230 over the ensuing 20 years have interpreted the statute broadly.

Second, Section 230 states 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”.

Section 230 does not define “liability”. As the opinions of the California Supreme Court noted, the word “liability” is vague and is sometimes defined by secondary sources to mean responsibility for pecuniary harm and money damages, and other times is given a broader meaning of any form of legal responsibility. See Pet. Appx. at 90a (plurality opinion); *id.* at 145a (Cuellar, J., dissenting).

This Court has never construed the scope of this important statute. However, there is a conflict among the lower courts about whether it applies to claims for injunctive relief and whether it is limited to immunity from being named in a lawsuit as opposed to other judicial acts.

In *Mainstream Loudoun v. Board of Trustees*, 2 F. Supp. 2d 783, 790 (E.D.Va. 1998), the District Court held that Section 230’s immunity was an immunity from civil liability and did not bar a suit for injunctive and declaratory relief. This directly conflicts with the California Supreme Court’s holding herein.

In *General Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178, 1182 (10th Cir. 2016), the Tenth Circuit held that Section 230 grants only immunity from liability, not immunity from suit. In *Chumley*, a defendant attempted to appeal an interlocutory order holding that certain Internet content was not covered by Section 230 immunity.

The Tenth Circuit held that because Section 230 does not grant immunity from suit, but only immunity from liability, the order was not immediately appealable. The California Supreme Court in the case at bar, in contrast to *Chumley*, held that Section 230 granted immunity to Respondent from any judicial process that the California court thought to be holding Respondent responsible for Bird's posts, not merely an immunity from being named as a defendant in a suit.

On the other hand, several courts have agreed with the California Supreme Court herein that Section 230 bars injunctive relief claims. *See, e.g., Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 983-86 (10th Cir. 2000); *Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532, 540 (E.D.Va. 2003); *Smith v. Intercosmos Media Group, Inc.*, 2002 WL 31844907 at \*4 (E.D.La. Dec. 17, 2002); *Medytox Solutions, Inc. v. Investorshub.com, Inc.*, 152 So.3d 727, 731 (Fla. App. 2014).

The importance of this issue cannot be overstated. The Internet is replete with unlawful, unprotected harmful content. For instance, there is revenge porn, where jilted ex-lovers post nude and sexual photographs and videos on the Internet in an act of revenge against those who rejected them. Danielle K. Citron & Mary A. Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 347 (2014). And there is doxing, where an adversary exposes the private information such as home addresses and workplaces of private persons whom he or she wishes to target. David M. Douglas, *Doxing: A Conceptual Analysis*, 18 Ethics & Info. Tech. 199 (2016). 25 percent of Internet users have witnessed physical

threats being made online. Maeve Duggan, *Online Harassment* (Oct. 22, 2014). Women have been subjected to brutal sexual harassment online. Alice E. Marwick & Ross Miller, *Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape* (Jun. 10, 2014) at 5, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1002&context=clip>. Online harassment has led to job losses, dropping out of school, and even suicides. Mary A. Franks, *Sexual Harassment 2.0*, 71 Md. L. Rev. 655, 658 (2012).

Online defamation, the issue in the case at bar, is a significant aspect of this larger problem. Examples of online defamation include posts which falsely claim that a person had a mental illness or a sexually transmitted disease, doctored photographs depicting a person's head atop another's naked body, a false claim that a person had been in a drug rehabilitation center, and false accusations of sexual affairs. Danielle K. Citron, *Cyber Civil Rights*, 89 Boston U. L. Rev. 61, 70, 73, 76 (2009).

Further, once such defamatory statements are made online, they then appear prominently in Google searches of the person's or business' name, thereby causing continuing damage to the victim. Jessica L. Chilson, Note, *Unmasking John Doe: Setting a Standard for Discovery in Anonymous Internet Defamation Cases*, 95 Va. L. Rev. 389, 419, 425 (2009); David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 William & Mary L. Rev. 1, 17 (2013) (stating there is a greater need for injunctions in Internet defamation cases because defamatory statements persist on the Internet in a way that they

did not in the pre-Internet era). “[D]efamatory statements are forever archived and accessible via general search engines.” Heather Saint, *Section 230 of the Communications Decency Act: The True Culprit of Internet Defamation*, 36 Loyola L. A. Ent. Law R. 39, 40 (2015).

Section 230 protects parties, such as Respondent, who aggregate user content and publish it for the world to read and view, by eliminating their exposure from being named as a defendant or sued for damages from such user-generated content. However, nothing in Section 230 suggests that Congress intended to make it impossible for courts to order material to be removed after an adjudication that such material was unlawful or unprotected.

If the California Supreme Court’s interpretation of Section 230 is allowed to stand, victims of unlawful and unprotected content will have no effective remedy to remove the material. They might be able to obtain a large judgment against a judgment-proof defendant who may even not be located in the jurisdiction, but the one remedy that could actually be effective at mitigating their injury—removal of the unlawful content—will be foreclosed to them.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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