Case No. 2017 AP 344

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In the State of Wisconsin Supreme Court

YASMEEN DANIEL, Individually, and as Special Administrator of the Estate of Zina Daniel Haughton,

Plaintiff-Appellant,

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, as Subrogee for Jalisco's LLC,

Intervening Plaintiff,

— v. —

ARMSLIST, LLC, an Oklahoma Limited Liability Company, BRIAN MANCINI and JONATHAN GIBBON,

Defendants-Respondents-Petitioners,

BROC ELMORE, ABC INSURANCE CO., the fictitious name for an unknown insurance company, DEF INSURANCE CO., the fictitious name for an unknown insurance company and ESTATE OF RADCLIFFE HAUGHTON, by his Special Administrator Jennifer Valenti,

Defendants,

PROGRESSIVE UNIVERSAL INSURANCE COMPANY,

Intervening Defendant.

On Appeal from Circuit Court of Milwaukee County, Civil Division, No. 2015CV008710.
The Honorable **Glenn H. Yamahiro**, Presiding Judge.
Reversed by the State of Wisconsin, Court of Appeals, District IV.

BRIEF OF *AMICI CURIAE*
MEMBERS OF THE UNITED STATES CONGRESS ON THE MEANING OF THE COMMUNICATIONS DECENCY ACT

(COUNSEL FOR AMICI LISTED ON INSIDE COVER)

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STATEMENT OF INTEREST

Amici are current and past members of Congress, who enacted the Communications Decency Act (CDA) or who enacted the recent amendment clarifying CDA Section 230, the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). As supporters who participated firsthand in its development, Amici are familiar with Section 230's meaning and scope. Amici are concerned that some courts have applied the statute in a manner inconsistent with its text and have disrupted the state courts' longstanding role in developing and applying state tort law.

Amici include Senator Richard Blumenthal, who sponsored and coauthored FOSTA; Representative Bobby Rush, a FOSTA cosponsor who also voted to enact the CDA in 1996; retired Representative Jim Moran, another original supporter of the CDA; and retired Representative Luis Gutiérrez, who supported both the CDA and FOSTA.

ARGUMENT

I. TEXT AND PURPOSE OF COMMUNICATIONS DECENCY ACT SECTION 230

Congress enacted CDA Section 230 with two aims: to address children's unrestricted access to offensive material on the internet, but to do so while still promoting the burgeoning array of informational resources becoming available on the internet. *See* 47 U.S.C. § 230(a), (b); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1163–64 & n.12 (9th Cir. 2008) (en banc) (Kozinski, J.) (detailing legislative history).

To these ends, Section 230 includes two key provisions. First, Section 230(c)(1) immunizes computer service providers from any theory of liability that treats them "as the publisher or speaker of any information provided by" someone else. Second, Section 230(c)(2) provides that "[n]o provider . . . of an interactive computer service shall be held liable on account of . . . any action taken in good faith to restrict access to . . . [objectionable content]."

In crafting Section 230, Congress had in mind the then-recent decision *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995), which held an internet service provider liable for defamatory content posted by one of its users. H.R. Rep. No. 104-458, at 194. *Stratton Oakmont* reasoned that by taking steps to screen content, Prodigy took on the role of a newspaper-like publisher and could be liable for repeating the defamer's words. *Id.* at *10. With CDA Section 230, Congress rejected that rationale, freeing websites to screen objectionable content without fear of being held liable as publishers of whatever content they choose not to censor.

II. EARLY COURTS' APPROACH TO SECTION 230

Early courts construed Section 230 broadly, to bar "any cause of action that would make service providers liable for information originating with a third-party user." *See, e.g.*, *Zeran v. Am. Online, Inc.,* 192 F.3d 327, 330 (4th Cir. 1997). These courts extended immunity without considering whether a theory of liability treated the defendant as a publisher or whether the defendant attempted to filter objectionable material.

That approach serves part of Section 230's goal quite well: If Section 230 creates immunity from any action involving third-party content, there can be no recurrence of *Stratton Oakmont*. But, read this way, the statute creates no incentive to filter objectionable content—the purpose of the CDA. If websites that censor third-party content are already immune under subsection (c)(1) against any cause of action involving third-party content, what is the purpose of subsection (c)(2), which grants immunity if they censor? Such a reading defies both common sense and the canon of surplusage, which instructs that "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979); *accord* Antonin Scalia & Bryan A. Garner, *Reading Law* 176 (2012) ("canon prevents . . . an interpretation that renders [a provision] pointless").

III. THE SHIFT TOWARD NARROWER IMMUNITY

Recent decisions have led a departure from *Zeran* toward interpretations that are more consistent with the Section 230's text and address growing concerns[1] about

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[1] *See generally, e.g.*, Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, ___ Harv. J. on Legis. ___ (forthcoming 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3106383; Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401 (2017); Joel R. Reidenberg *et al.*, *Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals*, Report of Center on Law and Information Policy at Fordham Law School; Note, Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 Harv. J.L. & Pub. Pol'y 863 (2010); John Palfrey & Urs Gasser, *Born Digital: Understanding the First Generation of Digital Natives* 106–07 (2008) ("The scope of the immunity the CDA provides for online service providers is too broad . . . . There is no reason why a social network should be protected from liability related to the safety of young people simply because its business operates online.").

the statute's scope. *See, e.g.*, *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008) (Easterbrook, J.) (Although the *Zeran* "view has support in other circuits, . . . § 230 cannot be understood as a general prohibition of civil liability."); *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 721 (Wash. 2015) ("[I]t is difficult to reconcile an expansive reading finding 'broad immunity' with the actual language of the statute."); *see also Roommates.com*, 521 F.3d at 1163–64.

First, courts have read Section 230(c)(1) to bar only actions that treat a website as a "publisher or speaker." As Judge Easterbrook put it, "[Section 230] limits who may be called the publisher of information that appears online. That might matter to liability for defamation, obscenity, or copyright infringement. But Chicago's amusement tax [action based on StubHub!'s decision not to include a tax-collection function on its website] does not depend on who 'publishes' any information or is a 'speaker.' Section 230(c) is irrelevant." *City of Chi. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010); *accord Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016) ("negligent failure to warn claim does not seek to hold Internet Brands liable as [a] publisher or speaker"); *Sigler v. Kobinsky*, No. 06-CV-1143, 2007 WL 7328792 (Wis. Cir. Ct. Nov. 20, 2007), *aff'd* 314 Wis. 2d 784 (Wis. Ct. App. 2008) ("A defendant must establish . . . that the cause of action treat[s] the defendant as a publisher.").

Second, recent decisions have recognized that a website that plays a role in developing damaging content, either itself or in cooperation with another, cannot

avail itself of Section 230(c)(1), which immunizes only in cases of "information provided by another." 47 U.S.C. § 230(c)(1); *accord Roommates.com*, 521 F.3d at 1165; *J.S.*, 359 P.3d at 718; *see also* Dickinson, *Interpretive Framework, supra,* at 879–80, n.79 (vicarious liability theories such as conspiracy, respondeat superior, and some types of ratification survived after Section 230).

IV. CONGRESSIONAL REPUDIATION OF *ZERAN*'S BROAD IMMUNITY

A. Sex Trafficking and Backpage.com

But the shift has not been universal. Although many courts have rejected *Zeran* and adopted narrower, text-focused interpretations, others have continued to apply Section 230 broadly—with sometimes-disastrous consequences.

For example, in 2016, the First Circuit considered an action by sex-trafficking victims against Backpage.com, *Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016). The plaintiffs alleged that Backpage "deliberate[ly] structure[ed] its website to facilitate sex trafficking" by, for example, removing postings connected with law-enforcement "sting" operations and scrubbing metadata from escort photographs to limit their usefulness to law-enforcement agencies. *Id.* at 16–17.

Even though the action sought to hold Backpage.com liable not as the "publisher or speaker" of the material on its website, but for its own conduct—participation as a member of a sex-trafficking-for-profit conspiracy—the court found Backpage immune under Section 230. The plaintiffs' circumstances "evoke[d] outrage," but the First Circuit felt bound by an earlier decision adopting *Zeran*'s approach to immunity, *Universal Communication Systems, Inc. v. Lycos,*

Inc., 478 F.3d 413 (1st Cir. 2007). "Precedent cinches the matter. In *Lycos*, we considered [and rejected] the argument that the prophylaxis of section 230(c) did not encompass decisions regarding the construct and operation of a defendant's websites. . . ." *Backpage.com*, 817 F.3d at 16–17.[2]

B. FOSTA Clarifies Section 230's Scope

Appalled that some courts had stretched Section 230 to immunize even even websites like Backpage.com, Congress took action. FOSTA clarifies that Section 230 is no bar to actions like that against Backpage.com, which sought to hold the defendant liable for *its own* wrongful conduct. The stated purpose of FOSTA is "to clarify that section 230 of [the] Act does not prohibit the enforcement . . . [of] civil law relating to sexual exploitation of children or sex trafficking, or for other purposes." Pub. L. 115-164, 132 Stat. 1253. Section 230 "was never intended to provide legal protection to [such] websites." *Id.* at § 2(1).

Perplexingly, after relying extensively on *Backpage.com* before the Court of Appeals,[3] Armslist now argues that FOSTA's repudiation of *Backpage.com* actually *supports* its position in this appeal. According to Armslist, "[t]hat Congress saw the need to amend the CDA to exclude protection for certain sex trafficking crimes"

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[2] Bound by its precedent, the First Circuit's decision contrasted sharply with that of the Washington Supreme Court. *Compare J.S.*, 359 P.3d at 718 ("Backpage's [posting rules were] . . . specifically designed so that pimps can . . . traffic in sex."; *id.* at 720–21 ("If the elements of a cause of action include proof that an ISP is the publisher or speaker . . . then the action cannot proceed. But subsection 230(c)(1) does not protect the ISP from liability for other causes of action.") (Wiggins, J. concurring), *with Backpage.com*, 817 F.3d at 21 n.5 (declining to follow Washington Supreme Court because foreclosed by First Circuit precedent).

[3] *See* Respondents' Br. 3, 4, 7, 10, 14–15, 19, 26–29, 31, 33.

proves that the First Circuit's broad reading of Section 230 was correct, because otherwise "the amendment would not have been necessary." Respondents' Br. 20. Armslist's interpretation of FOSTA is astonishing, bold, and completely inaccurate.

First, Armslist misunderstands the operation of FOSTA. Congress did not enact FOSTA to narrow Section 230's applicability to traditional sex-trafficking actions. Traditional "sex trafficking crimes are clearly outside th[e] scope" of "speaking and publishing." Armslist's Br. 20. FOSTA, however, created a new breed of sex-trafficking actions based on the sort of publication-related conduct that Section 230 ordinarily immunizes: (1) "facilitating a violation of" sex-trafficking law, including by "publishing information designed to facilitate sex trafficking," 132 Stat. 1255, at § 5; and (2) operation of a website or other "interactive computer service" "in reckless disregard of the fact that such conduct contributed to sex trafficking," 132 Stat. 1253–54, at § 3.

Because the new actions impose liability for publication of user-created information, Congress amended Section 230 by adding subsection (e)(5), which prevents websites from invoking Section 230(c)(1) to escape liability. The amendment permits liability—even for publication of third-party content—when that publication violates FOSTA's new provisions. The amendment makes no change regarding actions, such as this one, which were already permitted under Section 230 because not based on the defendant's publication of third-party content. Indeed, FOSTA expressly prohibits such a construction. 132 Stat. 1255, at § 7

("Nothing in this Act . . . shall be construed to limit . . . any civil action . . . that was not [previously] limited or preempted by Section 230.").

Second, Congress most certainly did not enact FOSTA because it agreed with *Backpage.com*'s *Zeran*-line interpretation of Section 230. Congress enacted FOSTA because it thought those cases were dead wrong. The purpose of FOSTA was to "clarify" what was already true—"that section 230 of [the CDA] does not prohibit" suits like *Backpage.com*. *See* 132 Stat. 1253. FOSTA's legislative history is replete with denunciations of those courts that have interpreted Section 230 to create broad immunity:

> H.R. Rep. No. 115-572, Part 1, at 4 ("In civil litigation, bad-actor websites have been able to successfully invoke this immunity provision despite engaging in actions that go far beyond publisher functions.")
>
> H.R. Rep. No. 114-214, at 5 (lamenting that "Backpage persuaded the district court to dismiss the case [under the CDA]" but adding that "[t]he Supreme Court of Washington State, however, has reached a contrary conclusion").
>
> H.R. Rep. No. 115-199, at 2 (Section 230's "protections have been held by courts to shield from civil liability . . . nefarious actors, such as the website Backpage.com.")
>
> 164 Cong. Rec. S1852 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal, D-Connecticut, coauthor and cosponsor of FOSTA) ("I want to make absolutely clear, this legislation is not intended to prejudice the rights of anyone who has been victimized by a crime online other than sex trafficking. For example, I disagree with the courts that have held that the [CDA] immunizes online firearm sales—like Armslist—for facilitating illegal gun sales. While this legislation does not address those cases, nobody should infer that Congress believes they were rightly decided.")
>
> 163 Cong. Rec. S4670–71 (daily ed. Aug. 1, 2017) (statement of Sen. Portman, R-Ohio, coauthor and cosponsor of FOSTA who voted to enact the CDA) ("[*Backpage.com*] found that the victims made a strong case that backpage tailored its site to make underage sex trafficking easier" but found it immune "no matter how complicit the website was. . . . [That] law was not intended to protect those who willingly facilitate illegal conduct, such as sex trafficking.").

> 164 Cong. Rec. S1853 (daily ed. Mar. 21, 2018) (statement of Sen. Heitkamp, D-North Dakota, who sponsored FOSTA) ("I never believed that the [CDA] protected [Backpage.com] from . . . civil penalty if they were complicit and, in fact, abetted these crimes. I never believed that, *but there were judges in America who did*.") (emphasis added).
>
> 164 Cong. Rec. H1277 (daily ed. Feb. 27, 2018) (statement of Rep. Collins, R-Georgia, who supported FOSTA) ("[S]ome websites have successfully invoked the section 230 immunity provision despite engaging in actions that venture far outside the scope of those envisioned by the statute . . . Doe v. Backpage . . . held that . . . this law shielded the company from the claims that were filed by the child victims. . . . FOSTA is a recommitment to Americans that Congress never intended to create a system that allows business to commit crimes online that they could not commit offline.")
>
> 164 Cong. Rec. H1291 (daily ed. Feb. 27, 2018) (statement of Rep. Roby, R-Alabama, who sponsored FOSTA) ("Thanks to broad interpretation of existing law, specifically section 230 in America's courts, these websites are essentially, immune from State and local prosecutions.")
>
> 164 Cong. Rec. H1295 (daily ed. Feb. 27, 2018 (statement of Rep. Maloney, D-New York, who sponsored FOSTA) ("[T]oday . . . we have the opportunity to declare that the intention of the law was never to protect traffickers and companies that [enable them]. . . . Let's show the world, *the courts*, the families, the victims where we stand.") (emphasis added).

With FOSTA, Congress rejected *Backpage.com*'s *Zeran*-line interpretation of Section 230, finding the results of that court's approach so troubling that it enacted legislation that clarifies Section 230's scope and ensures that the outcome can never be repeated—even in jurisdictions that, like the First Circuit, are precedentially committed to *Zeran*.

V. CDA SECTION 230 DOES NOT IMMUNIZE ARMSLIST

For this Court, the path is simpler. Wisconsin never embraced *Zeran* in the first place. In interpreting the statute, Amici respectfully suggest that the Court be guided by recent decisions in the Seventh Circuit and around the country that have read Section 230 to do just what it says: "What § 230(c)(1) says is that an online

information system must not be 'treated as the publisher or speaker of any information provided by' someone else." *Chicago Lawyers*, 519 F.3d at 671.

Section 230 bars actions that hold websites liable as publishers of third-party content, but is irrelevant to claims unrelated to such publications—for example, claims that the defendant helped develop the content at issue, negligently supervised another's online communications, failed to include website functionality to collect taxes, failed to warn of dangers of using its website, or designed a website to facilitate wrongful conduct. *See Roommates.com*, 521 F.3d at 1172; *Lansing v. Sw. Airlines Co.*, 980 N.E.2d 630, 639–41 (Ill. App. Ct. 2012); *Sigler*, 2007 WL 7328792; *StubHub!*, 624 F.3d at 366; *Internet Brands*, 824 F.3d at 853; *J.S.*, 359 P.3d at 722. If a claim does not treat the defendant as a publisher, Section 230 does not apply, even if the defendant happens to publish third-party content and even if such publication is a but-for cause of the plaintiff's injury. *See Internet Brands*, 824 F.3d at 853 (publication of third-party content a but-for cause of injury, but failure to warn claim did not treat defendant as publisher).

In this case, Ms. Daniel asserts claims against Armslist for its own conduct, not its publication of third-party content. Section 230 is irrelevant. *See* Compl. ¶¶ 37–208; Daniel's Br. 20–38.

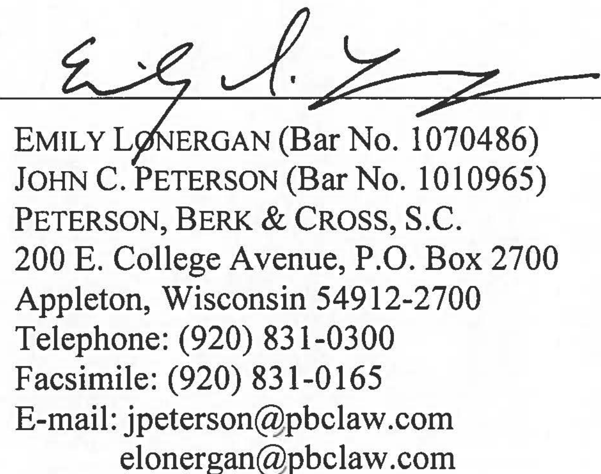
CONCLUSION

Section 230 does not immunize defendants for their own actions or against causes of action not predicated on publication. Just like brick-and-mortar establishments, websites can engage in all manner of tortious conduct. They should

not escape liability merely because they operate in cyberspace. Congress intended no such reworking of state tort law. Those courts that have so expanded Section 230 immunity have strayed from the text, upset the rule of law, and undermined the state courts' role as arbiters of private law. It is the state courts that are entrusted with that duty, and Amici affirm their great faith in the state courts to discern well-pleaded from frivolous tort claims and apply time-honored doctrines to new contexts. The viability of Ms. Daniel's claims is for the Wisconsin courts, not Congress, to decide.

Dated: January 24, 2019

Respectfully Submitted,



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CERTIFICATION PURSUANT TO WIS. STAT. § 809.19(8)(d)

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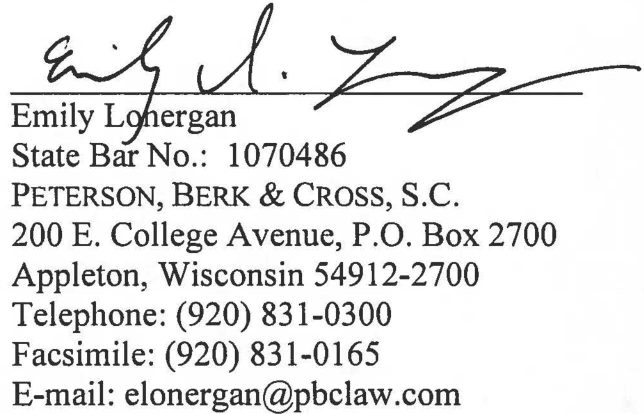

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I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of section 809.19(12), Stats.

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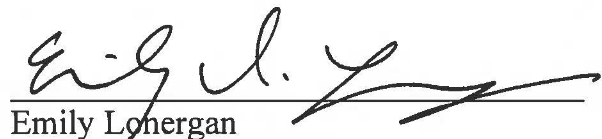

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