No. 18-506

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. YELP EFFECTIVELY CONCEDES THE IMPORTANCE OF THE ISSUES IN THIS CASE AND THE IMPORTANCE OF SECTION 230.

Respondent Yelp's ("Yelp") Opposition concedes or does not contest many of the key reasons why this Court should accept this case for review. These include: (1) 47 U.S.C. § 230 is an incredibly important immunity statute that governs almost all user-generated content on the Internet and social media, *see* Opp. to Pet. for Cert. at 12; (2) this Court has never passed on the scope of Section 230; and (3) under the construction given to it by the California Supreme Court, victims of a wide variety of torts, including revenge porn, online harassment and stalking, invasion of privacy, infliction of emotional distress, and defamation, will have no remedy that will ensure that the illegal and injurious material be removed from the Internet, and no way to effectively prevent the dissemination of such illegal and tortious material to anyone in the world.[1]

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[1] Yelp's opposition contains some misleading statements regarding the record in this case. For instance, Yelp states that Petitioners merely "believ[ed]" that Bird wrote all of the posts at issue. Opp. to Pet. for Cert. at 3. In fact, Yelp never contested below that Bird authored all of the posts. Pet. Appx. 17a. Yelp also states the representation lasted "a few months". Opp. to Pet. for Cert. at 3. In fact, it lasted 25 days. Pet. Appx. at 8a. Yelp also claims that Bird only posted one review before the case was filed. Opp. to Pet. for Cert. at 4 n. 1. In fact, the record discloses at least two, in January and

II. THE CALIFORNIA SUPREME COURT'S DECISION SPLIT WITH OTHER LOWER COURT AUTHORITY.

Yelp is incorrect that the California Supreme Court's decision does not create a split of authorities in the lower courts. At least two lower courts have issued published decisions that are still good law and have not been overturned, and which conflict with the California Supreme Court's decision herein. One such decision, *General Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178, 1182 (10th Cir. 2016), holds that Section 230 immunity is not complete immunity from suit (which was necessary to its holding on appellate jurisdiction), whereas the California Supreme Court held that the bar on the imposition of liability in the statute effectively conferred not only complete immunity from any sort of suit, but in fact conferred complete immunity from any sort of judicial action at all.

The California Supreme Court could not have reached the decision it did without this holding on the scope of Section 230 immunity. Petitioners, after all, did not sue Yelp—they sued Ava Bird, who authored the defamatory communications at issue. Petitioners obtained an order **enforcing** the defamation judgment they obtained against Ms. Bird by means of an order requiring that Ms. Bird's defamatory postings be taken down. This remedy is

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February 2013 (the Complaint was filed in April). Pet Appx. 57a-60a.

no different than any number of other remedies that direct a non-party to take action to enforce a judgment. For instance, a trial court might issue a garnishment order directing the judgment debtor's bank to disgorge the judgement debtor's funds held by that bank to satisfy the judgment. Nonetheless, the California Supreme Court held that the analogous removal order herein constituted holding Yelp "liable" and treating Yelp as a "publisher" and therefore fell within Section 230's immunity.

Another lower court case, *Mainstream Loudoun v. Board of Trustees*, 2 F. Supp. 2d 783, 790 (E.D.Va. 1998), holds that Section 230 does not bar suits for injunctive relief. While this Court need not go that far to decide this case (as in the case at bar, the injunction was issued against a non-party who was never sued and never held **liable** for anything), it is nonetheless the case that the holding of the California Supreme Court was dependent on the conclusion that Section 230 extended beyond suits for damages and immunized defendants even against claims for injunctive relief alone. Thus, the California Supreme Court's ruling conflicts with the holding in *Mainstream Loudoun*.

Yelp's attempt to minimize the import of the language in *Mainstream Loudoun*, by calling it "dicta" and stating that it interprets a different portion of Section 230 pertaining to library filtering, is unpersuasive.

First, the Court's statement about injunctive relief is clearly a holding, not dicta, as indicated in the sentence immediately following the discussion of

injunctive relief: "We therefore **hold** that 47 U.S.C. § 230 does not bar this action." 2 F. Supp. 2d at 790 (emphasis added).

Second, the Court's holding was that the language "civil liability" in Section 230 did not apply to actions for injunctive relief, and that holding was stated broadly: "[D]efendants 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." 2 F. Supp. 2d at 790. The Court was interpreting the definition of "liability" in Section 230, just like the California Supreme Court did, and it found it did not bar claims for declaratory injunctive relief. Thus, in no way is the Court's holding consistent with the California Supreme Court's holding in the case at bar.[2] Thus, there is a conflict in the lower courts.

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[2] Yelp argues that this Court should follow a California Court of Appeal case, *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772 (Cal. App. 2001), which distinguished *Mainstream Loudon* as applying only to Section 230(c)(2) immunity, and not to the supposedly separate immunity of Section 230(c)(1), which prohibits treating Yelp as a "publisher". Of course, this Court is not bound by the discussion in *Kathleen R.*, and it should not distinguish *Mainstream Loudon* on this ground for at least two reasons. First, the California Supreme Court herein specifically passed on the issue of whether the removal order against Yelp constituted "liability". Pet. Appx. 90a-91a; *see* Opp. to Pet. for Cert. at 15-16 (conceding the California Supreme Court decided the meaning of "liability" in the statute). Second,

III. THE CASES CITED BY YELP GIVING A BROAD CONSTRUCTION TO SECTION 230 UNDERSCORE AN ADDITIONAL REASON FOR THIS COURT TO GRANT CERTIORARI.

Yelp cites a number of cases that hold that the scope of Section 230 is broad, *see* Opp. to Pet. for Cert. at 14-15 n. 4 (listing cases), and there is no doubt that a number of courts have given the statute a very broad construction, positing that it was Congress' intent to offer extremely broad protection to publishers of user-generated content on the Internet. Notably, however, these cases all involve direct liability for torts based on a "publisher" theory, and do not discuss or decide the issue herein: whether or not a trial court may issue an order **enforcing** a judgment by directing a **nonparty** interactive computer service to remove illegal or tortious user content.

Sections 230(c)(1) and 230(c)(2) should be read **together**. *Helvering v. New York Trust Co.*, 292 U.S. 455, 464 (1934). Treating Section 230(c)(1) "immunity" as completely separate from Section 230(c)(2) "immunity" would render Section 230(c)(2) meaningless, as there would be no situations where the supposedly separate immunity of Section 230(c)(2) would need to apply. Thus, the sensible construction is to construe the two provisions together, as expressing the intention that holding an interactive computer service liable for a tort on a theory of publisher liability is impermissible.

The very cases cited by Yelp point out another reason why this Court should accept this case for review and clarify the scope of Section 230. The cases cited by Yelp have assumed that Congress intended to confer a very broad immunity based on some of the substantive language of Section 230, barring "liability" or the treatment of any interactive computer service as a "publisher".

However, there is other language in the statute that suggests a much more specific purpose: to protect interactive services who make decisions to filter and remove tortious user content from being treated as the "publisher" of user content and required to pay damages because they made a decision during their filtering process and chose not to remove a particular user's expression. 47 U.S.C. § 230(b)(4) (purpose clause of statute: "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"). The title of Section 230 in the United States Code is "[p]rotection for private **blocking and screening of indecent material**" (emphasis added), again suggesting that Congress meant to protect services that filtered Internet content from being treated as "publishers" while interactive services that made no content filtering decisions would not be liable for tortious content.

The reason why this protection was deemed necessary was because defamation law has traditionally imposed strict liability on "publishers",

Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (2d Cir. 1980), while imposing liability on mere "distributors" only when they knew or had reason to know that they were distributing a defamatory statement, *Cubby Inc. v. Compuserve Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991). The test for whether one was a "publisher" of someone else's speech depended on whether editorial control was exercised. *Id.* at 140.

This worked reasonably well in the pre-Internet era: for example, the editors of a newspaper decided which letters to the editor were published, and thus could be strictly liable for defamatory content therein, whereas a bookstore had no control over the content of all of the thousands of books in its inventory, and thus could not be held liable for defamation absent a showing of fault.

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 at *5 (N.Y. Supr. Ct. May 23, 1995), however, Prodigy, an online service which advertised itself as family friendly and engaged in extensive filtering of inappropriate material, was held on summary judgment in a libel case to have taken on the role of a "publisher" and therefore was strictly liable for any defamatory user content, whether it knew about the content or not.

Congress enacted Section 230 in direct response to *Stratton Oakmont*. *Zeran v. America Online*, 129 F.3d 327, 331 (4th Cir. 1997) ("Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision."); *accord* Mary G. Leary, *The Indecency and*

Injustice of Section 230 of the Communications Decency Act, 41 Harv. J. of L. & Pub. Policy 553, 560-61 (2018).

This narrower purpose (to ensure that interactive services which attempt to remove problematic content are not adjudicated as "publishers" and forced to pay defamation judgments) is consistent with the broader purpose of the Communications Decency Act as a whole, which was to **prohibit the distribution of indecent materials on the Internet to minors**. (This Court held the portions of the statute containing those prohibitions unconstitutional in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), while not addressing the meaning of Section 230.) Section 230 would further the CDA's purpose by ensuring that an interactive service would not be chilled from attempting to remove indecent content and to protect minors by the threat of strict liability for defamation as a "publisher".

Thus, the California Supreme Court's decision below, in addition to conflicting with *Chumley* and *Loudoun*, also creates a conflict with the purpose clause of Section 230 and ignores the context in which the statute was enacted, in favor of an overbroad immunity that was never contemplated by Congress and which would thwart the ability of courts throughout the country to order the removal of illegal, tortious, and injurious content from the Internet.

IV. THERE ARE STRONG PUBLIC POLICY REASONS TO GRANT REVIEW

Yelp contests the public policy rationales asserted by Petitioners, arguing that by enacting the recent FOSTA/SESTA legislation, Pub. Law 116-154, Congress has specifically decided which classes of victims are entitled to an exemption from Section 230, and thereby implicitly declined to permit any relief for defamation victims such as Plaintiffs. This argument is utterly without merit.

FOSTA/SESTA, of course, does not address the issue in this case, which is whether an injunction obtained against a nonparty interactive computer service in order to enforce a judgment constitutes "liability" or treating the service as a "publisher" under Section 230. Rather, FOSTA/SESTA creates a federal cause of action for promoting or facilitating prostitution and/or recklessly disregarding sex trafficking, and carves out an exemption to Section 230 for such conduct. 18 U.S.C. § 2421A; 47 U.S.C. § 230(e)(5).

Nothing in FOSTA/SESTA indicates any sort of Congressional intent to deprive victims of other forms of injurious expression access to injunctive relief against nonparty interactive computer services. Congress simply identified one class of victims which it felt should be afforded a cause of action for damages against certain interactive computer services which facilitated the sex trade.

Petitioners, however, are not asking for damages against Yelp. Section 230 ensures that Yelp and others similarly situated cannot be sued for damages for defamation. However, the public policy issue raised by this suit is unaffected by FOSTA/SESTA—should "liability" and "treated as a publisher" be interpreted so broadly (despite indicia that Congress intended to address a narrower issue) that no victim of revenge porn, no victim of a doxing or a serious privacy invasion, no victim of an identity theft, no victim of stalking or online harassment, and no victim of false and defamatory speech that could ruin its business can obtain an order requiring the removal of the injurious and illegal and tortious content, even after obtaining a final adjudication that the speech was unprotected and tortious.[3]

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[3] Yelp makes an argument on the merits, characterizing the injunction entered in this case as a "prior restraint" and emphasizing the alleged burden of defending against requests for injunctions. None of these contentions, of course, constitute justifications for denying certiorari, as they neither negate the existence of conflicts in the lower courts nor establish the unimportance of the issues being argued. In any event, it is worth noting that Judge Goldsmith's order in this case was **not** a prior restraint. Rather, it was an order enforcing a final judgment. *See, e.g., Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957) (statute that permitted seizure of obscene materials only after a judicial proceeding determining obscenity "studiously withholds restraint upon matters not already published and not yet found to be offensive" and was thus not a prior restraint).

Yelp makes much of the fact that there are potential remedies against tortfeasors, including damages and injunctive relief. However, Yelp ignores that these remedies are often ineffective: tortfeasors may be out of the jurisdiction and even out of the country (exemplified by the recent allegations of mischief perpetrated on social media sites by Russian nationals), judgment proof (as Bird is in this case), or may simply refuse to comply with a trial court's takedown orders. In many circumstances, a Section 230 bar against a third party injunction will mean that the tortfeasor gets his or her fondest wish: that the content will be left up on the Internet in perpetuity to inflict injury on the plaintiff.

If Yelp is correct and Section 230 extends beyond the contemplation of Congress to this set of facts, then a statute intended to protect companies who were trying to do the right thing by filtering indecent content on their websites will have morphed into an effectively near-absolute right of tortfeasors to permanently injure their victims, precluding any effective remedy under any state's law.[4] This would be an utter perversion of Section 230.

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[4] Yelp makes much of what it, and the California Supreme Court below, characterized as a "tactical decision" to sue only Bird and not Yelp directly. However, there was nothing nefarious about this "tactic"; Petitioners were simply respecting Yelp's Section 230 immunity. Petitioners acted entirely consistently with the legal position that they now take before this Court—that Yelp is immune from a

V. CONCLUSION

For the foregoing reasons and those stated in the Petition for Certiorari, Petitioners urge this Court to grant the petition.

Respectfully submitted,

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suit for damages, but may be ordered to remove defamatory or other tortious and illegal content by means of an injunction directed to a third party. Following what a party believes to be the law should not be condemned as a "tactic".