

No. 19-153

IN THE
Supreme Court of the United States

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

Petitioner,

v.

ARMSLIST, LLC, *et al.*,

Respondents.

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

**BRIEF OF *AMICI CURIAE* NATIONAL
COALITION AGAINST DOMESTIC
VIOLENCE, *ET AL.* IN SUPPORT OF
PETITION FOR CERTIORARI**

ANTHONY J. DREYER
Counsel of Record

HANNAH MAREK

SHELLI GIMELSTEIN

SKADDEN, ARPS, SLATE,

MEAGHER & FLOM LLP

Four Times Square

New York, New York 10036

(212) 735-3000

anthony.dreyer@skadden.com

*Counsel for Amici Curiae
National Coalition Against
Domestic Violence, et al.*

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INTEREST OF *AMICI CURIAE*¹

The *Amici Curiae* include 27 organizations that share a common goal to prevent domestic violence, the danger of which is exacerbated by abusers' access to guns.²

Guns radically increase the risk that domestic violence will turn deadly. In the United States—where 20 people are physically abused *each minute* by an intimate partner³—an abuser's access to firearms increases the risk that abuse will escalate to homicide at least five-fold.⁴

1. No one other than the undersigned authored this brief in whole or in part, and no counsel or party other than the undersigned made a monetary contribution to fund or intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

2. The *Amici Curiae* comprise the following 27 organizations: National Coalition Against Domestic Violence, End Domestic Abuse Wisconsin, Advocates of Ozaukee, Battered Women's Justice Project, Beloit Domestic Violence Survivor Center, Brighter Tomorrows, Community Referral Agency, Domestic Abuse Intervention Services, Family Advocates, Inc., Family Support Center, Futures Without Violence, Harbor House, Haven, Inc., HELP of Door County, UMOS Latina Resource Center, Legal Momentum, Milwaukee Center for Children and Youth, National Domestic Violence Hotline, New Beginnings APFV, New Day Advocacy Center, PAVE, Sojourner Family Peace Center, The Bridge to Hope, The Rainbow House, The Women's Community, Inc., UNIDOS, and Violence Intervention Project.

3. Nat'l Coalition Against Domestic Violence, *National Statistics Domestic Violence Fact Sheet*, https://www.speakcdn.com/assets/2497/domestic_violence2.pdf (last visited Aug. 29, 2019).

4. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control*

Women are most at risk: 85% of domestic abuse victims are women,⁵ and at least one-third of all women murdered are killed by intimate partners.⁶ The number of women murdered in domestic homicides is staggering. Between 2001 and 2012, 11,766 American women were killed by male partners (current or ex)—*nearly double the number of American troops killed in Afghanistan and Iraq in those years.*⁷ Fifty-five percent of those women were shot to death.⁸ Between 2012 and 2016 alone, on average, 600

Study, 93 Am. J. Pub. Health 1089, 1092 (2003); see also Michael B. Siegel & Emily F. Rothman, *Firearm Ownership and the Murder of Women in the United States: Evidence That the State-Level Firearm Ownership Rate Is Associated with the Nonstranger Femicide Rate*, 3 Violence & Gender 20 (2016).

5. Alissa Scheller, *At Least a Third of All Women Murdered in the U.S. Are Killed by Male Partners*, Huffington Post (Oct. 9, 2014, 1:11 PM), http://www.huffingtonpost.com/2014/10/09/men-killing-women-domesti_n_5927140.html (citing the Violence Policy Center, the Bureau of Justice Statistics, the National Institute of Justice, and the Center for American Progress).

6. *National Statistics Domestic Violence Fact Sheet*, *supra*.

7. Mansur Gidfar, *Don't Believe in the War on Women? Would a Body Count Change Your Mind*, Upworthy (June 19, 2012), <http://www.upworthy.com/dont-believe-in-the-war-on-women-would-a-body-count-change-your-mind> (citing the Federal Bureau of Investigation, Domestic Violence Statistics).

8. Arkadi Gerney & Chelsea Parsons, *Women Under the Gun: How Gun Violence Affects Women and 4 Policy Solutions to Better Protect Them* 1, Center for American Progress, <https://cdn.americanprogress.org/wp-content/uploads/2014/06/GunsDomesticViolencereport.pdf> (last updated June 2014) (citing the Federal Bureau of Investigation, Supplemental Homicide Data (2001-2012)).

women were shot to death each year by intimate partners.⁹ In 2014, over half (63%) of the 870 women murdered by their partners or ex-partners were killed by a firearm, and 239 women were shot to death by a partner during the course of an argument.¹⁰ Indeed, in that year, women were more likely to be killed by an intimate partner wielding a firearm than by any other means of homicide.¹¹ In light of these horrific statistics, the State of Wisconsin enacted multiple, reasonable laws to address domestic abusers' access to firearms and to save countless innocent lives, including more efficient background checks and firearm surrender procedures for domestic abusers.

Protecting citizens' health and safety falls squarely within the police powers of the State. Under the U.S. Constitution, the federal government cannot and should not interfere with states' authority in this regulatory domain. Recognizing these federalism principles, the Communications Decency Act carves out an exception to its general preemption in situations where an "interactive computer service" ("ICS") intentionally facilitates the circumvention or violation of state law. Yet the enforceability of Wisconsin's important state protections against gun violence by domestic abusers is now cast into doubt by the Wisconsin Supreme Court's ruling, which interprets and allows defendants to use the Communications Decency Act in ways never intended.

9. *Gun Violence in America*, Everytown Research, <https://everytownresearch.org/gun-violence-america/> (last updated April 4, 2019).

10. Violence Policy Ctr., *When Men Murder Women: An Analysis of 2014 Homicide Data* 3, 21 (2016), <http://www.vpc.org/studies/wmmw2016.pdf>.

11. *See id.* at 21.

Committed to protecting victims of domestic violence, the *Amici Curiae* have a direct interest in the enforceability of Wisconsin law, and thus the outcome of this action. We respectfully submit this brief in support of Yasmeen Daniel (“Daniel”)’s petition for certiorari.

SUMMARY OF ARGUMENT

As alleged in Daniel’s complaint¹², Armslist.com (“Armslist”) knowingly enables dangerous people banned from purchasing guns to obtain guns anonymously on the Internet. (Compl. ¶¶ 9, 54.) And it cannot be disputed that Armslist’s operation has led to multiple murders of domestic violence victims by their abusers, including the murder-suicide in this case that killed four people and injured four others. (Compl. ¶ 7.) To avoid responsibility, Armslist ironically seeks to hide behind the “Good Samaritan” safe harbor, 47 U.S.C. § 230(c)(1), in the Communications Decency Act of 1996 (the “CDA”), 47 U.S.C. §§ 230, 560-561, which limits the liability of an ICS for content posted by third parties. That Armslist could avail itself of a “Good Samaritan” safe harbor and thus avoid the laws of the State of Wisconsin is incongruous with the allegations of the complaint and legally untenable.

The CDA’s liability limitation applies narrowly to an ICS’s publication of third-party content only. The CDA’s safe harbor does not protect an ICS for its *own* intentional conduct designed to enable illegal user activity, such as the illegal gun purchase at issue in this lawsuit—a purchase that plainly violated both federal and Wisconsin state law. As the Wisconsin Court of Appeals correctly observed, the

12. The factual allegations in Daniel’s well-pleaded complaint are to be taken as true at the pleading stage.

presumption against preemption of state laws requires a narrow interpretation of the CDA that allows Wisconsin to enforce its own gun laws. On appeal, the Wisconsin Supreme Court reversed, disregarding the presumption against federal preemption of state law and finding that the CDA could preclude Armslist's liability for its conduct and the design and content of the website it created. Because this ruling is inconsistent with the purpose of the CDA and would enable domestic abusers and others to violate legal bans against their possession of firearms, in contravention of federal and Wisconsin law, *Amici Curiae* respectfully urge this Court to grant Yasmeeen Daniel's petition for certiorari.

ARGUMENT

I. THE WISCONSIN SUPREME COURT'S TEXTUAL INTERPRETATION OF THE CDA PUTS VICTIMS AT GREATER RISK TO BE KILLED

A. Circumventing Wisconsin Laws That Prevent Abusers From Accessing Firearms Usurps State Legislative Authority and Endangers Victims' Lives

It is critical for the State of Wisconsin to be able to enforce its fundamental state policy to protect victims of domestic violence by prohibiting domestic abusers' access to guns. Allowing Armslist to flout state laws requiring basic background checks for gun purchasers under the illusory shield of federal preemption threatens not only the basic principles of federalism, but the lives of abuse victims.¹³

13. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 494 (1996) (noting that the "presumption against the pre-emption of state

Wisconsin enacted its laws in response to devastating accounts and statistics regarding domestic abusers' access to firearms that has led to the murder of numerous victims in Wisconsin. The Azana Spa shooting at issue in this case, sadly, is just one of many similar, deadly events that occur in Wisconsin every year. In the State of Wisconsin, there were over 100 victims of domestic violence-related homicides in 2016-2017.¹⁴ Firearms are the most common means of perpetrating domestic violence homicides.¹⁵ Indeed, domestic violence assaults involving a gun are 12 times more likely to result in death than those without a firearm.¹⁶ A staggering seventy percent of the domestic violence homicides in Wisconsin in 2017 resulted from gun use, and in at least 11 of those instances, the shooter was legally prohibited from possessing a firearm.¹⁷

Victims live in constant fear of their abusers getting access to a gun. Zina Haughton testified in support of her request for a restraining order that her husband's threats to her life "terrorize my every waking moment." (Compl. ¶ 3.) Many petitioners file TROs after separating

police power regulations' . . . is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.").

14. End Domestic Abuse Wis., *Wisconsin Domestic Violence Homicide Report 2017*, at 5 (2018), https://www.endabusewi.org/wp-content/uploads/2018/11/2017_Wisconsin_Domestic_Violence_Homicide_Report_FinalTjySpW.pdf.

15. *Id.* at 10.

16. *Id.*

17. *Id.* at 6.

from their abuser or as a first step of separation, and are at greatest risk of increased violence or homicide at this point, making the enforcement of firearms bans for abusers especially important to their safety.¹⁸

Recognizing the danger of guns in the hands of abusers, Wisconsin has passed multiple laws to protect victims and their families. First, Wisconsin law prohibits possession of a firearm by individuals subject to a domestic abuse restraining order under section 813.12 of the Wisconsin Statutes. Wis. Stat. § 941.29(1m)(f). More recently, Wisconsin legislators and Governor Scott Walker reinforced the importance of preventing abusers' access to guns in the Stopping Abuse Fatalities through Enforcement Act, or "SAFE Act." Passed with bipartisan support, the SAFE Act established procedures to ensure and verify that abusers surrender their firearms. Stopping Abuse Fatalities through Enforcement Act, 2014 Wis. Sess. Laws 1284. In light of the "heightened risk that firearms pose to domestic violence victims,"¹⁹ the law was meant to "prevent domestic violence homicides."²⁰ Expressing its support for the SAFE Act, the Milwaukee Commission on Domestic Violence and Sexual Assault noted the importance of strengthening the legal procedures to

18. Joakim Petersson et al., *Risk Factors for Intimate Partner Violence: A Comparison of Antisocial and Family-Only Perpetrators*, 34(2) *Journal of Interpersonal Violence* 1-21 (2016).

19. Letter from Jon Richards, Wis. State Representative, to Members, Assembly Comm. on Pub. Safety and Homeland Sec., in Support of Assembly Bill 464 (Nov. 19, 2013).

20. Testimony of Garey Bies, Wis. State Representative, to Members, Assembly Comm. on Pub. Safety and Homeland Sec., on Assembly Bill 464 – Relinquishing Firearms in Cases Involving a Restraining Order (Nov. 19, 2013).

ensure that abusers surrender their guns, particularly given that, from 2000-2013, “at least 53 Wisconsinites . . . lost their lives at the hands of a perpetrator who was legally prohibited from possessing a firearm.”²¹

Wisconsin reinforced the importance of its systems to prevent guns from finding their way into the hands of abusers, including efficient background checks, with recent legislation in 2015. Under the new law, the waiting period before a purchaser can access a gun is simply however long it takes to pass a background check. This law recognizes that sustaining robust gun rights is closely linked to ensuring gun safety. It seeks to ensure that guns are accessible to those who lawfully may obtain them, while at the same time are inaccessible to those who may not. To achieve both of these goals, the state must be able to enforce the law against those who hamper this critical element of state policy by facilitating illegal gun sales to domestic abusers and others banned from owning guns.

B. Armslist Was Designed to Make It Easy for Abusers to Obtain Firearms, With Deadly Consequences

Armslist’s alleged conduct intentionally allows abusers to have easy access to firearms, which puts victims of domestic violence in lethal danger. By enabling unregistered users to engage in “private” sales transactions, Armslist designed its website with the goal

21. Letter from Erin M. Perkins, Coordinator, Milwaukee Comm’n on Domestic Violence and Sexual Assault, to André Jacque, Wis. State Representative, and Members, Assembly Comm. on Pub. Safety and Homeland Sec. 1 (Nov. 18, 2013).

of circumventing mandatory background checks and other state measures concerning firearm sales and protection of abuse victims.

Tragically, this strategy is working. Armslist’s alleged negligence in the Haughton case is not an isolated incident. Under strikingly similar circumstances in 2017, Sara Schmidt was killed by her abusive husband who illegally purchased a firearm through Armslist.²² The public rarely learns about the transaction history of firearms used in homicides, since “detailed trace information only comes out in public during high-profile cases when investigators track down a straw-purchaser or other violator and prosecutors file charges.”²³ Therefore, there are likely even more homicides facilitated by Armslist beyond the statistics known to the public.

Shooting victims are not the only ones who suffer when abusers illegally access guns in violation of state law. According to Sojourner Family Peace Center, a Milwaukee-based nonprofit serving domestic violence survivors, “when a highly-publicized domestic violence homicide like the Azana Spa shooting happens, our advocates hear increased reluctance from survivors about going forward in filing for restraining orders, for fear that

22. Alison Dirr, *Five years apart, Armslist was source of guns in high-profile domestic violence deaths*, Post-Crescent (Sept. 19, 2018, 10:07 AM), <https://www.postcrescent.com/story/news/crime/2018/09/19/guns-harrison-murder-suicide-azana-shooting-found-same-website/1224081002/>.

23. Ashley Luthern, *How did a gun sold in Wisconsin end up being used to kill a Chicago cop?*, Milwaukee Journal Sentinel (Mar. 1, 2018, 4:37 PM), <https://www.jsonline.com/story/news/crime/2018/03/01/how-did-gun-sold-wisconsin-end-up-being-used-kill-chicago-cop/385027002/>.

their abuser would be able to access a firearm despite a judicial order for surrender/prohibition. Domestic violence homicides have a chilling effect on other survivors accessing lifesaving protections.”²⁴ Additionally, according to a report by the Battered Women’s Justice Project, “batterers who have access to guns may be more violent than those who do not. Researchers have found that simply having access to a firearm is associated with a batterer’s use of one or more controlling behaviors versus no controlling behaviors against his partner,” and that domestic violence offenders who have access to firearms commit more severe assaults than those who do not.²⁵ As discussed, Armslist plays a direct role in creating this chilling effect by facilitating abusers’ access to firearms through designing its platform in a way that circumvents background checks. (Compl. ¶¶ 49-54.)

II. BECAUSE ARMSLIST’S CONDUCT IS AT ISSUE, THE CDA DOES NOT SHIELD IT FROM LIABILITY AND DOES NOT PREEMPT THE STATE’S ENFORCEMENT OF ITS GUN LAWS

A. The CDA Does Not Provide Safe Harbor for an ICS’s Own Conduct

The CDA’s “Good Samaritan” safe harbor applies narrowly to an ICS’s publishing activities of third-party content: (1) where information is provided online by an

24. Statement from Sojourner Family Peace Center (December 7, 2018) (on file with author).

25. April M. Zeoli, *Non-Fatal Firearm Uses in Domestic Violence*, The Battered Women’s Justice Project (2017), <https://www.preventdvgunviolence.org/assets/nonfatal-gun-dv-zeoli-.pdf>.

“information content provider” other than the ICS seeking safe harbor, (2) such ICS will not be treated as the “publisher” or “speaker” of that information. 47 U.S.C. § 230(c)(1); *see Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100, 1105 (9th Cir. 2009) (noting that the Act does not “declare[] a general immunity from liability deriving from third-party content” and that “[i]t is the language of the statute that defines and enacts the concerns and aims of Congress; a particular concern does not rewrite the language”).

However, the CDA does not protect an ICS from liability for its own conduct in enabling user activity, which includes developing tools for users to engage in illegal transactions on its website. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) (holding the safe harbor did not apply “beyond [the CDA’s] narrow language and its purpose” to immunize defendant from plaintiff’s failure to warn claim, which was based on defendant’s own conduct, not its publication of third-party content); *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (“[47 U.S.C. § 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 [for] Chicago’s amusement tax . . . [47 U.S.C. §] 230(c) is irrelevant.”).

As one federal Court of Appeals has noted, an ICS that “helps to develop unlawful content” is not protected by the CDA “if it contributes materially to the alleged illegality of [its users’] conduct.” *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008); *id.* at 1164 (noting that “[t]he [CDA] was not meant to create a lawless no-man’s-land on the Internet”).

In *Roommates.com*, the Ninth Circuit found that the CDA did not immunize an ICS which “match[ed] people renting out spare rooms with people looking for a place to live” from liability for violating federal housing discrimination law because it “designed its website registration process around” questions and answer choices relating to users’ sex, family status and sexual orientation. *Id.* at 1161, 1164. The court found that if an ICS actively designs its website in a way that facilitates its users’ circumvention of the law, it materially contributes to that illegal conduct even if a user produces the content at issue. *See id.* at 1172. In *J.S. v. Village Voice Media Holdings, L.L.C.*, 359 P.3d 714 (Wash. 2015) minors featured in advertisements for sexual services on backpage.com alleged that the website’s operators knowingly developed posting guidelines and rules that induced child prostitution. *Id.* at 715-16. Affirming the lower court’s denial of motion to dismiss under 47 U.S.C. § 230, the Washington Supreme Court held the plaintiffs adequately alleged that Backpage’s conduct went beyond publishing when it “intentionally developed its website to require information that allows and encourages . . . illegal trade to occur through its website, including the illegal trafficking of underage girls.” *Id.* at 718 (alteration in original).

Armslist cannot escape liability through the CDA safe harbor—at least not at the pleading stage—because Daniel alleged that Armslist actively designed its website in a way that facilitates illegal gun sales to individuals who are prohibited from purchasing firearms, such as domestic abusers. (Compl. ¶¶ 49-54.) As Daniel alleges, Armslist was developed to fill a vacuum left by general marketplaces like eBay and Craigslist that stopped their online gun sales due to the high prevalence of illegal purchases. (*See*

id. ¶¶ 45-48.) Where other ICSs saw the clear risk of violating state law, Armslist saw opportunity: Armslist is a specialized online gun store that purposefully takes advantage of the anonymity that the Internet provides to facilitate unlawful gun sales. (*See id.* ¶¶ 41-42, 49.) This is evidenced by specific decisions that Armslist made, such as: (1) allowing buyers to search for “private sellers” only (thereby avoiding background checks); (2) permitting users not to register and allowing buyers to identify unregistered sellers (thereby encouraging anonymity); and (3) preventing users from flagging illegal seller advertisements. (*Id.* ¶¶ 54/P-App. 94-95.)

In the same way that Roommates.com chose to display subscribers’ discriminatory preferences for their desired housing—which is not illegal in and of itself—to help its users discriminate in violation of federal law, *see Roommates.com*, 521 F.3d at 1165, Armslist displays this information in order to help users circumvent federal and state gun laws. This conduct violates Wisconsin law and clearly transcends Armslist’s allegedly passive role as a platform that merely hosts third-party content. Daniel seeks to hold Armslist liable for this purposeful promotion of unlawful gun purchases, and accordingly the CDA does not apply.

B. An Overly Broad Interpretation of the CDA Violates the Presumption Against Federal Preemption

The CDA does not immunize ICSs generally from state laws governing different fields. As this Court has pointed out, a preemption clause in federal law must be

cast narrowly to avoid unduly impinging on state law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 494 (1996). To identify the domain of state law expressly preempted by Congress, courts must apply a “presumption against pre-emption” unless it is contrary to the “clear and manifest purpose of Congress,” particularly when Congress legislates in a field traditionally occupied by states. *Id.* (citation omitted); *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (noting that “an express federal pre-emption clause ... does not immediately end the inquiry because the question of the substance and scope of Congress’[s] displacement of state law still remains”).

Indeed, the Ninth Circuit recently recognized that the CDA cannot be interpreted so broadly that it prevents state and local entities from enforcing their own laws. In *Homeaway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019), the Ninth Circuit found that the CDA did not preempt Santa Monica’s enforcement of a local ordinance requiring Airbnb and Homeaway to cross-reference booking requests with properties licensed and listed on the City’s registry, noting that “the CDA does not provide internet companies with a one-size-fits-all body of law . . . [they] must also comply with any number of local regulations concerning, for example, employment, tax, or zoning.” *Id.* at 683. Accordingly, the scope of federal preemption of state law should be construed narrowly unless Congress has expressly required otherwise.

Here, Daniel seeks to enforce Wisconsin law against Armslist for circumventing state laws that prohibit the sale of guns to domestic abusers. By broadly construing the CDA to preempt Daniel’s state law claim, the

Wisconsin Supreme Court contravened the presumption against federal preemption. This interpretation of the CDA effectively prevents Wisconsin from enforcing the law in the context of any online gun sale conducted through virtual marketplaces like Armslist because it would permit website operators to assist users to engage in illegal sales without incurring any liability. This violates both the language and purpose of the CDA's preemption clause. *See* 47 U.S.C. § 230(e)(3).

CONCLUSION

The Wisconsin Supreme Court erred in finding that Armslist is immune from liability for its role in the deaths of Zina Haughton and her two co-workers, the injury of four others, and Daniel's horror of having her mother gunned down in front of her. Armslist's promotion of illicit arms transactions involving known abusers must not be immunized under the CDA simply because Armslist does business on the Internet instead of in a dark alley behind the courthouse. Accordingly, we respectfully urge the Court to grant Yasmeen Daniel's petition for certiorari.

Dated this 3rd day of September, 2019.

Respectfully Submitted,

ANTHONY J. DREYER
Counsel of Record

HANNAH MAREK
SHELLI GIMELSTEIN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
anthony.dreyer@skadden.com

*Counsel for Amici Curiae
National Coalition Against
Domestic Violence, et al.*