No. 15-6

In the Supreme Court of the United States

MEDYTOX SOLUTIONS, INC.,
SEAMUS LAGAN AND WILLIAM G. FORHAN,
Petitioners,

v.

INVESTORSHUB.COM, INC.,
Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an action seeking an injunction for the removal of libelous postings from an interactive computer service is preempted by Section 230 of the Communications Decency Act, 47 U.S.C. § 230.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondent Investorshub.com discloses that its parent company ADVFN PLC, a public company trading on the London Stock Exchange, owns 10% or more of the corporation's stock.

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INTRODUCTION

Petitioners, Medytox Solutions, Inc., Seamus Lagan and William G. Forhan ("Petitioners"), attempt to invoke this Court's discretionary jurisdiction to review the decision by the Fourth District Court of Appeal of Florida, which held that Section 230 of the Communications Decency Act (47 U.S.C. § 230 (1998)) ("Section 230") immunizes interactive computer services providers ("ISPs") from lawsuits seeking to force them to remove from their websites allegedly defamatory statements made by third parties.

Respondent Investorshub.com ("iHub") is an online forum where third party posters can create and post content concerning financial markets and information about public companies. (App. 4).[1] According to Petitioners' complaint, the website hosts nearly 85 million individual postings on almost 22,000 separate message boards, with 40,000 new posts added each trading day (App. 4). In May 2012, Christopher Hawley, using the screen name "Seamus outer," posted four allegedly defamatory statements on the forum. At the request of Petitioners' counsel, iHub removed two of the third-party posts Petitioners claimed were defamatory but declined to remove two others. (App. 4). Petitioners sued iHub for failing to remove the two third party posts, sought a declaratory judgment that the posts were defamatory and further sought an injunction to require iHub to stop publishing the content. Though purporting to seek a declaratory judgment, the complaint actually asked the trial court

[1] References to the Appendix submitted with the Petition are designated "App." followed by the page number in the Petitioners' Appendix on which the material appears.

to enjoin iHub from further hosting on its website the two posts made by user "Seamus outer" that remained on iHub's discussion forum.

The trial court dismissed the complaint and entered judgment in favor of iHub. (App. 11). The Fourth District Court of Appeal affirmed the trial court, relying on the Florida Supreme Court's decision in *Doe v. Am. Online*, *Inc.*, 783 So. 2d 1010 (Fla. 2001), *cert. denied*, 534 U.S. 891 (2001), and following the Third District Court of Appeal's decision in *Giordano v. Romeo*, 76 So. 3d 1100 (Fla. 3d DCA 2011), reaching the same result as the *Giordano* Court had reached on the same issue (whether Section 230 immunity bars claims for injunctive relief). (App. 3). The Florida Supreme Court denied Petitioner's petition for review. (App. 1).

SUMMARY OF THE ARGUMENT

The Communications Decency Act, 47. U.S.C. § 230, bars any action against an ISP that treats the ISP as publisher or speaker, regardless of whether the requested relief lies in tort or equity.

Petitioners seek to invoke the discretionary jurisdiction of this Court to resolve an alleged conflict between the laws of the Seventh and Ninth Circuits and the Fourth District Court of Appeal of Florida regarding whether the Communications Decency Act applies to actions for injunctive relief.

First, there is no jurisdictional conflict that requires resolution by this Court. The cases cited by Petitioners are not in conflict with Florida law and do not address the Question Presented in the Petition.

In addition, the Florida courts below have correctly interpreted the broad federal immunity granted to ISP's under the Act. Indeed, Petitioners treat Respondent as the speaker or publisher of content by seeking removal of a third party's allegedly libelous postings, and accordingly, Respondent is protected from suit.

ARGUMENT

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." 47 U.S.C. § 230(c)(1). Section 230 further reads: "[*n*]*o cause of action may be brought* and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (emphasis added).

I. There is no conflict and no basis for this Court to exercise jurisdiction.

Supreme Court Rules permit a party to petition for discretionary review when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b). There is no such conflict.

Specifically, the Seventh and Ninth Circuit cases Petitioners cite to support conflict jurisdiction are not analogous and have not decided the legal issue in this case – whether the Act bars claims for injunctive relief against an ISP for third party internet posts.

A. There exists no conflict with Barnes v. Yahoo!, Inc.

Petitioners first cite *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), *as amended (*Sept. 28, 2009). In *Barnes*, plaintiff brought an action against an ISP, Yahoo!, for its refusal to remove public profiles about plaintiff made by plaintiff's former boyfriend without plaintiff's knowledge or consent. The profiles contained nude photographs of the plaintiff and a solicitation to engage in sexual intercourse with the plaintiff. Upon plaintiff's request for removal, defendant Yahoo!'s director of communications told plaintiff directly that she would personally walk plaintiff's requests over to the division responsible for taking down unauthorized profiles and that they would "take care of it." *Id.* at 1099. As a result, plaintiff relied on the director's promise and took no further action. After two months, when Yahoo! had not removed the profiles, plaintiff initiated a lawsuit against Yahoo! for negligent undertaking and promissory estoppel.

The *Barnes* Court held that the CDA barred the negligent undertaking claim but not the promissory estoppel claim. The Ninth Circuit dismissed Plaintiff's negligent undertaking claims on the basis that plaintiff was seeking to hold Yahoo! liable for failing to remove content, and the steps it took, or later abandoned, to de-publish the content were publishing conduct protected by Section 230. *Id.* at 1103.

As the Ninth Circuit had previously held, "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content," and such functions are immune from suit. *Fair Housing Council of San Fernando*

Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1171 (9th Cir.2008). "[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove." *Barnes*, 570 F.3d at 1103. Under *Barnes*, any negligence in failing to remove content was protected by Section 230 as activity that could be "boiled down to deciding whether to exclude material that third parties seek to post online." *Id.* at 1103 (quoting *Roommates*, 521 F.3d at 1170-71). As such, Yahoo! enjoyed immunity for any negligence in failing to remove the profiles. *Id.* at 1106.

As to plaintiff's promissory estoppel claim, however, the *Barnes* Court found that the defendant was not protected by Section 230. Specifically, the court found that Yahoo! violated an enforceable promise as a counter-party to a contract, distinctly different than claims based on the ISP's non-contractual conduct. The basis for liability was not Yahoo!'s publishing conduct. Rather, it was Yahoo!'s manifest intention to be legally obligated to remove the profiles and failure to do so that gave rise to the subset of contractual liability known as promissory estoppel. *Id.* at 1107.

No promissory estoppel theory was alleged by Petitioners in this case. Rather, Petitioners premised their claims on Respondent's refusal to agree (i.e., refusal to promise) to remove the posts Petitioners wanted removed. In other words, Petitioners have sued Respondent for declining to remove content. Such publishing decisions are squarely within the protection of Section 230 afforded by *Barnes*. Thus, as the Fourth District Court of Appeal of Florida noted in reviewing

this case (App. 10, n. 1) *Barnes* and the instant action are factually opposite and legally distinct. There exists no conflict between the two.

B. There exists no conflict with City of Chicago, Ill. v. StubHub!, Inc.

Petitioners also claim the Fourth District Court of Appeal of Florida's decision conflicts with the Seventh Circuit decision in *City of Chicago, Ill. v. StubHub!, Inc.,* 624 F.3d 363 (7th Cir. 2010). But like *Barnes*, *StubHub!* does not provide adequate grounds for conflict jurisdiction.

In that case, StubHub!, an online ticket retail service, asserted protection under Section 230 to claim tax immunity related to collections from online ticket sales. *Id.* at 365. Specifically, StubHub! contended that federal law blocked Chicago from imposing a tax on Internet ticket auction sites, citing both to Section 230 and to the Internet Tax Freedom Act. *Id.* at 365.

The Court declined to afford tax immunity on this basis of Section 230 as tax requirements have nothing to do with the content of any speech. *Id.* The Seventh Circuit further noted that whether a party is a "publisher" for purposes of Section 230 immunity might matter for defamation, among other causes of action, but the amusement tax had no relation to who may be the "publisher" or "speaker" of content, rendering Section 230 of the Act *irrelevant*. *Id.* at 366. Here, Section 230 is highly relevant as Petitioners seek a judicial determination that specific content is defamatory and that iHub should be forced to de-publish it. As with *Barnes*, *StubHub!* is inapposite

with the instant action, and the Florida Courts' resolution of this matter is not inconsistent.[2]

Given the substantial differences between the cases invoked by Petitioners and this action, there simply is no conflict that requires resolution by this Court. The Petition should be denied.

II. The Florida courts correctly interpreted the protection afforded Investorshub.com under the Communications Decency Act, 47 U.S.C. § 230.

In immunizing an ISP from a suit based on its failure to remove objectionable content, the Florida Supreme Court in *Doe v. America Online* specifically held that Section 230 "expressly bars 'any actions,' and we are compelled to give the language of this preemptive law its plain meaning." 783 So. 2d at 1018 (relying on *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied,* 524 U.S. 937 (1998)). The instant action correctly applied the law of Florida, and elsewhere, on this point.

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[2] Petitioners also cite *Mainstream Loudoun v. Bd. of Tr. of the Loudoun County Library*, 2 F. Supp. 2d 783 (E.D. Va. 1998), *Doe v. Franco Productions*, Case No. 99 C 7885, 2000 WL 816779 (M.D. Ill. June 22, 2000) and *Doe v. GTE Corp.,* 347 F.3d 655, 660 (7th Cir. 2003) in support of jurisdiction and claim that these courts have allowed claims for injunctive and declaratory relief. Neither case is in conflict with the Florida opinion. *Mainstream Loudoun*, 2 F. Supp. 2d at 790 (public library was not entitled to CDA immunity against a challenge to restrictions on library patron access to certain websites because such restrictions *by a state actor* violate library patrons' First Amendment rights); *Doe v. GTE Corp.*, 347 F.3d at 660 (affirming dismissal of action challenging an ISP's refusal to remove objectionable content and expressly *declining* to interpret Section 230).

In *Doe*, America Online, Inc. ("AOL"), an ISP, failed to block access to a child pornographer who was using AOL chat rooms to market photographs and videotapes of young boys having sex with each other and with the pornographer. *Doe*, 783 So. 2d at 1011. Jane Doe, the mother of one of the pornographer's victims, sued AOL on her son's behalf, alleging that AOL failed to take steps to stop the pornographer from using AOL's chat rooms to market child pornography for sale and distribution, even though AOL knew or should have known about the content of the posted materials. *Id.* at 1012. AOL neither warned the pornographer nor suspended his service; instead, refusing to take down his chat room solicitations. *Id.*

In immunizing AOL, The Florida Supreme Court expressly adopted the reasoning of the Fourth Circuit and United States District Court for the Eastern District of Virginia in *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124 (E.D. Va. 1997), *aff'd* 129 F.3d 327 (4th Cir. 1997). *Doe*, 783 So. 2d at 1013-17. The *Zeran* court, in reviewing an ISPs failure to take down fake postings purporting to be from the plaintiff and offering for sale offensive t-shirts, had held that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether the publish, *withdraw*, postpone or alter content – are barred" by Section 230. *Id.* (emphasis added). The *Zeran* Court reasoned that once an ISP is notified of the potentially defamatory posting, it is thrust into the role of a traditional publisher and must decide whether to publish, edit, or remove the posting. By seeking to impose liability on an ISP for its failure to remove the offending statement, plaintiff sought to impose liability on the ISP for "assuming the

role for which Section 230 specifically proscribes liability – the publisher's role." *Id*. at 332-33. Such an approach would undermine the purpose and scope of Section 230, said the *Zeran* Court, as faced with potential liability every time someone complained about third party content, computer service providers would be forced to severely restrict speech on the web, creating a chilling effect not tolerated by the First Amendment.

In *Doe*, as here, the plaintiff brought a cause of action challenging an ISP's refusal to remove objectionable content. Whether a cause of action seeks an award of money or an injunction[3] against the ISP, in each instance, the plaintiff has brought a cause of action that seeks to treat the ISP as the publisher of third party content by challenging the ISP's decision not to withdraw content.

To make a determination that an ISP must remove content from its website, a court necessarily must make a legal determination that the objected to speech is defamatory (or otherwise pass judgment on its

[3] Petitioners downplay the extraordinary nature of what they were asking the trial court to do, which was to remove from publication statements already published and to forego future publication of the statements. Petitioners, in essence, seek a prior restraint, "the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). This is akin to asking a court to burn newspapers or books or to recall those items in circulation based on an accusation that something contained therein is libelous. The law of defamation has never supported such an approach.

content[4]), placing the interactive computer service provider in the role of a publisher who must defend the content of the speech or face an injunction prohibiting publication. This intrudes on the publisher's traditional editorial functions; namely, *whether to publish* or *withdraw* third party content, and is precisely the exercise of editorial discretion Section 230 is designed to immunize. *Doe v. Am. Online, Inc.*, 718 So. 2d 385 (Fla. 4th DCA 1998); *Zeran*, 129 F.3d at 333; 47 U.S.C. § 230.

Consistent with the foregoing, the Fourth District Court of Appeal of Florida found that 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." (App. 10). Whether the relief sought is for damages or here, forcible removal of content from Respondent's website, the Petitioners are asking the Court to hold Respondent responsible as if it is a publisher or speaker of said content. The Fourth District acted in accordance with the precedent set in Florida and other circuits in affirming dismissal of the action below. The Florida Supreme Court declined review. (App. 1). This Court should decline review too.

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[4] Petitioners cite to matters outside the record in their Petition in informing the Court that a jury found the poster liable in a separate action. (Petition at 17.) This is both improper and incorrect. First, the information was not in the record in the trial court or on appeal. Second, there existed no identity of parties or statements at issue in the separate action. Accordingly, for the trial court to determine whether iHub should be enjoined from publishing the statements at issue, it would have to make its own determination of whether *these* statements were defamatory of *these* Petitioners, placing iHub squarely in the position to defend the statements' content and running afoul of Section 230.

CONCLUSION

Congress' intent in enacting the Communications Decency Act, which bars any action that treats an interactive computer service provider as publisher or speaker of content, is clear. Petitioners attempt to fabricate conflict by citing to the Seventh and Ninth Circuits to suggest that they have allowed claims for injunctive relief. This simply is not an accurate statement of the law. There is no jurisdictional conflict between Florida and other United States circuits that requires review by this Court, and the Florida courts' review of this matter is consistent with prevailing law. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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