

No. 18-506

IN THE

Supreme Court of the United States

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

v.

YELP, INC.,
Respondent.

On Petition for Writ of Certiorari to the
California Supreme Court

**OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

THOMAS R. BURKE

Counsel of Record

ROCHELLE L. WILCOX

DAVIS WRIGHT TREMAINE LLP

505 Montgomery Street, Suite 800

San Francisco, CA 94111-6533

(415) 276-6500

thomasburke@dwt.com

rochellewilcox@dwt.com

AARON SCHUR

YELP INC.

140 New Montgomery St.

San Francisco, CA 94105

(415) 908-3801

QUESTION PRESENTED

The California Supreme Court followed uniform federal and state law in holding that 47 U.S.C. § 230(c)(1) (“Section 230”) bars injunctive relief, along with other forms of liability, against Internet publishers of third-party speech. The court rejected Petitioners’ procedural maneuvering—their attempt to obtain injunctive relief against Yelp Inc. without naming Yelp as a party in litigation or giving Yelp notice—finding that Section 230’s plain language prohibits Petitioners from obtaining any relief against Yelp based on its publication of third-party content on its website, Yelp.com. In doing so, the court found support in Congress’s 2018 amendments to Section 230, which created a narrow exception in a single, discrete area (not relevant here), but otherwise reaffirmed its broad reach. The question presented by the Petition is:

Should this Court accept review to hold, for the first time by any court in the Nation, that Section 230(c)(1) does not preclude claims for injunctive relief, thereby creating a clear path for plaintiffs to circumvent Section 230 and subvert the broad immunity intended by Congress?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE	2
A. Factual Background.	2
B. Procedural History.	3
III. REASONS FOR DENYING THE WRIT	11
A. Uniform Federal and State Law Supports the California Supreme Court’s Decision.	11
1. Federal and State Courts Consistently Hold that Section 230 Broadly Protects Internet Publishers.....	12
2. Federal and State Courts Consistently Hold that Section 230(c)(1) Prevents Injunctive Relief.....	15
B. There Is No Circuit Split On this Issue.....	19
C. Congress Has Consistently Approved Section 230’s Broad Reach, with Narrow Exceptions as It Deems Appropriate.	21
IV. CONCLUSION	27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Almeida v. Amazon.com, Inc.</i> , 456 F.3d 1316 (11th Cir. 2006).....	14
<i>Barrett v. Rosenthal</i> , 40 Cal. 4th 33 (2006).....	13, 22, 25
<i>Batzel v. Smith</i> , 333 F.3d 1018 (9th Cir. 2003).....	14, 15
<i>Ben Ezra, Weinstein, & Co.</i> <i>v. America Online Inc.</i> , 206 F.3d 980 (10th Cir. 2000).....	14, 16, 22
<i>Carafano v. Metrosplash.com Inc.</i> , 339 F.3d 1119 (9th Cir. 2003).....	12, 14
<i>Chicago Lawyers' Comm. for</i> <i>Civil Rights Under Law, Inc.</i> <i>v. Craigslist, Inc.</i> , 519 F.3d 666 (7th Cir. 2008).....	14
<i>Dart v. Craigslist, Inc.</i> , 665 F. Supp. 2d 961 (N.D. Ill. 2009).....	16
<i>Doe v. America Online</i> , 783 So.2d 1010 (Fla. 2001)	22
<i>Doe v. Backpage.com, LLC</i> , 817 F.3d 12 (1st Cir. 2016)	14

<i>Doe v. MySpace, Inc.</i> , 528 F.3d 413 (5th Cir. 2008).....	14
<i>Edwards v. District of Columbia</i> , 755 F.3d 996 (D.C. Cir. 2014).....	25
<i>General Steel Domestic Sales, L.L.C.</i> <i>v. Chumley</i> , 840 F.3d 1178 (10th Cir. 2016).....	21
<i>Giordano v. Romeo</i> , 76 So.3d 1100 (Fla. Dist. Ct. App. 2011).....	16
<i>Green v. America Online, Inc.</i> , 318 F.3d 465 (3d Cir. 2003).....	14
<i>Hinton v. Amazon.com.dedc, LLC</i> , 72 F. Supp. 3d 685 (S.D. Miss. 2014).....	16
<i>Johnson v. Arden</i> , 614 F.3d 785 (8th Cir. 2010).....	14
<i>Jones v. Dirty World Entm't</i> <i>Recordings, LLC</i> , 755 F.3d 398 (6th Cir. 2014).....	14
<i>Kathleen R. v. City of Livermore</i> , 87 Cal. App. 4th 684 (2001).....	10, 17, 19, 20
<i>Kimzey v. Yelp! Inc.</i> , 836 F.3d 1263 (9th Cir. 2016).....	8
<i>Klayman v. Zuckerberg</i> , 753 F.3d 1354 (D.C. Cir. 2014).....	15

<i>Mainstream Loudoun v. Board of Trustees of Loudoun, 2 F. Supp. 2d 783 (E.D. Va. 1998)</i>	19, 20
<i>Medytox Solutions, Inc. v. Investorshub.com, Inc., 152 So.3d 727 (Fla. Dist. Ct. App. 2014)</i>	17
<i>Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976)</i>	16
<i>Nemet Chevrolet, Ltd. v. Consumeraffairs.Com, Inc., 591 F.3d 250 (4th Cir. 2009)</i>	15
<i>Noah v. AOL Time Warner, 261 F. Supp. 2d 532 (E.D. Va. 2003), aff’d 2004 WL 602711 (4th Cir. Mar. 24, 2004)</i>	16, 18
<i>Packingham v. North Carolina, 137 S. Ct. 1730 (2017)</i>	12
<i>Reit v. Yelp!, 907 N.Y.S.2d 411 (N.Y. Supr. 2010)</i>	17
<i>Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)</i>	11
<i>Ricci v. Teamsters Union Local 456, 781 F.3d 25 (2d Cir. 2015)</i>	14
<i>Shiamili v. Real Estate Group, 17 N.Y.3d 281 (2011)</i>	16

<i>Smith v. Intercosmos Media Group</i> , 2002 U.S. Dist. LEXIS 24251, 2002 WL 31844907 (E.D. La. 2002)	16
<i>Universal Commc'n Sys., Inc.</i> <i>v. Lycos, Inc.</i> , 478 F.3d 413 (1st Cir. 2007)	14
<i>Zeran v. America Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997).....	14, 15, 22

Statutes

28 U.S.C. § 4101	22
47 U.S.C. § 230	<i>passim</i>
47 U.S.C. § 230(a)(4)	13
47 U.S.C. § 230(b)(2)	12, 13
47 U.S.C. § 230(b)(3)	12
47 U.S.C. § 230(c)	14, 22
47 U.S.C. § 230(c)(1).....	<i>passim</i>
47 U.S.C. § 230(c)(2).....	19, 20
47 U.S.C. §230(e)(3)	<i>passim</i>
Pub. L. No. 115-164, § 4 (April 11, 2018) 132 Stat. 1253	23

Other Authorities

Liability, Black's Law Dictionary
(10th ed. 2014)15

Sen. Rep. No. 111 2d Sess. (2010)22

I. INTRODUCTION

The California Supreme Court followed uniform federal and state law in holding that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, bars injunctive relief against Internet publishers such as Yelp Inc., which publishes the popular consumer review website Yelp.com, for their role in publishing third-party speech. Its decision flowed from the plain language of Section 230 mandating broad protection for Internet publishers; the more than 300 cases that consistently have applied that plain language to prevent plaintiffs from obtaining any form of relief (including at least nine cases explicitly holding that Section 230 bars injunctive relief); and Congress's repeated affirmation that federal and state courts correctly have discerned Congress's intent by broadly interpreting the statute. Congress's amendment of Section 230 this last summer—to narrow the statute in a single respect, but otherwise leave its broad protection intact—is the most recent example of this clear congressional intent.

In the face of this overwhelming weight of authority, Petitioners' nationwide search has revealed only two cases that they can even argue are contrary to the California Supreme Court's decision. Pet. 16-17. Neither is. The single district court decision Petitioners cite was issued twenty years ago and merely stated in dicta, without any analysis, that a different subsection of Section 230 (not at issue here) did not bar injunctive relief. That case offers only an exceedingly slender reed on which to rest Petitioners' claims. The only circuit court decision

Petitioners cite addresses the collateral order doctrine, and simply holds that orders denying relief under Section 230 are not immediately appealable. It says nothing about Section 230's applicability to claims for injunctive relief and provides no reed at all on which to rest Petitioners' claims. Neither decision conflicts with the California court's decision.

As Petitioners' inability to cite a single case supporting their Petition demonstrates, there is no conflict whatsoever among the circuits. The cases they cite are irrelevant and do not address the question they pose—whether Section 230(c)(1) bars injunctive relief targeting online publishers of third-party speech (as opposed to the original speakers themselves, who receive no protection from Section 230). Given this, if this Court has any reason to resolve the question presented, that resolution should await further development in the lower courts. Certiorari should be denied.

II. STATEMENT OF THE CASE

A. Factual Background.

Yelp allows any member of the public to read and write online reviews about local businesses, government services, and other entities. A00240. Yelp is available to the public at no charge and without any registration requirement. *Id.* Those who register by creating an account may write reviews about businesses and service providers, and thus contribute to a growing body of tens of millions of publicly-available consumer reviews. *Id.* Tens of millions of other users read the reviews on Yelp when

making a wide range of consumer and other decisions. *Id.* The businesses listed on Yelp also can create free accounts, which allow them to publicly respond to any review, with such a response appearing next to the original review. *Id.* Individuals posting reviews on Yelp can remove them at any time. A00841. As Yelp’s website explains, it applies automated software to all reviews posted in an attempt to provide the most helpful reviews to consumers. A00519.

Hassell, a San Francisco attorney, owns The Hassell Law Group, P.C. (collectively, “Petitioners”). A00006. According to Petitioners’ Complaint, Defendant Bird suffered a personal injury on June 16, 2012, and retained The Hassell Law Group. A00002-3. After a few months, Petitioners ended the attorney-client relationship. *Id.* On January 28, 2013 a user with the screen name “Birdzeye B.” posted a one-star review of The Hassell Law Group on Yelp, complaining that “dawn hassell made a bad situation much worse for me” and accusing Petitioners of failing to communicate with her and abandoning her as a client, among other things. A00018. Believing that “Birdzeye B.” was Bird, Petitioners sent Bird an email that day, requesting she remove the “factual inaccuracies and defamatory remarks” from Yelp. A00005. Bird replied the next day, complaining about Petitioners’ representation. A00348.

B. Procedural History.

1. On April 10, 2013, Dawn Hassell individually, and the Hassell Law Group P.C., filed a complaint against Bird, but not Yelp, in San Francisco Superior Court. A00002. The suit asserted

claims based on two allegedly defamatory reviews—one by Birdzeye B. and another by a reviewer identified as J.D. (A00004-5)—and sought compensatory and punitive damages. It also sought injunctive relief against Bird only. A00013. Although the Birdzeye B. public account profile stated that its creator lived in Los Angeles (A00091), Bird was served through substitute service on the owner of the Oakland home in which Bird was injured, who told the process server that he had not seen Bird in months. A00026. On July 11, 2013, the court entered a default against Bird. A00023.¹

On November 1, 2013, Petitioners filed a Summary of the Case in Support of Default Judgment and Request for Injunctive Relief. A00033-36. They significantly expanded the relief being sought as described in the Complaint, adding another allegedly defamatory statement to their claim (A00036, A00102) and demanding for the first time that the court

make an order compelling Defendant
and Yelp to remove the defamatory

¹ Many of the factual assertions in the Petition for Review are untrue or exaggerated. Pet. 2. For example, Bird did not post “a series of negative reviews” before being sued. *Id.* She posted one review before the complaint was filed and Petitioners claimed without any evidence that Bird also had posted a review under a different user name. Pet. 57a-60a, 64a. Bird posted another review as an update after Petitioners sued her. Pet. 60a-61a. Petitioners also ignore the flawed service of process and the fact that they made no effort to enforce the judgment directly against Bird, and therefore have no idea if enforcement remedies available to them under California law would have been effective. Pet. 60a, 98a.

statements, including all entire posts, immediately. If for any reason Defendant does not remove them all by the Court-ordered deadline (which is likely given Defendant's refusal to answer the complaint), *the Court should order Yelp.com to remove all 3 of them.*

A00051 (emphasis in original).

Petitioners' Request for Judgment went further, seeking "an Order *ordering Yelp.com to remove the reviews and subsequent comments of the reviewer* within 7 business days of the date of the court's Order." A00051 (emphasis added). For several months, Petitioners did not serve their application for default judgment on Yelp or otherwise notify Yelp about it. A00243; *see also* A00837. The court granted the requested injunction, including the part ordering non-party Yelp to remove the existing comments and any "subsequent" comments posted by "Birdzeye B." or "J.D." A00213. The court made no factual findings as to Yelp. *Id.*

After an exchange of correspondence between Petitioners and Yelp in which Yelp explained, among other things, that Section 230(c)(1) and (e)(3) barred Plaintiff's attempts to enforce the injunction against it (A00537-551), on May 23, 2014, Yelp moved to vacate the Judgment based in part on the "expansive immunity" provided by Section 230 (A00235; *see* A00225-470), which Petitioners opposed (A00471-572). On September 29, 2014, the trial court denied Yelp's Motion. A00808. It held that injunctions may run to non-parties who are aiding and abetting an

enjoined person to violate an injunction and concluded that Yelp fit within this narrow exception to general due process requirements. A00808-809. It implicitly rejected Yelp's claim to immunity under Section 230, not even referencing it in its order. *Id.*

2. In a published decision, the court of appeal affirmed the trial court's conclusion that Yelp was bound by the prior restraint. Pet. 6a. Among other things, the court of appeal held that Section 230 did not protect Yelp from Petitioners' injunction. Pet. 39a-51a. Its decision turned largely on the fact that Petitioners tactically chose not to sue Yelp, or even give it advance notice of their claims, which the court found "distinguish[ed] the present case from Yelp's authority, all cases in which causes of action or lawsuits against internet service providers were dismissed pursuant to section 230." Pet. 47a (citations omitted); *see also id.* 49a-51a. The court reasoned that "[i]f an injunction is itself a form of liability, that liability was imposed on Bird, not Yelp." *Id.* 50a-51a. The court rejected each of Yelp's arguments. *Id.* 48a-51a.

3. The California Supreme Court granted Yelp's Petition for Review and reversed the decisions of the trial court and court of appeal. As relevant here, that court recognized the broad reach of Section 230, explaining that "[t]he immunity provisions within section 230 'have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source.'" Pet. 73a (citations omitted); *see generally* Pet. 73a-82a (discussing cases). The court then

turned to the language of the statute to glean the legislative intent. Pet. 82a.

The court found that Section 230 plainly applied to Petitioners' claims, and "[h]ad plaintiffs' claims for defamation, intentional infliction of emotional distress, and false light been alleged directly against Yelp, these theories would be readily understood as treating Yelp as the 'publisher or speaker' of the challenged reviews" within the scope of Section 230. Pet. 83a (citations omitted). The court explained that "[t]his immunity, moreover, would have shielded Yelp from the injunctive relief that plaintiffs seek." *Id.* (citations omitted). Petitioners do not dispute this reasoning, or the court's holdings on these points.

The California Supreme Court then enunciated the question at the heart of this case—"whether a different result should obtain because plaintiffs made the tactical decision not to name Yelp as a defendant." Pet. 84a. In other words, does a plaintiff's "litigation strategy allow[] them to accomplish indirectly what Congress has clearly forbidden them to achieve directly"? *Id.* The court answered with a resounding "no." Regardless of the procedural posture, by entering injunctive relief against Yelp, the lower courts were treating Yelp "as 'the publisher or speaker of ... information provided by another information content provider,'" which Section 230 prohibited. *Id.* (citing 47 U.S.C. § 230(c)(1).) Pet. 84a (citations omitted).

Noting that "courts have rebuffed attempts to avoid section 230 through the 'creative pleading' of

barred claims,” the court explained that “we are not persuaded by plaintiffs’ description of the situation before the court.” *Id.* (citing *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016)). The court recognized that California law has held non-parties to be bound by injunctions in limited circumstances, but held that

this principle does not supplant the inquiry that section 230(c)(1) requires. Parties and nonparties alike may have the responsibility to comply with court orders, including injunctions. But an order that treats an Internet intermediary ‘as the publisher or speaker of any information provided by another information content provider’ nevertheless falls within the parameters of section 230(c)(1).

Pet. 86a (citation omitted). Because, at bottom, “Yelp is being held to account for nothing more than its ongoing decision to publish the challenged reviews” (Pet. 87a), the court found that Section 230 plainly applies.²

The court rejected Petitioners’ narrow definition of the “liability” barred by Section 230—effectively, civil liability for damages—explaining that “[t]his argument reads constraining force into the language within section 230(e)(3)” that does not

² In doing so, the court asserted that Yelp was “immunized from suit.” *Id.* The Petition seizes on this language to claim a circuit split. *E.g.*, Pet. 16-17. As explained below, Petitioners play with words, confusing two very different kinds of immunity. Section III.B, *infra*.

exist. As the court explained, “[t]his phrasing does not provide strong support for, much less compel, plaintiffs’ construction,” and “in common legal parlance at the time of section 230’s enactment, ‘liability’ could encompass more than merely the imposition of damages.” Pet. 90a (citing Black’s Law Dict. (6th ed. 1990) p. 914). Thus, “plaintiffs’ interpretation misses the forest for the trees. Section 230(e)(3) underscores, rather than undermines, the broad scope of section 230 immunity by prohibiting not only the imposition of ‘liability’ under certain state-law theories, but also the pursuit of a proscribed ‘cause of action.’” Pet. 91a (citations omitted).

The court concluded that Section 230’s “inclusive language ... conveys an intent to shield Internet intermediaries from the burdens associated with defending against state-law claims that treat them as the publisher or speaker of third party content” and demands that treat them as a publisher, which Congress believed “would facilitate the ongoing development of the Internet.” Pet. 91a-92a (citations omitted). Because “[t]hese interests are squarely implicated in this case”—“[a]n injunction like the removal order plaintiffs obtained can impose substantial burdens on an Internet intermediary”—the court held that Section 230 prevented application of the injunction to Yelp. Pet. 92a.

Finally, the court noted the strong public policy reasons supporting its decision. Recognizing “that plaintiffs’ position, if accepted, would open the door to fraud and to sharp litigating tactics,” the court explained that “[t]here are numerous reasons why a removal order that appears facially valid may

nevertheless be challenged by an Internet intermediary as illegitimate.” Pet. 93a n.24. Noting the skewed incentives that would result from the dissent’s approach—which would have granted courts free reign to issue injunctions against Internet intermediaries without any advance notice—the court explained the practical implications of permitting such an easy workaround to Section 230 liability. Pet. 93a-94a & n.25. It elaborated:

As evinced by the injunction sought in [*Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684 (2001)], which demanded nothing less than control over what local library patrons could view on the Internet (*id.*, at p. 691 ...), the extension of injunctions to these otherwise immunized nonparties would be particularly conducive to stifling, skewing, or otherwise manipulating online discourse—and in ways that go far beyond the deletion of libelous material from the Internet. Congress did not intend this result, any more than it intended that Internet intermediaries be bankrupted by damages imposed through lawsuits attacking what are, at their core, only decisions regarding the publication of third party content.

Pet. 96a-97a. Pointing out that Petitioners “still have powerful, if uninvoked, remedies available to them” against Bird, the court rejected Petitioners’

arguments and reversed the decisions of the lower courts. Pet. 98a-99a.³

III. REASONS FOR DENYING THE WRIT

A. Uniform Federal and State Law Supports the California Supreme Court's Decision.

The Internet has effected one of the greatest expansions of free speech and communications in history. As this Court put it, “the content on the Internet is as diverse as human thought.” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 852 (1997) (citation omitted).

This is no accident. In 1996, to promote the free flow of information on the Internet, Congress resolved to protect websites and other online providers from liability for their users' content. Section 230 embodies that command, prohibiting courts from treating such a provider as the “publisher or speaker” of third-party content. 47 U.S.C. § 230(c)(1). Grounded in core First Amendment principles, Section 230 offers extraordinary protection for innovation and expansion of free speech on the Internet.

³ The court's analysis of Section 230 commanded the concurrence of a majority of the court. Three Justices fully joined the lead opinion (Pet. 99a); a fourth Justice agreed that Section 230 bars Petitioners' attempt to enjoin Yelp's speech but wrote separately to argue that the case should have been decided on another ground (Pet. 100a).

**1. Federal and State Courts
Consistently Hold that Section
230 Broadly Protects Internet
Publishers.**

Section 230 was adopted 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,” and to “encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet.” 47 U.S.C. §§ 230(b)(2), (3). Congress’s goals were achieved. The Internet has become an indispensable open forum for third-party speech, as this Court recently affirmed in *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017).

a. To achieve these and other goals, Congress barred any claims against Internet publishers based on the publication of third-party content—*i.e.*, content not created by the website operator itself, but contributed by an array of authors, photographers, and others that provide a diversity of expression that extends far beyond the resources of any one single online publisher. Section 230 sets forth a straightforward principle: If someone authors injurious content, a plaintiff can pursue the author of that content, but not the entity that displays it on the Internet. *See* 47 U.S.C. § 230(c)(1); *see generally* *Carafano v. Metroplash.com Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (“*Carafano*”) (protecting website where “the selection of the content was left exclusively to the user”).

As the California Supreme Court previously explained—and courts consistently have held—Section 230 “precludes courts from entertaining claims that would place a computer service provider 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.” *Barrett v. Rosenthal*, 40 Cal. 4th 33, 43-44 (2006) (citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“*Zeran*”). The court invoked “the congressional finding that the Internet has flourished ‘with a minimum of government regulation’ (§ 230(a)(4)), and the policy statement favoring a free market for interactive computer services ‘*unfettered by Federal or State regulation*’ (§ 230(b)(2))” to support its decision rejecting liability there. *Id.* at 44 (citing *Zeran*, 129 F.3d at 330-331; emphasis added). The court reiterated that “Congress ‘made a policy choice ... not to deter harmful online speech [by] imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” *Id.*

b. To accomplish its broad goals, Section 230 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,” and it separately preempts any state law, including imposition of tort liability, that is inconsistent with its protections. 47 U.S.C. §§ 230(c)(1) & (e)(3). Courts reviewing Section 230’s legislative history have found that it has two primary goals.

First, “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*, 129 F.3d at 331.

Second, Congress designed Section 230 to “encourage service providers to self-regulate the dissemination of offensive material over their services.... 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.* (emphasis added); *accord Carafano*, 339 F.3d at 1122-23; *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003) (“*Batzel*”).

To further these two complimentary policy goals, “courts have treated § 230(c) immunity as quite robust,” *Carafano*, 339 F.3d at 1123, and federal courts consistently have rejected attempts to hold defendants responsible for third-party content posted on their websites.⁴ In each of these decisions, the

⁴ See, e.g., *Doe v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015); *Green v. America Online, Inc.*, 318 F.3d 465, 470-72 (3d Cir. 2003); *Zeran*, 129 F.3d at 330-32; *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Jones v. Dirty World Entm’t Recordings, LLC*, 755 F.3d 398, 408 (6th Cir. 2014); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010); *Carafano*, 339 F.3d at 1125; *Batzel*, 333 F.3d at 1031-32; *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 984-86 (10th Cir. 2000) (“*Ben Ezra*”); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321

appellate court properly focused on the author of the content—rather than the publisher or distributor—no matter how offensive or objectionable the content might be. This is because “Congress made a policy choice ... not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” *Zeran*, 129 F.3d at 330; *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.Com, Inc.*, 591 F.3d 250, 254-255 (4th Cir. 2009) (Section 230 “immunity protects websites not only from ultimate liability, but also from having to fight costly and protracted legal battles” (citations, internal quotes omitted)); *accord Batzel*, 333 F.3d at 1031.

**2. Federal and State Courts
Consistently Hold that Section
230(c)(1) Prevents Injunctive
Relief.**

As the California court correctly concluded, Petitioner’s arguments turn on an exceedingly narrow definition of the “liability” that is precluded by Section 230. Pet. 90a. That court rejected Plaintiffs’ arguments, explaining that “in common legal parlance at the time of Section 230’s enactment, ‘liability’ could encompass more than merely the imposition of damages.” *Id.* (citing Liability, Black’s Law Dictionary (10th ed. 2014); “defining ‘liability’ as “a broad legal term that has been referred to as of the most comprehensive significance, including almost

(11th Cir. 2006); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014).

every character of hazard or responsibility, absolute, contingent or likely”). *See also* Pet. 90a-91a nt. 23 (explaining inconsistencies in dissenting Justice’s narrow interpretation of “liability”). Indeed, injunctive relief “is typically more intrusive” than damage awards, *Noah v. AOL Time Warner*, 261 F. Supp. 2d 532, 540 (E.D. Va. 2003), *aff’d* 2004 WL 602711 (4th Cir. Mar. 24, 2004), and this Court long has recognized the uniquely pernicious dangers of prior restraints on speech. *See, e.g., Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). The suggestion that prior restraints are allowed where liability is barred would turn the First Amendment on its head.

Given this, it is no surprise that courts across the nation consistently have held that Section 230 bars injunctive relief, as well as tort and contract liability. *See Ben Ezra*, 206 F.3d at 983, 986 (Section 230 barred claims for damages and injunctive relief); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 687, 692 (S.D. Miss. 2014) (claims seeking injunctive relief and damages based on allegedly selling recalled hunting equipment barred by Section 230); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 963, 969 (N.D. Ill. 2009) (rejecting public nuisance claim, including request for injunctive relief); *Smith v. Intercosmos Media Group*, 2002 U.S. Dist. LEXIS 24251, 2002 WL 31844907, *13-14 (E.D. La. 2002) (rejecting injunction claim against ISP based on alleged failure to block purportedly fictitious domain registrants); *Giordano v. Romeo*, 76 So.3d 1100, 1102 (Fla. Dist. Ct. App. 2011) (rejecting claims for defamation and injunctive relief); *Shiamili v. Real Estate Group*, 17 N.Y.3d 281, 285, 293 (2011) (rejecting defamation claim based on

a blog post, seeking damages and injunctive relief); *Reit v. Yelp!*, 907 N.Y.S.2d 411, 415 (N.Y. Supr. 2010) (rejecting request for preliminary injunction, and granting Yelp’s motion to dismiss complaint).

The reason federal and state courts consistently conclude that Section 230 bars injunctive relief is clear. “An action to force a website to remove content on the sole basis that the content is defamatory is necessarily treating the website as a publisher, and is therefore inconsistent with section 230.” *Medytox Solutions, Inc. v. Investorshub.com, Inc.*, 152 So.3d 727, 729, 730-731 (Fla. Dist. Ct. App. 2014) (rejecting action for declaratory and injunctive relief based on Section 230).

Thus, in *Kathleen R.*, 87 Cal. App. 4th at 697-698, the court of appeal held that section 230(c)(1) protected a city from claims based on public access to the Internet at a public library, which included a request for injunctive relief. The court explained that “by its plain language, § 230[(c)(1)] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Id.* at 692, 697-698 (citation, internal quotes omitted; bracketed citation in original). Noting that “claims for ... injunctive relief are no less causes of action than tort claims for damages,” the court held that they also “fall squarely within the section 230(e)(3) prohibition.” *Id.* at 698. As such, the plaintiff’s equitable claims there “contravene[d] section 230’s stated purpose of promoting unfettered development of the Internet no less than her damage claims.” *Id.*

As the court explained in *Noah*, 261 F. Supp. 2d at 538-39,

given that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief. After all, in some circumstances injunctive relief will be at least as burdensome to the service provider as damages, and is typically more intrusive.

Id. at 540; *see id.* at 538-39 (in seeking to hold defendant liable for refusing to intervene to stop alleged online harassment and requesting “an injunction requiring [defendant] to adopt ‘affirmative measures’ to stop such harassment,” plaintiff “clearly” is attempting “to ‘place’ [defendant] ‘in a publisher’s role,’ in violation of § 230” (citing *Zeran*, 129 F.3d at 330)).

Petitioners cannot cite a single case that supports their claim that Section 230 allows interactive computer services to be subject to injunctions to remove third-party content so long as they are not named in an action. *See* Section B, *infra*. The California Supreme Court plainly was correct in rejecting Petitioners’ demand for injunctive relief against Yelp because it is entirely based on Petitioners’ claim that Yelp published defamatory speech, but Section 230 bars all such claims. Pet. 92a-93a. The lower court’s decision is consistent with

uniform federal and state law. The Petition presents no issue worthy of this Court’s review.

B. There Is No Circuit Split On this Issue.

Petitioners found only two cases—in the entire Nation—that they could cite to claim a circuit split. Pet. 16-17. But no circuit court decision addresses the point raised in the Petition for Certiorari—thus, there is no circuit split—and neither case Petitioners cite even supports their request for this Court’s review. Instead, the district court decision they invoke merely mentions a different Section 230 subsection in dicta, and the circuit case addresses the collateral order doctrine, not whether Section 230(c)(1) applies to injunctive relief.

1. Petitioners rely primarily on a case decided two decades ago—and barely cited since—holding that a plaintiff’s claim for injunctive relief was not barred by Section 230(c)(2)—a subsection not at issue in this case. Pet. 16 (citing *Mainstream Loudoun v. Board of Trustees of Loudoun*, 2 F. Supp. 2d 783 (E.D. Va. 1998)). The court held that Section 230(c)(2) does not protect government entities—there, a public library sued for its attempt to block access to certain content at public terminals—because Congress’ intent was to protect *private* content providers. *Id.* at 787, 790. In dicta, the court said that even if it did, “defendants cite no authority to suggest that the ‘tort-based’ immunity to ‘civil liability’ described by § 230 would bar the instant action, which is for declaratory and injunctive relief.” *Id.* (citing § 230(a)(2); *Zeran*, 129 F.3d at 330). As the court in *Kathleen R.* later pointed out—and Petitioners fail to

acknowledge—*Mainstream Loudoun* is distinguishable because subsection (c)(2) contains limiting language that is not applicable to subsection 230(c)(1). 87 Cal. App. 4th at 697-698. Thus, even if this conclusory, twenty-year-old dicta were worthy of this Court’s attention—it is not—it would not matter because the district court interpreted a different subsection of Section 230.

2. The second case Petitioners invoke is even less relevant. Pet. 17, citing *General Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178 (10th Cir. 2016). There, the district court rejected defendant’s request for summary judgment of claims against it based on twenty allegedly misleading Internet posts, finding that only three were barred by Section 230. *Id.* at 1180. Defendant appealed, and the sole issue decided by the Tenth Circuit was whether the collateral order doctrine conferred appellate jurisdiction on the court. *Id.* at 1180-81. The court relied on this Court’s “increasingly emphatic instructions that the class of cases capable of satisfying this “stringent” test should be understood as “small,” “modest,” and “narrow”” to hold that it did not. *Id.* at 1181 (citation omitted).

The court rejected defendant’s argument that prior references to Section 230 as providing “immunity from suit” supported immediate review, explaining that such immunity would require “an explicit statutory or constitutional guarantee that trial will not occur” but Section 230 “does not contain such language.” *Id.* at 1181-82 & n.1 (citation omitted). The court explained that the qualified immunity that supports *appellate jurisdiction*

allowing immediate review “is a benefit typically only reserved for government officials.” *Id.* at 1182 (citations omitted; discussing “three instances when courts may extend qualified immunity to private parties,” none of which applied there).

Contrary to Petitioners’ claims, *General Steel* is in no way inconsistent with the California Supreme Court’s Opinion. Pet. 17. That court did not consider the type or scope of liability barred by Section 230. It merely addressed the separate question of jurisdiction for immediate appellate review under federal law. Petitioners’ heavy reliance on this case—although it is wholly inapposite—exposes the emptiness of their request to this Court. If this Court’s review of this issue ever might be warranted, it would only be after a more fulsome analysis by the lower appellate courts. There is no genuine conflict among the lower courts and even if there were, this is not a suitable case to resolve that conflict.

C. Congress Has Consistently Approved Section 230’s Broad Reach, with Narrow Exceptions as It Deems Appropriate.

Petitioners tellingly ignore Congress’s consistent approval of the broad reach of Section 230 that courts have recognized—presumably because it refutes the arguments at the heart of their Petition. In both of its decisions interpreting Section 230, the California Supreme Court has noted and adhered to this plain evidence of legislative intent, establishing that its interpretations of Section 230 have been correct.

1. In its first decision interpreting Section 230, the California Supreme Court pointed out that in 2002—as Section 230 was in its infancy, and its full reach being explored by the courts—Congress adopted legislation that created a new Internet domain for family-friendly content. *Barrett*, 40 Cal. 4th at 54. Citing to a Congressional Report prepared by one of the co-authors of Section 230, the court noted Congress’ express approval of the broad interpretation of Section 230(c) in cases such as *Zeran*, *Ben Ezra* and *Doe v. America Online*, 783 So.2d 1010 (Fla. 2001). *Id.* at 54 & nts. 16, 17.

2. In the Opinion at issue here, the California Supreme Court found support for its holding in the fact “that in another instance where Congress became aware of procedural end-runs around section 230, it took steps to rein in these practices—instead of regarding a judgment so obtained as a *fait accompli* that must be enforced, without further consideration of the circumstances surrounding it.” Pet. 85a nt. 20. The court explained that Congress’ enactment in 2010 of the Securing the Protection of Our Enduring and Established Constitutional Heritage Act (28 U.S.C. § 4101 *et seq.*), “responded to concerns that defamation judgments were being obtained in countries that did not recognize the same free-speech protections as those provided in the United States.” Pet. 85a nt. 20 (citing Sen. Rep. No. 111-224, 2d Sess., at 2 (2010).) The legislation prohibited courts from recognizing foreign judgments for defamation unless doing so would be consistent with Section 230. Pet. 85a-86a nt. 20 (citing *id.*, 28 U.S.C. § 4102(c)(1).) Thus, Congress again expressed its approval of the broad reach of

Section 230, without any suggestion that Section 230 should be constrained in any way.

3. Finally, as the court recognized, the President recently signed into law the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” (“SESTA/FOSTA”). Pet. 97a (citing Pub. L. No. 115-164, § 4 (April 11, 2018) 132 Stat. 1253). With this narrow bill, Congress amended Section 230 and relevant criminal statutes to withdraw Section 230 immunity from certain state criminal actions against persons involved in sex trafficking. As the court explained, “[f]or almost two decades, courts have been relying on section 230 to deny plaintiffs injunctive relief when their claims inherently treat an Internet intermediary as a publisher or speaker of third party conduct.” Pet. 97a; *see also* Section A.2, *supra*. Although some plaintiffs undoubtedly were harmed by the speech at issue, “***Congress has declined to amend section 230 to authorize injunctive relief against mere republishers, even as it has limited immunity in other ways.***” Pet. 97a (citing Pub. L. No. 115-164, § 4 (April 11, 2018) 132 Stat. 1253 (emphasis added)). The court concluded that “[a]lthough this acquiescence is not itself determinative, it provides a final indication that the dissenting justices are simply substituting their judgment for that of Congress regarding what amounts to good policy with regard to online speech. ***But that is not our role.***” Pet. 97a-98a (emphasis added).

4. At bottom, the Petition is premised on Petitioners’ claim that the Internet is an unregulated abyss, affording no recourse to people purportedly harmed by third-party speech posted there. But this

is simply not true. As shown above, Congress specifically addressed one of the issues repeatedly invoked by Petitioners—human trafficking—by providing that Section 230 does not stand in the way of enforcement of federal and state criminal laws. Outside of this unrelated area, plaintiffs are not left without a remedy—although if they were, it would not matter because Congress’s intent controls.

For over twenty years, Congress has insisted that plaintiffs look to the content creator alone for a remedy, including through tools such as judgment liens and contempt proceedings—post-judgment options that Petitioners never pursued here, but which the California Supreme Court appropriately recognized could provide meaningful relief to Petitioners. Pet. 98a. In the past two decades, no court has approved Petitioners’ stratagem of denying a website publisher its due process rights in order to tactically avoid the immunity Congress established through Section 230. This Court’s blessing of the injunction entered against Yelp—following an uncontested hearing to prove up the default judgment against the Internet poster alone (A00213)—would create a gaping hole in the broad immunity adopted by Congress in Section 230, that future plaintiffs would quickly exploit.

As Congress appropriately has recognized, Section 230 immunity plays a vital role in the legal landscape that has allowed the Internet to flourish. “The provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are [] a strong demonstration of legislative commitment to the value of maintaining a free market for online expression.”

Barrett, 40 Cal. 4th at 56. Viewed only through the prism of review websites such as Yelp, Section 230’s broad protection of websites that publish third-party content plainly serves the public interest. *E.g.*, *Edwards v. District of Columbia*, 755 F.3d 996, 1006 (D.C. Cir. 2014) (“[f]urther incentivizing a quality consumer experience are the numerous consumer review websites, like Yelp ..., which provide consumers a forum to rate the quality of their experiences”).

Congress’s studied decision to provide broad protections to Yelp and entities like it plainly furthers the public interest. If Internet publishers are denied their right to exercise editorial control in publishing consumer reviews, businesses will have an effective tool to remove critical commentary and consumers will suffer. If this Court were to reverse the California court’s opinion, Yelp and other websites would suffer and the public that relies on the wealth of online third-party commentary—to aid decision-making on myriad issues like consumer purchases, politics, and employment—would be harmed as subjects of criticism follow Petitioners’ example: intentionally sue the commenter alone, perhaps in a manner that maximizes the chance that he or she will be unable or unwilling to defend the lawsuit regardless of its underlying merit, and then after a default judgment present the injunction to the website publisher as an unassailable *fait accompli*. Pet. 93a & nt. 24. A decision reversing the California court would undermine the validity and efficacy of the information available to consumers, and online speech generally.

Petitioners' quest to deny Yelp the federal immunity it would have received if Petitioners had sued Yelp directly should stop here and now. Their insistence that the lower courts should have elevated the form of the action—namely, the fact that Yelp was tactically not named as a party—over the plain language of Section 230 and Congress's clear intent in enacting it to protect websites from actions that treat them as publishers or distributors of third-party content, would exalt form over substance and eviscerate the protection provided by Section 230. Congress has spoken—repeatedly—and the California Supreme Court properly has abided by that mandate in its decisions interpreting Section 230. There is no Circuit split; there is no statutory language; and there is no public policy, to support Petitioners' arguments. Petitioners seek a remedy without a reason.

IV. CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted this 14th day of
December, 2018.

THOMAS R. BURKE

Counsel of Record

ROCHELLE L. WILCOX

DAVIS WRIGHT TREMAINE LLP

505 Montgomery Street, Suite 800

San Francisco, CA 94111-6533

(415) 276-6500

AARON SCHUR

YELP INC.

140 New Montgomery Street

San Francisco, California 94105

(415) 908-3801